



Corporate Insolvency in Australia

Response to Questions on Notice to the TMA
10 February 2023

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1. Introduction

We refer to the previous submissions of the Turnaround Management Association of Australia (**TMA**) dated 25 November 2022 (**First Submission**), the public hearing we attended on 14 December 2022 and your letter of 23 December 2022 (**Questions on Notice**).

Firstly, we would like to thank you for genuinely engaging with us.

The TMA appreciates the opportunity to respond to the Questions on Notice and to provide comment to, and participate in, these important reforms being explored by the Parliamentary Joint Committee (the **Inquiry**). Set out below are the TMA's comments on the Questions on Notice and Additional General Questions (**Response**).

1.1 Outline of submissions

A number of matters raised by the Questions on Notice are considerably broad, and as per our First Submission, the TMA's Response is designed to put forward key issues for further consideration by the Inquiry rather than to provide a comprehensive solution to the issue raised. An exception to this approach is the TMA's response to Question on Notice 1 which provides recommendations which are capable of being implemented in advance of any broader review conducted by the Inquiry.

The TMA's response otherwise reflects that further work and analysis is required as part of any root and branch review. We have focused our responses to those matters that are within the TMA's core objects. Therefore, we comment only on those areas that affect turnaround and corporate renewal.

1.2 Acknowledgement

As with our First Submission, the TMA and the authors once again acknowledge the assistance and feedback of the various TMA members who have contributed to the discussion of the issues surveyed and included in this Response, as well as the other local and international professionals and academics who have kindly shared their time and insights with us. The authors and those contributing to our First Submission and this Response have done so voluntarily, and in their own time, without payment. Any errors or omissions are attributable to the relevant authors.

1.3 Views expressed in these submissions

The views expressed in this Response represent the views of its authors, and do not necessarily reflect the views of all members of the TMA. In preparing this Response, the authors have sought and considered the views of a sample of TMA members. The authors have sought to reflect a considered position that likely reflects the majority views of the broader TMA membership.

As previously noted, the TMA is a "broad church", and its members at times have contrary views to those expressed here. We have endeavoured to note the key places where this is the case.

1.4 Intellectual property

The contents of this Response and our First Submission remain the intellectual property of the relevant authors and/or the TMA as applicable. These documents may be reproduced but should not be used or reproduced without attribution to TMA.

1.5 Disclaimer

The contents of this Response are for reference purposes only and may not be current as at the date of this Response. This Response provides a summary only of the subject matter covered, without the assumption of a duty of care by the TMA, its members or any of the contributing authors. The submissions do not constitute legal advice and should not be relied upon as such.

2. Questions on Notice to the TMA

The TMA responds to your Questions on Notice below, using your numbering and structure.

2.1 Question on Notice 1 – Recommended changes to experience and continuing education requirements to qualify as a registered liquidator

Question 1(a) - How changes could be implemented regarding Gender Balance

The current position: registration of liquidators

Registration of liquidators is governed by Subdivision B of the Insolvency Practice Schedule (Corporations)¹ (IPS) and Division 20 of the Insolvency Practice Rules (Corporations) (IPR). Specifically:

- (a) s 20-10 of the IPS provides for a committee to be convened to consider applications for registration as a liquidator, which committee must consist of ASIC, a registered liquidator chosen by ARITA and a person appointed by the Minister (**Committee**)
- (b) relevantly for present purposes, s 20-20(4)(a) of the IPS provides that the Committee must decide that the applicant should be registered as a liquidator if it is satisfied that the applicant "*has the qualifications, experience, knowledge and abilities prescribed*"
- (c) rule 20-1(2) of the IPR specifies a number of matters in respect of each of which the Committee must be satisfied in respect of an applicant for registration as a liquidator, in terms of their "*qualifications, experience, knowledge and abilities*" including in particular (in rule 20-1(2)(c)):

¹ Being Schedule 2 to the Corporations Act 2001 (Cth) (Act).

"that the applicant has, during the 5 years immediately preceding the day on which the application is made, been engaged in at least 4,000 hours of relevant employment² at senior level"
(the **Experience Requirement**)

- (d) s 20-20(5) of the IPS nonetheless provides the Committee with a discretion (the **Discretion**), even where the Committee is not satisfied that the requirements of rule 20-1(2) of the IPR have been satisfied, to decide that the applicant should be registered as a liquidator, provided that the applicant would be suitable to be registered as a liquidator.

ASIC has set out in Regulatory Guide RG 258 *Registered liquidators: Registration, disciplinary actions and insurance requirements (RG258)* its interpretation of, and requirements regarding, the Experience Requirement (refer **Appendix 1**). The Experience Requirement is set out in Table 4 of Page 12 of RG258 and is as follows:

Table 4: Summary of experience requirements

Eligibility requirements	What you need to have	What you should include in your application
To be registered to practise as an external administrator of companies, receiver and receiver and manager: s20-20(4)(a) and rule 20-1(2)(c)	During the five years immediately preceding the day on which the application is made—have engaged in at least 4,000 hours of relevant employment at a senior level in the external administration of companies, receivership and receivership and management.	A summary of your employment history for the last five years (including names of employers, positions held and dates). AND Full details demonstrating that you have engaged in 4,000 hours of relevant insolvency experience at a senior level in the five years immediately preceding the day on which you make this application. Note: Use the template <i>Senior level employment history</i> (available at www.asic.gov.au) to provide this information.
To be registered to practise only as a receiver and receiver and manager: s20-20(4)(a) and rule 20-1(2)(d)	During the five years immediately preceding the day on which the application is made—have engaged in at least 4,000 hours of relevant employment at a senior level in receivership and receivership and management.	A summary of your employment history for the last five years (including names of employers, positions held and dates). AND Full details demonstrating that you have engaged in 4,000 hours of relevant insolvency experience at a senior level in the five years immediately preceding the day on which you make this application. Note: Use the template <i>Senior level employment history</i> (available at www.asic.gov.au) to provide this information.

² IPR 20-1(3) provides that "**relevant employment**" must include:

(a) employment that involves any of the following:

- (i) assisting a registered liquidator in the performance of the registered liquidator's duties as external administrator of companies, receiver or receiver and manager;
- (ii) providing advice in relation to the external administration of companies, receivership or receivership and management;
- (iii) providing advice in relation to Subdivision C of Division 3 of Part 5.7B of the Act;
- (iv) providing advice in relation to the restructuring of company debt outside the external administration of companies, receivership or receivership and management;

(b) employment that provides direct or indirect exposure to processes (including bankruptcy) under the *Bankruptcy Act 1966*; and
(c) any other employment that the committee considers relevant.

RG258 at paragraph 258.17 states, in respect of the Discretion:

“If the committee is not satisfied of one of the following matters, the committee may still decide that you should be registered as a liquidator provided it is satisfied that you would be suitable to be registered if you complied with conditions it specifies. The matters are:

(a) that you possess the prescribed qualifications, experience, knowledge and abilities;

(b) that your registration either as a liquidator under the Corporations Act or as a trustee under the Bankruptcy Act 1966 (Bankruptcy Act) has not been cancelled within 10 years before making your application (other than in response to a written request from you); and

(c) that you are resident in Australia or in another prescribed country: s20-20(5).”

ASIC provides no guidance as to how the Discretion may be applied, nor does the Committee or ASIC publicise instances of the application of the Discretion. The ASIC application form, Form 903B *Application for registration as a liquidator*, does not provide for the inclusion of information by the applicant that would be relevant to the exercise of the Discretion such as periods of extended leave.

Proposed changes: registration of liquidators

Appropriate amendments to the Experience Requirement in the IPR could either:

- (a) extend the 5 year "look back" period to (say) 10 years; or
- (b) extend the 5 year "look back" period by an amount of time that reflects parental leave or other extended periods of leave actually taken, or part time work arrangements.

It is the TMA's submission (having consulted with various of our women registered liquidator members) that the former of these is the most simple, certain and appropriate, and would enable potential applicants to better plan around periods of parental leave.

The TMA's proposed amended working of the Experience Requirement in rule 20-1(2)(c) of the IPR would be as follows:

“that the applicant has, during the 10 years immediately preceding the day on which the application is made, has engaged in at least 4,000 hours of relevant employment at senior level”.

Consequently ASIC would need to amend RG258, Form 903B and the “Senior level employment history” form.

Transparency around the criteria which will be considered in applying the Discretion will benefit applicants and the Committee (particularly if the proposed change recommended above to the Experience Requirement is not made).

The TMA also recommends that ASIC publish an updated version of RG258, amending RG258.17 to articulate the bases on which the Discretion may be exercised or has been exercised where the applicant does not technically satisfy the Experience Requirement. This might, for example, specify types of adjacent work - not caught by the current definition of "relevant employment" - that would be taken into account by the Committee in exercising the Discretion (such as pre-external administration advisory, work on restructurings not undertaken in an external administration or precedent drafting, internal training, quality and comparable internal firm work), or that an applicant's caregiving responsibilities may be taken into account.

The current position: CPE requirements for registered liquidators

Section 20-40 of the IPS provides that the IPS may impose conditions on all registered liquidators, and rule 20-5 of the IPR provides that it is a condition on the registration of any person as a registered liquidator, that the person undertake at least 120 hours of continuing professional education (**CPE**) during:

- (a) the period of 3 years starting on the day the person is first registered as a liquidator; and
- (b) each subsequent period of 3 years during which the person is registered as a liquidator.

120 hours is already a significant amount of CPE, particularly compared to the requirements in (for example) the legal profession. There is no capacity to extend or pro rate these 3-year periods to allow for any extended leave taken, such as parental leave, (and the TMA is aware of at least one woman registered liquidator having been issued with a "show cause" notice in relation to CPE obligations while on parental leave) or to reflect part time working arrangements. While one period of parental leave in a 3-year period may still allow the 120 hours to be met, two periods of parental leave in a 3-year period will make it unnecessarily onerous.

We are aware that the pro rating of CPE requirements occurs in other regulated professions (see, for example, the mandatory continuing legal education provisions applicable to solicitors in New South Wales: see Rule 10 of the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*).

Proposed change: CPE requirements

The TMA recommends that s20-40 be amended by changing the full stop at the end of s20-40 to a comma and adding after the existing content the words:

"provided that the requirement of 120 hours will be pro-rated for the amount of any period or periods of extended leave taken in any 3 year period or to reflect part time working arrangements."

Question 1 (b) - Any reason they could not be implemented now?

We see no reason why the amendments proposed above could not be implemented now. Whilst we do call for a more comprehensive review of the legislation in our First Submission, that should not affect or delay these changes.

Question 1 (c) - Would it be useful to have both UK-style path and traditional Australian path available

While s 20-20(2)(b) of the IPS already allows for an exam, this is at the election of the Committee and not the applicant, and there is no right for an applicant to elect to sit an exam. We can see no compelling reason why an exam option (with a reduced "hours" Experience Requirement) could not also be offered, noting the overriding role of the Committee in making the ultimate assessment of suitability for registration.

A broader assessment of whether the current registration regime applying to liquidators remains optimal and fit for purpose (informed by considerations of inclusivity) would be desirable, including whether the Experience Requirement and the CPE requirements prioritise quantity over quality. For example, while the TMA accepts the clear value in relevant experience, there is the scope for consideration as to whether the Experience Requirement (including as amended as proposed above) remains appropriate (for example, in terms of "relevant employment" the exclusion of pre-insolvency and other advisory work, work on restructurings not undertaken in an external administration and precedent preparation, training, quality and other comparable internal firm roles). Such an assessment ought to have regard to the regimes in comparable jurisdictions including the UK.

Other observations on improving the number of women in restructuring and turnaround (insofar as they are registered liquidators)

Having canvassed various of our women registered liquidator members, other matters that have been raised that might make a difference to the low percentage of registered liquidators that are women include:

- (a) Regular reporting by ASIC on the percentage of female registered liquidators (ideally with expressed targets)
- (b) equitable briefing obligations being adopted by the Commonwealth/Commonwealth authorities in respect of the retainer of

restructuring and turnaround advisers (including reporting on progress against the targets)

- (c) in light of the very onerous, inflexible and personal obligations on registered liquidators (such as in relation to deadlines, obligations around chairing meetings and personal liability) consideration of appointments as external administrators being of a firm and not of individuals (as is the case in other regulated roles such as auditors)

2.2 Question on Notice 2 – Creditor right imbalances

In any root and branch review, consideration of the purpose of Australian insolvency law should focus on the rehabilitation of businesses and maximisation of value for all stakeholders.³ This requires, among other things, a nuanced analysis of the existing regime, rather than a binary analysis focused on the protection of debtors or creditors.

Other key jurisdictions that are viewed as international leaders in restructuring and turnaround, such as the US and the UK, have designed and continue to develop and reform systems to promote corporate turnaround. TMA considers that it is important that reforms of this nature are considered as a part of a broader roots and branch review (discussed in more detail below) to ensure that Australia remains a leading jurisdiction for investment on an international stage.

In Australia, we have the privilege of being able to critically consider those tools, how they have been used in practice and the ultimate outcomes (including with respect to the impact on creditors), to inform an analysis on what additions or enhancements could be made to the existing 'scale of options' outlined in Treasury's submission 34, in pursuit of rehabilitation and value maximisation.

By way of example, as described in further detail in the TMA's submission "Helping Companies Restructure By Scheme of Arrangement" lodged with Treasury on 17 September 2021, restructuring and turnaround tools that are now available in other international jurisdictions include::

- the "cross-class cram down" mechanism which was developed as an integral part of the US Chapter 11 process and is now also available in the UK as a part of the new UK restructuring plan; and
- the robust moratoriums permitted under the US bankruptcy code to provide protection for a debtor while it pursues rehabilitation;
- the recent reforms in both the UK and Singapore that seek to allow a company to pursue rehabilitation outside of an insolvency process.

While in certain instances creditors, or some class of creditors, rights may be diluted by mechanisms of this kind, ultimately they are designed to achieve the restructure

³ For example see the discussion in part [6.9] of the TMA's submission "Helping Companies Restructure By Scheme of Arrangement" lodged with Treasury on 17 September 2021 annexed at page 305 of the First Submission.

and turnaround of the business with a view to preserving value for all stakeholders. It will be critical for any roots and branch review to critically analyse this and ensure that stakeholders' rights are appropriately balanced.

3. Additional General Questions

3.1 Additional Question 1 – Root and Branch Review

Additional Question 1(a) – Should there be a root and branch review?

Yes, TMA supports a root and branch review.

Additional Question 1(b) – Why would a root and branch review be required?

We have identified examples of possible review topics in [2.2] of the TMA's First Submission dated 31 November 2022.

Corporate restructuring is a complex area, involving an intersection of many rights, issues and stakeholders. Law reform in this space is not straightforward, and recent experience, both in Australia and internationally, demonstrates that rushed amendments frequently fail to achieve their aims.

The legislation has not undergone a significant review since the Harmer Report was delivered in 1988, five years after the Australian Law Reform Committee commenced its inquiry into personal and corporate insolvency laws. Since then, Australia's economy has grown more complex, the financial services market has grown and matured, and business practices and technology have changed significantly. Over time, a number of legal and commercial practices have emerged in insolvency that are cumbersome. More specifically:

- (a) The voluntary administration regime has become procedurally more cumbersome (hence, costly) and is no longer always the 'quick, efficient and relatively inexpensive' process envisaged by its authors;
- (b) Turnaround practices and cultural approaches to trading of distressed entities have changed. Impacting, amongst others matters, administrator liability, participation in pre-planning exercises, sourcing new capital, maintaining workforce, preserving ongoing core business units and regularising ongoing contracts with pre-administration counterparts;
- (c) Restructuring techniques have evolved to resolve disconformities with control, funding and duties limitations within the Corporations Act and, as appropriate, listing rules designed to protect equity interests in solvency scenarios;
- (d) The supervisory function of Court approvals and modifications have become an increasingly necessary part of larger forms of restructuring assignments,

and some of those approvals are matter of course and in future legislation, may not need Court supervision (for example, the need to apply to Court to waive personal liability of an administrator when they borrow money to support trading of a company in administration);

- (e) Global practices have favoured techniques not easily applied in Australian structurally separated group situations (cross class and cross entity cram downs, especially for tax group entities);
- (f) Alternate processes have been incorporated within the Corporations Act for dealing with micro and small corporate distressed entities;
- (g) Societal expectations around protection of workforce entitlements and, to some extent, sub-contractor rights, have altered waterfall (*pari passu*) entitlements.

The Harmer Report, that led to the creation of a global leading Voluntary Administration regime was released 35 years ago. It would be appropriate to empower a new committee of turnaround experts to report on reforms to promote restructuring and turnaround of enterprises capable of being saved, without abrogating from the need to protect creditors and maintain insolvency regimes for those entities that cannot be sensibly rescued (**Review Committee**).

A defined time period (at least 12 months noting that the Harmer Report was delivered after a 5 year process) to consider these issues and the issues identified in all of the various recently undertaken reviews and submissions would be appropriate. Following this, we would suggest issuance of a proposed model based on various reviews already undertaken and input from the Review Committee for public comment. Some of our members believe a longer period for review is necessary to allow appropriate consultation to occur.

The TMA supports the use of recent reviews of legislation in other jurisdictions to guide a root and branch review.

The ALRC review is informative but we understand it is more targeted at simplification. In the TMA's view, a review as is being contemplated here would consider in more detail the aims and intention of the insolvency laws and in particular, seek to strike an appropriate balance between affected stakeholders.

The TMA is of the view that the root and branch review should address both the policy and legislative framework.

3.2 Additional Question 2 – Purpose of Australian Insolvency Laws

Question 2(a) - What are the goals and purposes of Australia's corporate insolvency laws?

The goals and purposes of Australia's corporate insolvency laws are set out in section 435A of the Corporations Act (as they relate to Voluntary Administration).

Question 2(b) - Do you think those goals and purposes are clearly articulated at present? To the extent they are, are they in turn adequately realised in practice?

They are clearly articulated, but are focused on the use of the existing voluntary administration procedures.

Any broader assessment of whether the current goals and purposes are adequately realised will need to be undertaken in the root and branch review. The goals and purposes should be considered more broadly, in the context of not only formal insolvency arrangements, but informal turnaround and restructuring situations as well.

Question 2(c) - The Australian economy has changed considerably since the Harmer report was released in 1988. Have the goals and purposes of Australia's insolvency law changed with it?

We don't believe the goals and aims of the insolvency laws have changed since the Harmer Review.

We do think there are changes that can be made to better strike the balance of interest between stakeholders.

A root and branch review would consider if the current goals were adequate and seek to change the regime accordingly. In our view, this is a key consideration of any review, that is to ensure that the aims and intention of the legislation are clear up front. Further, in our view, this would include consideration of how businesses can be more effectively turned around, with jobs saved, suppliers keeping business and the consequential positive effects on the economy of saving businesses from liquidation. Such review would include the significant body of judicial consideration of the existing legislation which is available.

Question 2(d) - Is there an appropriate balance between the interests of stakeholders with the mixture of creditor and debtor-in-possession regimes that are currently in place?

As discussed above, in any root and branch review, consideration of the purpose of Australian insolvency law should not be limited to a binary consideration of whether insolvency laws are focused on the protection of debtors or creditors. Rather, the focus should be on the rehabilitation of businesses, and maximisation of value for all stakeholders.

Question 2(e) - Are the goals and purposes themselves adequate and appropriate, or may they need reform?

See above comments.

3.3 Additional Question 3 – Major reforms

Question 3(a) - What are the main gaps, discrepancies, or failings of Australia’s current corporate insolvency laws?

It would not be appropriate to attempt a summary of all possible means of reform in this paper. This committee is respectfully directed to the TMA’s submission “Helping Companies Restructure By Scheme of Arrangement” lodged with Treasury on 17 September 2021⁴ and the TMA’s submission “Review of the Insolvent Trading Safe Harbour” lodged on 1 October 2021.⁵ Each submission provided an analysis into comparative global systems, structural reform opportunities (restructuring mechanisms, new forms of funding, priority rights and resolving existing structural obstacles). In the First Submission, the TMA also suggested further major reforms around equity incentives (tax), cross class strategies in corporate restructures, removing gender obstacles and ensuring procedural effectiveness. This is not intended to be an exhaustive list, as the TMA favours a more considered analytical approach as set out above.

Question 3(b) – Are there major reforms required

Refer our answer above.

Question 3(c) – Are any adjustments needed to preference claims and the use of litigation funding?

Litigation funding and preferences are outside the remit of the TMA.

3.4 Additional Question 4 – Public interest aspects of Australia’s corporate insolvency laws

The TMA has not answered these questions as they relate to smaller formal insolvency matters, which are generally outside the remit of the TMA.

3.5 Additional Question 5 – International Best Practice

Additional Question 5(a) To what extent do Australia’s corporate insolvency laws align with the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law?

This question ought to be considered as part of the root and branch review.

Additional Question 5(b) Are there aspects of the UNCITRAL legislative guide that Australia should follow?

The UNCITRAL Legislative Guide has this as its stated purpose:

⁴ See copy annexed at page 220 of the First Submission.

⁵ See copy annexed at page 91 in the First Submission.

“The Legislative Guide provides a comprehensive statement of the key objectives and principles that should be reflected in a State’s insolvency laws. It is intended to inform and assist insolvency law reform around the world, providing a reference tool for national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. The advice provided aims at achieving a balance between the need to address a debtor’s financial difficulty as quickly and efficiently as possible; the interests of the various parties directly concerned with that financial difficulty, principally creditors and other stakeholders in the debtor’s business; and public policy concerns, such as employment and taxation. The Legislative Guide assists the reader to evaluate the different approaches and solutions available and to choose the one most suitable to the local context.”

The broad-based review of insolvency reform proposed by the TMA (the ‘root and branch’ review) would focus on a number of matters dealt with in the Legislative Guide, which are without existing structural equivalent in the formal law. Without formal law reform, these matters will continue to evolve by way of *ad hoc* practices, which have limited precedential value, adding uncertainty to already complex insolvency situations.

To provide some further examples to those within [2.2] of the First Submission, and picking up words in the Legislative Guide, the review might focus on reform to ensure procedural coordination of multiple proceedings concerning different debtors; issues concerning post-commencement and post-application finance in a group context; avoidance provisions; substantive consolidation of insolvency proceedings affecting two or more group members; appointment of a single or the same insolvency representative to all group members subject to insolvency; and coordinated reorganisation plans.

UNCITRAL has also carried out some useful analysis on the simplification of systems for micro and small insolvency restructures (in 2021). So, too, did OECD in providing its analysis in relation to reforms to promote successful restructuring turnarounds in a post COVID world (refer to the First Submission, in particular the Table at [5.4]). TMA respectfully recommends that the Inquiry refer to the World Bank, UNCITRAL and OECD discussion papers, examples of which are identified in the First Submission.

3.6 Additional Question 6 – Data and research: Submitters to this inquiry and many previous inquiries and reviews have recommended that better data, statistics, and research is needed on corporate insolvency.

Additional Question 6(a) – Are those recommendations difficult to progress, and if so, why?

Yes, as a significant barrier to the collection and analysis of better data and research into insolvency is funding.

Additional Question 6(b) - To assist insolvency reform in a root and branch review, what are the research questions for which better data is needed?

There a number of questions regarding the efficiency and efficacy of the various forms of insolvency that could be answered. Impacts of legislative changes, contributions of companies that have been turned around, insolvency practitioner's costs, dividends, an analysis of the body of court judgments, amongst a number of other issues could all be explored.

Additional Question 6(c) - Are there sources of data that exist, but are not publicly available?

Yes – we believe so. A number of statistics collected by ASIC do not appear to be published in detail, presumably due to lack of funding. There is room for improvement on collating the substantial amount of data ASIC has in relation to external administrations and making it publicly available.

Additional Question 6(d) - Have the COVID-19 emergency measures had a distortionary effect on available data from the past three years and broader trends over the past decade?

Likely yes, due to the decrease (or delay) in insolvencies and abnormal operating conditions experienced during the period.

3.7 Additional Question 7 – Harmonisation of various regimes

These matters are outside the remit of the TMA.

3.8 Additional Question 8 – COVID-19 emergency reforms

The TMA is of the view previously expressed, that the blanket exemption from insolvent trading laws, was a missed opportunity. Instead, government could have promoted safe harbour as the way to avoid these liabilities and thus promoted a turnaround culture in Australia sooner.

We don't believe there are any other consequential changes required to COVID-19 measures, which in an insolvency context have reverted to previous arrangements.

3.9 Additional Question 9 – Recent reviews

The TMA only comments on the Insolvent Trading Safe Harbour Statutory review, where the other reviews referred to are outside the remit of TMA. The TMA sees no barriers to implementing all the recommendations of that review and supports its findings.

3.10 Additional Question 10 – Small business restructuring and simplified liquidation reforms

The primary issue has been the complexity and cost of the regime. The TMA assumed that the regime was not working effectively based on the initial figures that it had only been used 100 times (compared to 436 administrations and 1576 liquidations in the same period of 2021).

However, despite the slow uptake when the regime was introduced in 2021, a recent ASIC report published 17 January 2023, attached as Annexure 1, appears to indicate that it is a process which has been increasingly adopted and implemented with increasing success.

3.11 Additional Question 11 – regulation of pre-insolvency advisors

Additional Question 11(a) What data and research are available on the impacts of the unregulated environment for pre-insolvency advisors

The TMA is not aware of any compiled data regarding the impact of unregulated pre-insolvency advisors.

Additional Question 11(b) What would be the benefits and disadvantages of regulating pre-insolvency advisors?

Any regulation of pre-insolvency advisors requires careful consideration of what the purpose of such regulation is intended to achieve.

On the one hand regulation might encourage and assist directors in obtaining advice from an appropriately qualified pre-insolvency advisor and by assisting directors in identifying advisors providing genuine restructuring advice from those promoting phoenixing activity.

While there appears to be these benefits to regulating, it is difficult to see how this may be done. Companies and boards in distress and at imminent risk of insolvency, need advice from a range of professionals in these situations, and as such there is no unifying technical background (compared to, for instance, the training and experience which underpins a Liquidators' registration).

There continue to be a number of pre-insolvency advisors in the market who promote illegal phoenixing activity. These advisors need to be sanctioned however, the regulation of pre-insolvency advisors is difficult, given the uncertainty of the complex situations that companies find themselves in.

In circumstances where it is difficult to define what pre-insolvency advice is, the focus should instead be on ensuring there is sufficient funding to support the prosecution of illegal phoenix advisors under the existing anti-phoenix legislation.

3.12 Additional Question 12 – Submission and timing of reforms

We have not reviewed other submissions in detail and therefore, the TMA makes no comment.

That said, the TMA's previous comments on gender equality and how they may be enacted apply, that is, there is no reason these reforms cannot be progressed now.

4. Conclusion

We look forward to reading your final report.

In preparing this response we would like to thank the following TMA members for providing their input:

- Maria O'Brien, Baker McKenzie (immediate Past President of TMA)
- Jennifer Ball, Clayton Utz (Chairperson of TMA)
- Amanda Coneyworth, KPMG
- Alinta Kemeny, Ashurst
- Ann Watson, Hall & Willcox
- Cameron Belyea, Clayton Utz
- Emily Seekts, KPMG
- Georgina Gamble, Hall & Willcox
- Jason Preston, McGrathNicol
- Kate Conneely, KordaMentha
- Kate Barnett, Olvera Advisors
- Lara Wiggins, KordaMentha
- Melissa Ferreira, Clayton Utz
- Paul Apathy, Herbert Smith Freehills
- Richard Hughes, Deloitte

Should you have any queries in relation to this submission, in the first instance, please contact Jennifer Ball from Clayton Utz on (02) 9353 4214 or jball@claytonutz.com.



ASIC
Australian Securities &
Investments Commission

REPORT 756

Review of small business restructuring process

January 2023

About this report

This report outlines the findings from our review of small business restructuring practitioner appointments from 1 January 2021 to 30 June 2022. It also sets out our observations on ASIC form lodgements by restructuring practitioners.

This report will be of interest to registered liquidators, industry bodies, academics and policy makers.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
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Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

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Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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Executive summary

- 1 In 2020, the Australian Government introduced legislation which changed Australia's insolvency framework for small businesses from 1 January 2021. These changes included a new simplified debt restructuring process for eligible small businesses and a new type of registered liquidator. Importantly, the new small business restructuring process was the first type of formal insolvency appointment which left the control of the insolvent company in the hands of the directors—not the appointed registered liquidator.
- 2 Small business restructurings occur in two phases:
 - (a) appointing a registered liquidator as the restructuring practitioner for a company:
 - (i) directors of a company appoint a restructuring practitioner if the company meets the eligibility criteria and the directors resolve that the company is insolvent or likely to be insolvent and that a restructuring practitioner should be appointed; and
 - (ii) a restructuring proposal period of 20 business days commences where the company proposes a restructuring plan; and
 - (b) entering into a restructuring plan (if one is approved by creditors).
- 3 This report outlines the findings from our review of:
 - (a) the ASIC company register and forms lodged with ASIC for all 82 small business restructuring practitioner appointments from 1 January 2021 to 30 June 2022 (review period); and
 - (b) the outcomes of those 82 appointments based on forms lodged with ASIC up to and including 30 September 2022.
- 4 We noted in our submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Corporate Insolvency in Australia (PJC Inquiry):

Anecdotal evidence obtained from ASIC's stakeholder engagement activities indicates the initial slow uptake may be because:

 - the eligibility threshold of \$1 million owing to creditors is too low;
 - the requirement to comply with taxation law lodgement requirements prevents companies that might otherwise be candidates for restructuring and return to viability, or suitable for the simplified liquidation process, from accessing these processes (ASIC notes the previous government enacted amendments to the regime following its commencement so that only substantial compliance with taxation obligations is required);

- the processes are too complex and do not provide a simple, reduced cost process;
- there are concerns that the appointment of a restructuring practitioner may void a company's existing business insurances and the automatic insurance cover maintained by the registered liquidator does not apply as the directors remain in control of the company;
- in some states, appointing a restructuring practitioner to a company may void licences required to operate a business, e.g. a builder's licence.

- 5 In this report, we set out general statistics on restructuring practitioner appointments, analyse the restructuring plans accepted by creditors and provide our observations on ASIC form lodgements by restructuring practitioners.
- 6 Data presented in this report about the number of restructuring plans accepted by creditors will not reconcile with ASIC published statistics or our submission to the PJC Inquiry. This is because we have analysed forms lodged with ASIC up to and including 30 September 2022 to determine the outcome of all appointments of a restructuring practitioner to a company made up to and including 30 June 2022, even though the outcome of the appointment was not determined until after that time (e.g. affected creditors accepted a restructuring plan between 1 July 2022 and 30 September 2022 in relation to the appointment of a restructuring practitioner to the company made up to 30 June 2022).

Summary of key findings

- 7 There were 82 restructuring practitioner appointments during the review period. From those appointments, 78 proposals were sent to affected creditors of which 72 transitioned to restructuring plans. The 10 remaining appointments were either terminated on the basis the company was not eligible, creditors rejected the proposed plan or the directors ended the restructuring appointment.
- 8 All registered liquidators appointed as restructuring practitioners during the review period were those registered to practise as external administrators of companies (including as restructuring practitioners), receivers and receivers and managers. To date, one person has been registered as a registered liquidator to practise only as a restructuring practitioner for a company or for a restructuring plan.
- 9 Based on information reviewed to 30 September 2022 we identified that:
- (a) creditors approved the majority (72) of the 78 proposed restructuring plans sent to affected creditors (92%);

- (b) where a restructuring plan was accepted, 47 plans were effectuated (65%), one plan was terminated (2%) and 24 plans were ongoing at 30 September 2022 (33%);
- (c) the majority of companies where a restructuring plan was effectuated or was ongoing appear to be continuing to operate their business (66%);
and
- (d) the Australian Taxation Office (ATO) was a creditor in 89% of companies which entered a restructuring plan and was a major creditor in 79% of those companies.

A Restructuring practitioner appointments

Key points

The main states where restructuring practitioner appointments were made during the review period were New South Wales (44%), followed by Victoria (34%) and Queensland (12%).

The main industry groups for restructuring practitioner appointments were accommodation and food services (21%), construction (20%) and retail trade (16%).

All registered liquidators appointed as restructuring practitioners during the review period were those registered to practise as external administrators of companies. Since 1 January 2021, only one person was registered as a liquidator to practise only as a restructuring practitioner.

Most restructuring plans proposed were accepted by affected creditors (92%).

The majority of restructuring plans (65%) commenced during FY2020–21 and FY2021–22 were effectuated as at 30 September 2022.

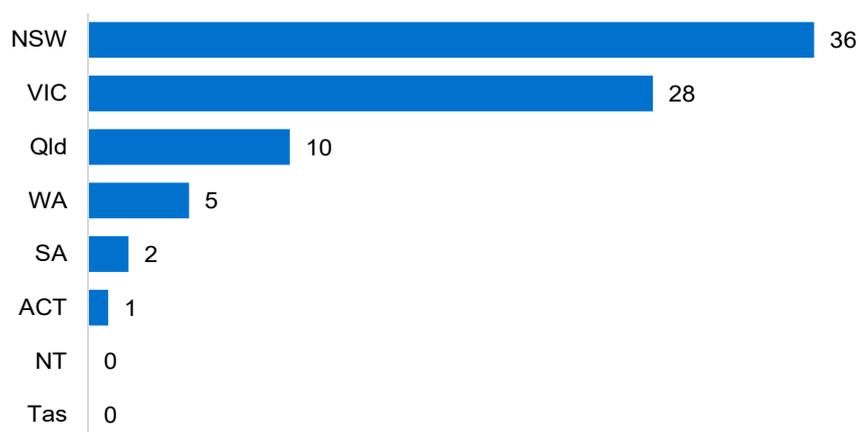
Where a restructuring plan was effectuated or was ongoing in FY2020–21 or FY2021–22, we determined a business was ongoing in the majority of those companies (66%).

- 10 The following sections include our analysis of the basic demographics of the affected small businesses, the profile of appointments by registered liquidator and the outcome of restructuring practitioner appointments for the review period.

By state/territory

- 11 The main states where small businesses accessed restructuring during the review period were New South Wales (44%), Victoria (34%) and Queensland (12%). This corresponds with the main regions of external administration and controller appointments during FY2021–22. The number of restructuring practitioner appointments by state/territory is shown in Figure 1.

Figure 1: Number of restructuring practitioner appointments by state/territory (for review period)



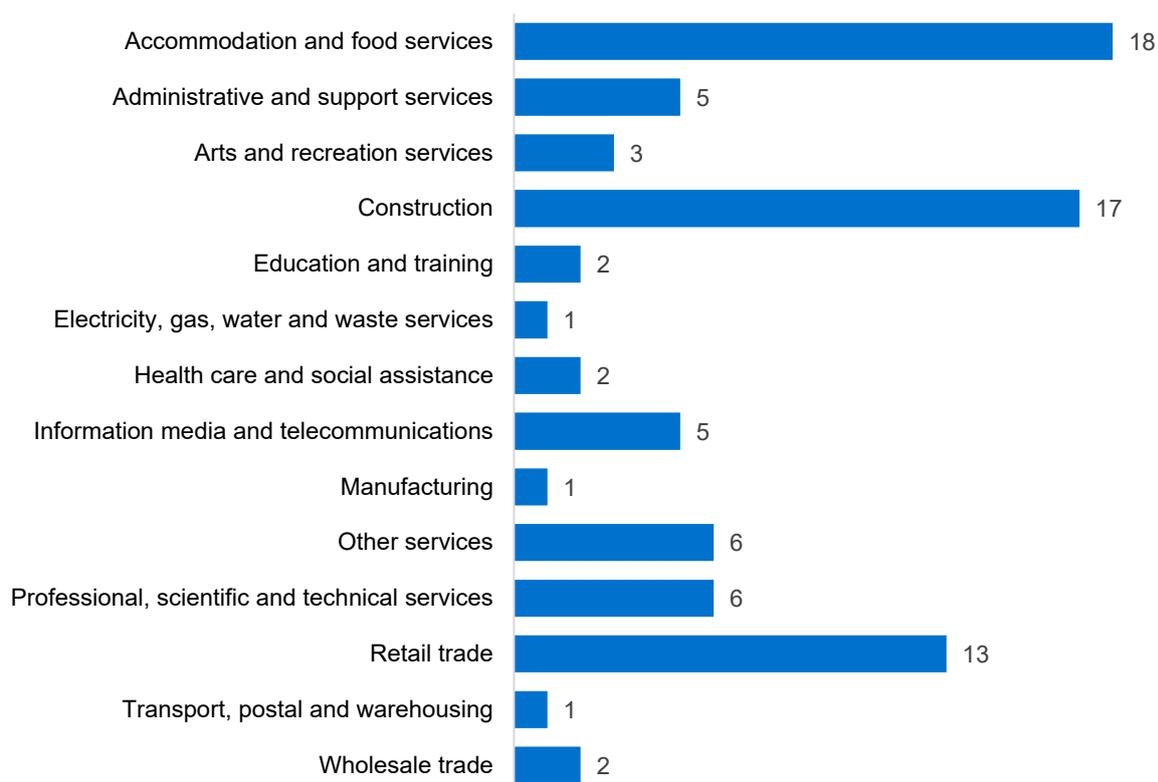
Source: [ASIC Series 1](#) published insolvency statistics data for restructuring practitioner appointments for the period 1 January 2021 to 30 June 2022.

Note: See Table 11 for an accessible version of this figure.

By industry

12 The main industry groups that accessed restructuring during the review period were accommodation and food services (21%), construction (20%) and retail trade (16%). During FY2021–22, external administration and controller appointments were primarily in construction (26%), accommodation and food services (15%) and other services (14%): see [ASIC Series 1A](#) published insolvency statistics data. Figure 2 shows restructuring practitioner appointments by industry.

Figure 2: Number of restructuring practitioner appointments by industry (for review period)



Source: [ASIC Series 1A](#) published insolvency statistics data for restructuring practitioner appointments for the period 1 January 2021 to 30 June 2022.

Note: See Table 12 for an accessible version of this figure.

Restructuring practitioners appointed

13 Since the commencement of the small business restructuring process on 1 January 2021, there has been one person registered as a liquidator to practise only as a restructuring practitioner for a company or for a restructuring plan. While there were six other applicants, the committees convened by ASIC for the purpose of considering their applications decided they should not be registered.

- 14 All registered liquidators appointed to the 82 restructuring practitioner appointments during the review period were those registered to practise as external administrators of companies (including as restructuring practitioners), receivers and receivers and managers.
- 15 The number of restructuring practitioner appointments per registered liquidator ranged from one to six for the review period as shown in Table 1. As at 30 September 2022, there were 651 registered liquidators and, as at 30 June 2022, 6% had taken appointments as restructuring practitioners. Based on the increasing number of restructuring appointments, we anticipate this proportion will increase for FY2022–23.

Table 1: Number of restructuring practitioner appointments per registered liquidator during the review period

Restructuring practitioner appointments per RL	Number of RLs
1	21
2	8
3	6
4 to 6	6

Source: [Form 505](#) Notification of appointment or cessation of an external administrator commenced during the period 1 January 2021 to 30 June 2022.

Outcome of restructuring practitioner appointments

- 16 The main outcome following the appointment of a restructuring practitioner was proposal by the company of a restructuring plan, and the majority of restructuring plans proposed were accepted by affected creditors (92%): see Table 2.
- 17 The figures in Table 2 may differ from the PJC Submission, as we analysed the outcomes of all 82 restructuring practitioner appointments that commenced during the review period, while the PJC Submission was based on lodgements for each financial year.

Table 2: Outcome of restructuring practitioner appointments commenced during the review period

Outcome	FY 21	FY 22	Total
Restructuring ended by directors	1	0	1
Restructuring ended as company not eligible	0	3	3

Outcome	FY 21	FY 22	Total
Restructuring plans not accepted by creditors	1	5	6
Restructuring plans accepted by creditors	10	62	72
Total	12	70	82

Source: [EX05](#) (Form 5608) *Notice of ending of restructuring* and [Form 505](#) lodged with ASIC for restructuring practitioner appointments commenced during the period 1 January 2021 to 30 June 2022.

- 18 The median number of days from the appointment of the restructuring practitioner to the commencement of the accepted restructuring plan was 50 days.
- 19 Companies executed the majority of restructuring plan proposals (81%) within the initial proposal period of 20 business days beginning on the day the restructuring began. We identified one restructuring plan that contravened the *Corporations Act 2001* (Corporations Act) as the plan was executed by the company one day outside of the allowable extension of the proposal period: see Table 3. This restructuring plan was subsequently effectuated (i.e. a dividend was paid to creditors).

Table 3: Analysis of restructuring plans and the proposal period

Restructuring plan	FY 21	FY 22	Total
Plans made by the company within initial proposal period	10	53	63
Plans made by the company with extension of proposal period	1	12	13
Plans made by the company outside of the maximum extension of proposal period	0	1	1
Plans made by the company— not lodged with ASIC (via Form 5614)	0	1	1
Total	11	67	78

Source: Analysis of all restructuring practitioner appointments during the review period including lodgement of [Form 505](#) and [EX04](#) (Form 5614) *Copies of restructuring documents given to affected creditors* up to 30 September 2022.

Note: Table 3 excludes four restructurings that were ended by the director or due to ineligibility.

- 20 Of the restructuring practitioner appointments commenced in FY2020–21 and FY2021–22, the majority of accepted restructuring plans were effectuated (65%), one plan was terminated (2%) and 24 plans were ongoing (33%) as at 30 September 2022: see Table 4.
- 21 The median number of days from restructuring plan commencement to effectuation was 20 days with an average number of days of 56.8.
- 22 The figures in Table 4 may differ from the PJC Submission, as we analysed the outcomes of the 78 plans that were proposed from the 82 restructuring practitioner appointments for the review period. The PJC Submission was based on lodgements for each financial year.

Table 4: Outcome of restructuring plans proposed as at 30 September 2022

Outcome of restructuring plan	FY 21	FY 22	Total
Plans effectuated	5	42	47
Plans ongoing	4	20	24
Plan terminated (external administrator appointed)	1	0	1
Plans not accepted by creditors	1	5	6
Total	11	67	78

Source: [Form 505, EX05](#) (Form 5608) and [EX06](#) (Form 5610) *Notice of termination of restructuring plan* lodged with ASIC for restructuring practitioner appointments that commenced during the period 1 January 2021 to 30 June 2022.

- 23 The Australian Government introduced the small business restructuring process to help more small businesses survive—meaning better outcomes for businesses, creditors, employees and the economy.
- 24 To understand its effectiveness so far, we analysed whether there was an ongoing business where a restructuring plan commenced for those companies in the review period. This included reviewing the ASIC company register and publicly available information. Table 5 sets out our analysis of the business continuity of companies with restructuring plans proposed in the review period.

Table 5: Analysis of business continuity for restructuring plans as at 30 September 2022

Company status	FY 21	FY 22	Total
Ongoing business			
Plans effectuated	1	27	28
Plans ongoing	3	16	19
Total	4	43	47
Business appears ceased or unable to identify ongoing business			
Plans effectuated (see Note 1)	4	15	19
Plans ongoing (see Note 2)	1	4	5
Total	5	19	24
Other			
Plan terminated or not accepted by creditors	2	5	7
Total	11	67	78

Source: ASIC company register and general internet searches for plans proposed from restructuring practitioner appointments commenced during the period 1 January 2021 to 30 June 2022.

Note 1: The 19 plans effectuated includes three plans where the company was deregistered after the plan was effectuated.

Note 2: The five plans ongoing includes two companies where we identified the business appears to have ceased.

- 25 Where a restructuring plan was effectuated or the plan was ongoing in FY2020–21 or FY2021–22, we determined a business was ongoing in the majority of those companies (66%). This was based on the company still being registered, as well as internet searches showing the business was still operating. For 34% of companies, we identified that the company was deregistered, the business ceased or we were unable to locate any information on the internet to indicate the business was ongoing.
- 26 We identified three companies which completed the small business restructuring process and were subsequently deregistered by ASIC. Our analysis of these companies shows the following:
- (a) The time between the effectuation of the restructuring plan to lodgement of the voluntary deregistration form (i.e. [Form 6010 Application for voluntary deregistration of a company](#)) with ASIC was

15 days (Company A), 344 days (Company B) and 52 days (Company C).

- (b) The final dividend paid to affected creditors was \$0.15 (Company A), \$0.13026 (Company B) and \$0.0134 (Company C).
- (c) For Company C, the voluntary deregistration form was lodged 52 days before the effectuation of the restructuring plan. This was identified by ASIC and a deregistration deferral applied during the period of the restructuring practitioner's appointment to the plan. Following the effectuation of the plan, the company was deregistered in accordance with the Corporations Act.

B Restructuring plan analysis

Key points

We conducted a review of the data and information on 72 restructuring plans accepted by creditors from 82 restructuring practitioner appointments in the review period.

Our review included categories of information on creditors, plan contributions, practitioners' remuneration and dividends.

We found that:

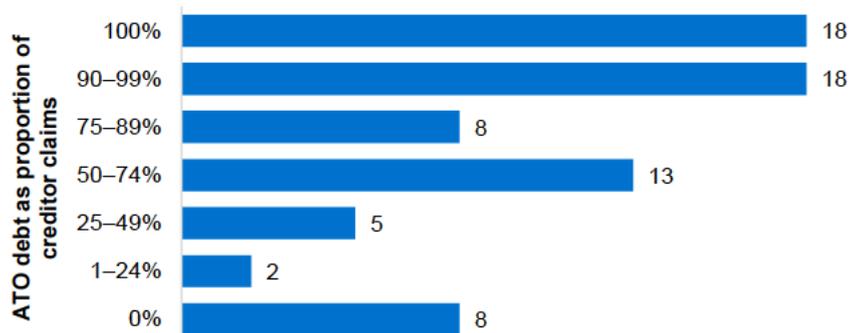
- the ATO was an affected creditor in 89% of the 72 restructuring plans that commenced during the review period;
- in most plans (79%), the ATO's debt represented 50–100% of the total admissible creditor claims;
- the majority of affected creditors were unrelated creditors;
- the majority of restructuring plans (79%) had total estimated admissible creditor claims of between \$53,762 and \$600,000;
- the majority (78%) of restructuring plans had a total of between one and five unrelated affected creditors;
- most of the proposed total contribution amounts (88%) were between \$15,001 and \$200,000;
- the majority (97%) of total plan contributions as a proportion of total estimated admissible creditor claims were between 1% and 50%;
- the main sources of plan contributions were from the director(s) or others (44%) and future trading profits of the company (34%); and
- based on available data, the average actual dividend was 15.2 cents in the dollar and 36% of companies had an actual dividend rate of between 10 and 20 cents in the dollar.

27 Our observations were drawn from a review of data and information on 72 restructuring plans accepted by creditors from all 82 restructuring practitioner appointments during the review period. Our data and information was from forms lodged with ASIC up to 30 September 2022 and ASIC's company register.

Creditors

28 The ATO was a creditor in 64 out of 72 restructuring plans (89%) that commenced from restructuring practitioner appointments during the review period.

29 In most plans (79%), the ATO's debt represented 50–100% of the total estimated admissible creditor claims as shown in Figure 3.

Figure 3: ATO debt as a proportion of total estimated admissible creditor claims

Source: [EX04](#) (Form 5614) lodgements for 72 restructuring plans accepted from restructuring practitioner appointments that commenced during the period 1 January 2021 to 30 June 2022.

Note 1: Information was also extracted from each [Restructuring Plan—Approved Form](#) (Word 42 KB) that accompanied an EX04 (Form 5614) lodgement. These figures may differ from the data and information provided by practitioners in the [Form 5612](#) for creditor claims.

Note 2: See Table 13 for an accessible version of this figure.

30 For a company to be eligible for small business restructuring, the total liabilities on the day the company enters the process must not exceed \$1 million.

31 Of the 72 companies which commenced a restructuring plan, the majority (79%) had total estimated admissible creditor claims of between \$53,762 and \$600,000. Table 6 sets out the ranges of admissible creditor claims for each of the 72 restructuring plans during the review period.

Table 6: Total estimated admissible creditor claims (for review period)

Admissible creditor claims	FY 21	FY 22	Total
\$0–\$200,000	2	13	15
\$200,001–\$400,000	3	24	27
\$400,001–\$600,000	2	13	15
\$600,001–\$800,000	2	7	9
\$800,001–\$1,000,000	1	5	6
Total	10	62	72

Source: [EX04](#) (Form 5614) lodgements for 72 restructuring plans accepted from restructuring practitioner appointments commenced during the period 1 January 2021 to 30 June 2022.

Note: The information for the total estimated admissible creditor claims was extracted from each [Restructuring Plan—Approved Form](#) that accompanied an EX04 (Form 5614) lodgement. These figures may differ to the data provided by practitioners in the [Form 5612](#) for creditor claims.

32 The total estimated admissible creditor claims for each approved restructuring plan ranged from \$53,762 to \$960,448. The median for FY2020–21 and FY2021–22 was \$387,872 and \$355,721 respectively (sourced from unstructured information in EX04 (Form 5614)).

33 Of the 72 restructuring plans reviewed, the majority of the companies’ affected creditors were unrelated.

34 The majority of plans (75%) consisted entirely of unrelated creditors: see Table 7.

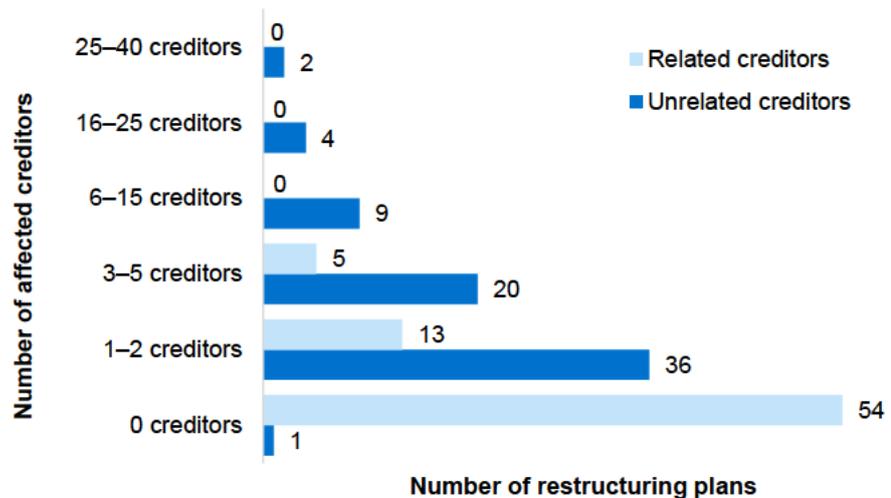
Table 7: Percentage of admissible debts for unrelated creditors compared to total admissible debts (for review period)

Percentage	No. of plans
0%	0
>0% and <50%	4
>50% and <100%	14
100%	54
Total	72

Source: [Form 5612](#) lodgements for 72 restructuring plans accepted from restructuring practitioner appointments commenced during the period 1 January 2021 to 30 June 2022.

35 The majority of restructuring plans (78%) had a total of between one and five unrelated affected creditors: see Figure 4.

Figure 4: Number of affected creditors (for review period)



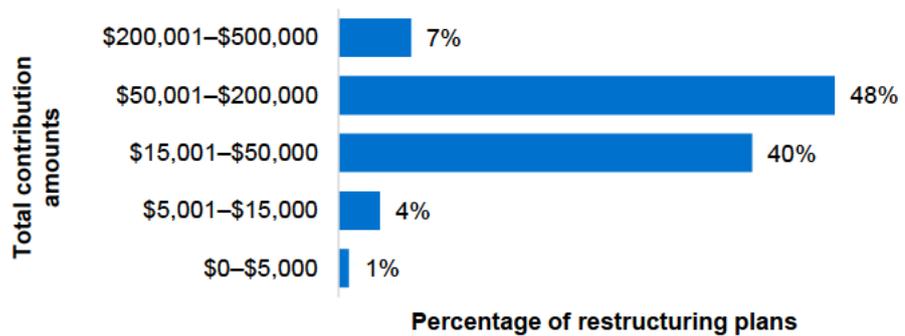
Source: [Form 5612](#) lodgements for 72 restructuring plans accepted from restructuring practitioner appointments commenced during the period 1 January 2021 to 30 June 2022.

Note: See Table 14 for an accessible version of this figure.

Plan contributions

- 36 For plan contributions, we reviewed 71 of the 72 restructuring plans that were accepted, omitting the one plan that was terminated because an external administrator was appointed to the company. The total restructuring plan contributions ranged from \$5,000 to \$500,000. The majority of total plan contribution amounts (88%) ranged from \$15,001 to \$200,000: see Figure 5.
- 37 The median total contribution amount was \$60,000.

Figure 5: Total plan contribution amounts (for review period)



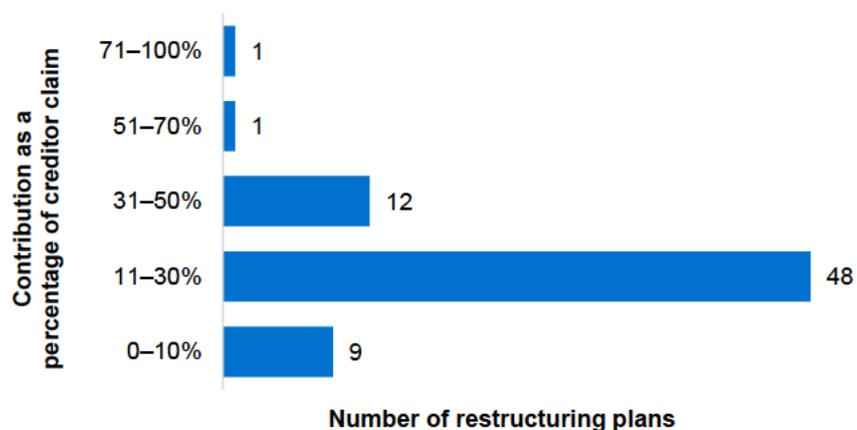
Source: [EX04](#) (Form 5614) lodgements for 71 restructuring plans accepted from restructuring practitioner appointments commenced during the period 1 January 2021 to 30 June 2022.

Note 1: The information was extracted from each [Restructuring Plan—Approved Form](#) that accompanied an EX04 (Form 5614) lodgement.

Note 2: See Table 15 for an accessible version of this figure.

- 38 The total plan contributions as a proportion of total estimated admissible creditor claims ranged from 1% to 76%, with a median of 20%. The majority of total plan contributions as a proportion of total estimated admissible creditor claims (97%) were between 1% and 50%: see Figure 6.

Figure 6: Total plan contributions as a proportion of total estimated admissible creditor claims (for review period)



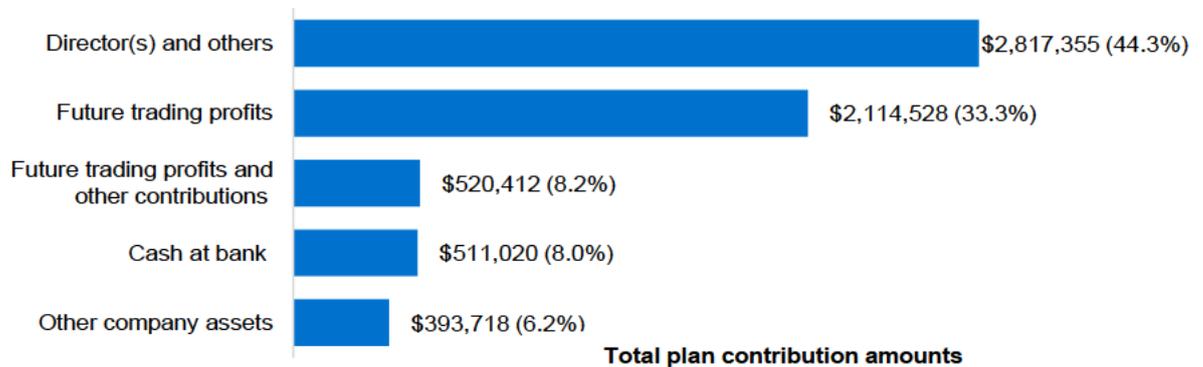
Source: [EX04](#) (Form 5614) lodgements for 71 restructuring plans accepted from restructuring practitioner appointments commenced during the period 1 January 2021 to 30 June 2022.

Note 1: The information was extracted from each [Restructuring Plan—Approved Form](#) that accompanied an EX04 (Form 5614) lodgement.

Note 2: See Table 16 for an accessible version of this figure.

- 39 The main sources of plan contributions were from the director(s) and others (44.3%) and future trading profits of the company (33.3%). See Figure 7.
- 40 The restructuring plans had a duration of ten business days to three years from acceptance of the plan. A restructuring plan must not provide for the company to make payments under the plan, in respect of an admissible claim, after three years beginning on the day the plan is accepted.
- 41 Where a restructuring plan is proposed, there is no statutory requirement to prepare a report to creditors or lodge with ASIC a copy of any reports issued to creditors. Of the limited reports to creditors lodged with ASIC (accompanying Forms 5614), the restructuring plan practitioner provided cash flow projections to support plans where contributions were sourced from long-term trading profits (i.e. 12-month projections).

Figure 7: Sources of plan contributions (for review period)



Source: EX04 (Form 5614) lodgements for 71 restructuring plans accepted from restructuring practitioner appointments commenced during the period 1 January 2021 to 30 June 2022.

Note 1: The information was extracted from each [Restructuring Plan—Approved Form](#) that accompanied an EX04 (Form 5614) lodgement.

Note 2: 'Director(s) and others' includes contributions or loans from directors, shareholders and third parties.

Note 3: 'Future trading profits and other contributions' includes a combination of trading profits and other contributions from directors or externally.

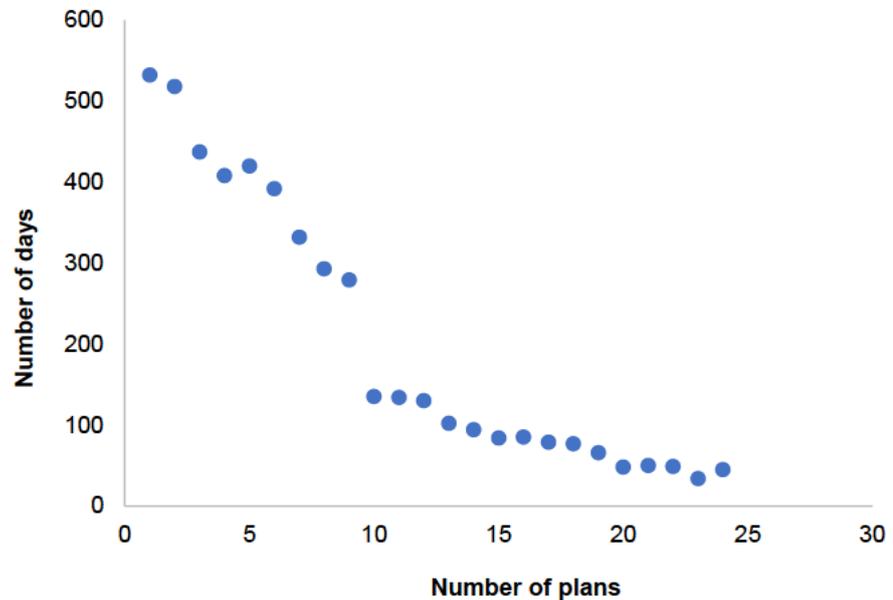
Note 4: 'Other company assets' includes trade debtors, motor vehicles, work in progress and ATO GST refunds.

Note 5: See Table 17 for an accessible version of this figure.

Age of ongoing plans

- 42 For those 24 restructuring plans ongoing as at 30 September 2022, we identified that:
- the oldest plan was 532 days (1.46 years);
 - the median age of those plans was 116 days (0.32 years); and
 - the average age of those plans was 201 days (0.55 years).

Figure 8: Days from plan commencement to 30 September 2022 for 24 ongoing restructuring plans



Source: [Form 505](#) lodgements for 24 of the 72 restructuring plans accepted from restructuring practitioner appointments commenced during the period 1 January 2021 to 30 June 2022.

Note: This graph is explained in paragraph 42 above (accessible version).

Remuneration

- 43 Data on remuneration was obtained from [Form 5602](#) *Annual administration return* and [Form 5603](#) *End of administration return* when lodged. The lodgement period of these forms is within three months of the anniversary year of the appointment and within one month of the end of the administration respectively.

Limitations

- 44 There are five completed restructuring plans where Form 5603 was lodged for both the restructuring and restructuring plan and no remuneration for the restructuring was disclosed. This may be due to misunderstanding, error or omission on the part of the registered liquidator when completing the forms.
- 45 A summary of remuneration for restructuring and restructuring plans reviewed is provided at Table 8.

Table 8: Median remuneration for restructuring and restructuring plan (to 30 September 2022)

Remuneration	Count	Median
Restructuring practitioner	81	\$12,940
Restructuring plan practitioner	47	\$4,735
Restructuring process (includes where both the restructure and plan were completed)	47	\$22,055

Source: [Form 5603](#) and [Form 5602](#).

Note 1: Restructuring practitioner remuneration does not include one matter where the plan was terminated.

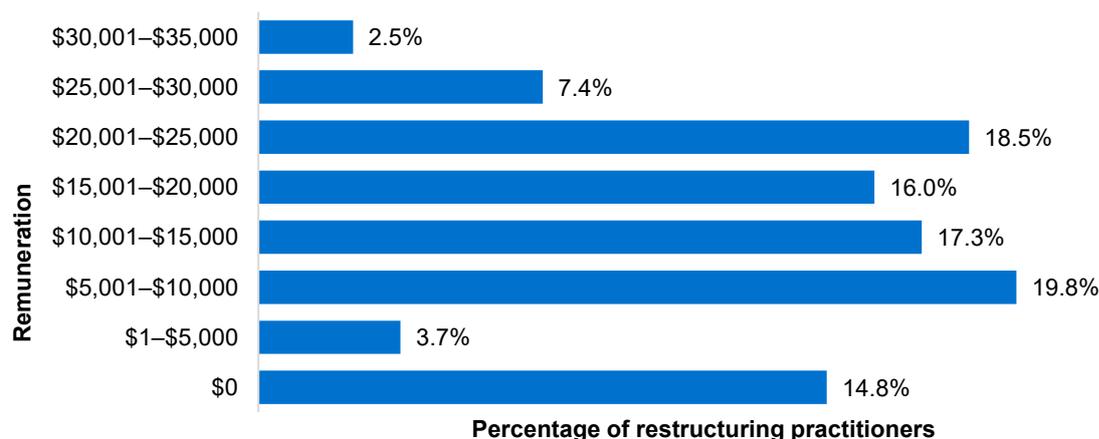
Note 2: The calculation of the median for restructuring practitioner remuneration includes five ongoing matters where no remuneration was disclosed in the Form 5603 for the restructuring practitioner and may be disclosed in the subsequent Form 5603 for the restructuring plan. If these five companies were excluded, the table would show 76 matters with a median remuneration of \$14,805.

Note 3: The restructuring plan practitioner and restructuring process counts of 47 are derived from 82 plans less 10 companies where the company was not eligible, the plan was not accepted or the plan was not made and 24 companies with ongoing plans where no data is available, and excluding one company where the plan was terminated.

Note 4: We identified five companies where the registered liquidator failed to separate the restructuring and plan remuneration. We used the data that was disclosed as it was.

Note 5: It is not accurate to add the median for both appointments and compare the median with the total as the two will not match.

- 46 As set out in Figure 9, almost twenty percent of practitioners (19.8%) were paid remuneration of between \$5,001 and \$10,000 for the restructuring. A similar percentage of practitioners were paid remuneration of \$10,001 to \$15,000 (17.3%) and \$20,001 to \$25,000 (18.5%). The average remuneration paid was \$13,694.
- 47 The Form 5603 lodged for 12 companies disclosed no restructuring practitioner remuneration paid for the restructuring phase. Of these, five matters are ongoing, and an additional three companies did not accept the plan. It is unclear whether this means no remuneration was paid for this period or whether the form was incorrectly completed.

Figure 9: Remuneration for restructuring

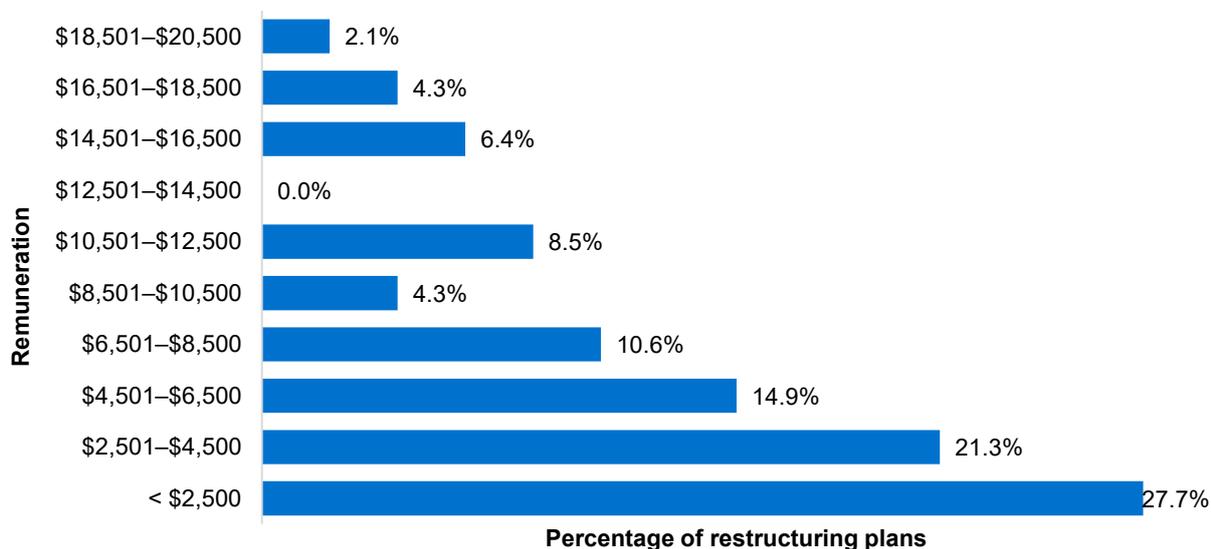
Source: [Form 5603](#) and [Form 5602](#) when lodged.

Note 1: See Table 18 for an accessible version of this figure.

Note 2: Excludes one appointment where the plan was terminated.

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Just over twenty-one percent of practitioners (21.3%) were paid remuneration of between \$2,501 and \$4,500 for the restructuring plan. The average remuneration charged was \$6,361. Almost twenty-eight percent of restructuring plan practitioners (27.7%) were paid less than \$2,500 for the restructuring plan: see Figure 10.

Figure 10: Remuneration for a restructuring plan

Source: [Form 5603](#) and [Form 5602](#) when lodged.

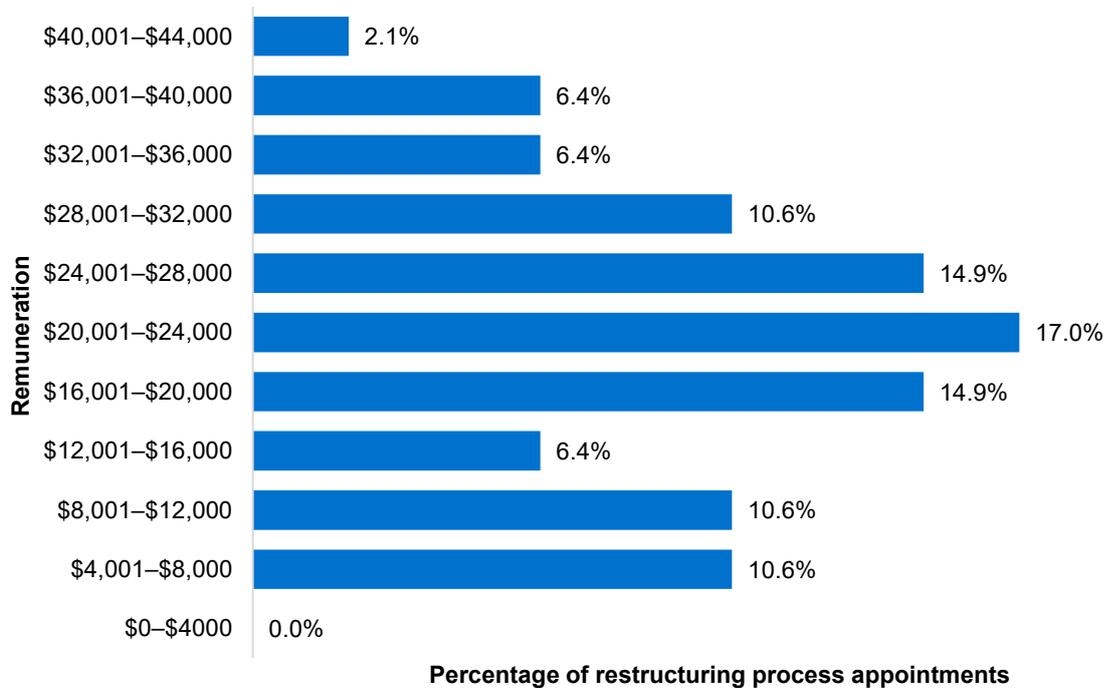
Note 1: Includes 47 restructuring plans where data is available. Does not include 24 companies with ongoing plans, 10 companies where the company was not eligible, the plan was not made or the plan was not accepted, and one company where the plan was terminated.

Note 2: See Table 19 for an accessible version of this figure.

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When remuneration for restructuring and the restructuring plan is combined, almost forty-seven percent of practitioners (46.8%) were paid total remuneration of between \$16,001 and \$28,000: see Figure 11. The average remuneration paid was \$21,670.

Figure 11: Remuneration for restructuring process



Source: [Form 5603](#) and [Form 5602](#) when lodged.

Note 1: Includes 47 companies where data is available for both the restructuring and the restructuring plan. Does not include 24 companies with ongoing plans where no data is available, 10 companies where the company was not eligible, the plan was not accepted, or the plan was not made, and one company where the plan was terminated.

Note 2: See Table 20 for an accessible version of this figure.

Dividends

50 Table 9 shows the dividend rate for restructuring plans accepted. Based on available data, the average proposed dividend was 18.7 cents in the dollar compared to the actual dividend of 15.2 cents in the dollar.

Table 9: Dividend rate for restructuring plans accepted (to 30 September 2022)

Dividend rate (cents in the dollar)	Count	Average
Proposed dividend rate	68	18.7
Actual dividend rate	44	15.2

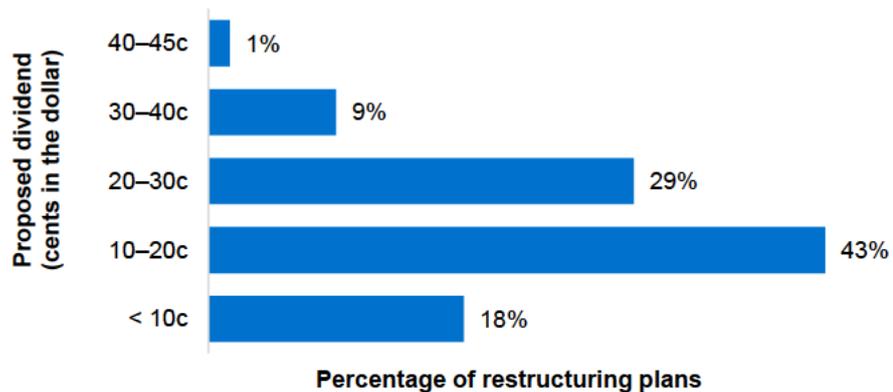
Source: [Form 5612](#) (for proposed dividend rate) and [Form 5603](#) and [Form 5602](#) when lodged for actual dividend rate.

Note 1: For the proposed dividend rate—includes 68 companies where data is available. Excludes four companies where the proposed dividend was not disclosed and ten companies where the plan was not accepted or not made, or the company was not eligible.

Note 2: For the actual dividend rate—includes 44 companies where data is available. Excludes 24 companies where the restructuring plan is ongoing. Also excludes three companies where dividend data is unknown and ten companies where the plan was not accepted or not made, or the company was not eligible and one company where the plan was terminated.

51 Forty-three percent of companies had a proposed dividend rate of between 10 and 20 cents in the dollar: see Figure 12.

Figure 12: Proposed dividend rate



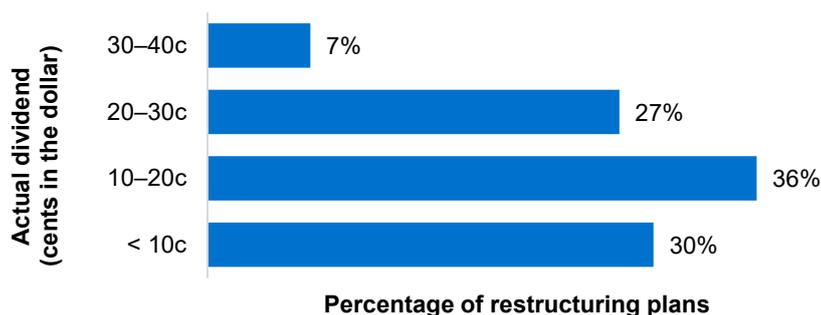
Source: [Form 5612](#)

Note 1: Includes 68 companies where data is available. Excludes four companies where the proposed dividend was not disclosed, ten companies where the plan was not accepted or not made, or the company was not eligible and one company where the plan was terminated.

Note 2: See Table 21 for an accessible version of this figure.

52 Thirty-six percent of companies had an actual dividend rate of between 10 and 20 cents in the dollar: see Figure 13.

Figure 13: Actual dividend rate



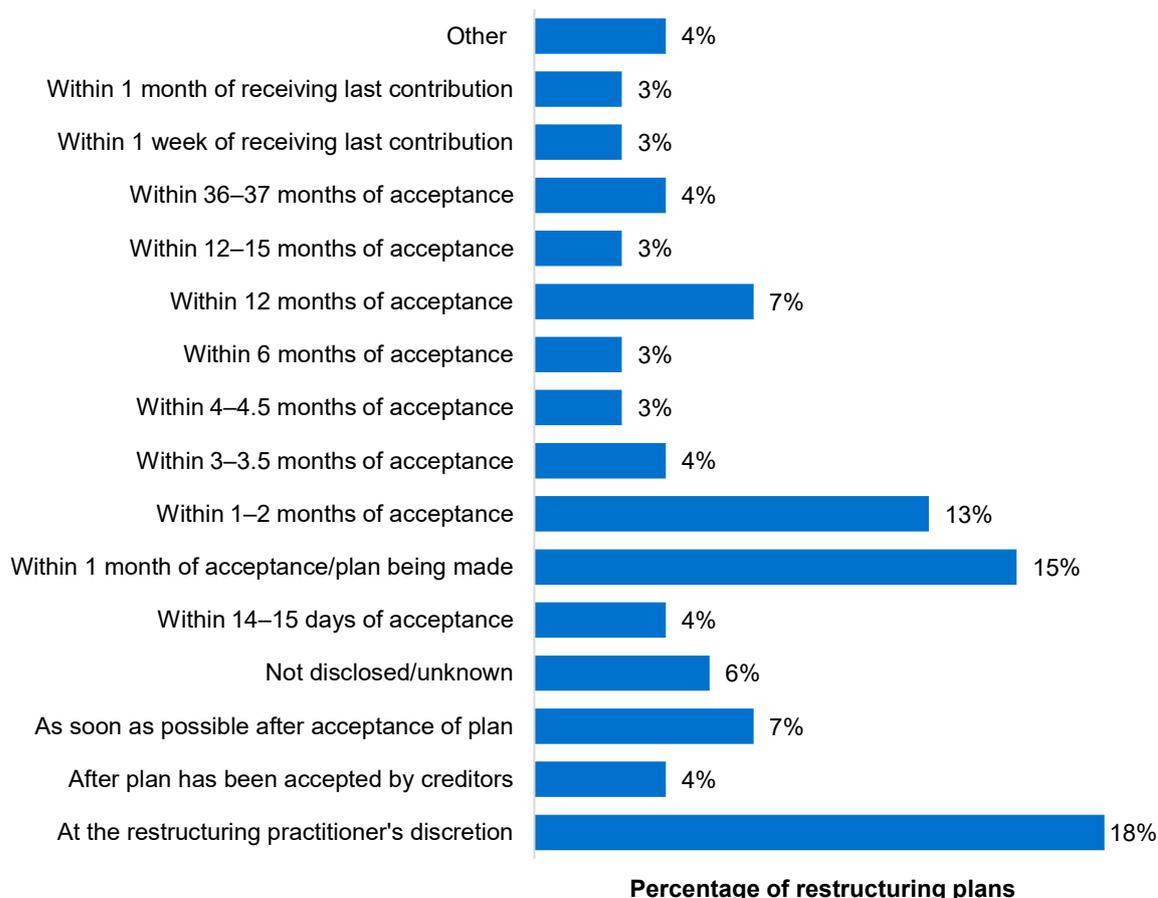
Source: [Form 5603](#) and [Form 5602](#) when lodged.

Note 1: Includes 44 of the 47 companies where data is available. Three companies had no dividend reported in the Form 5603.

Note 2: See Table 22 for an accessible version of this figure.

53 Eighteen percent of plans reported the proposed dividend would be paid at the restructuring practitioner’s discretion. Fifteen percent of plans indicated the proposed dividend would be paid within one month of accepting the plan: see Figure 14.

Figure 14: Timing of proposed dividend



Source: [EX04](#) (Form 5614).

Note 1: This figure includes 72 plans sourced from Form 5614, while Figure 12 contains 68 plans sourced from Form 5612.

Note 2: See Table 23 for an accessible version of this figure.

Dividends to remuneration

54 The average remuneration to dividends paid is 13.8% for restructuring plans and 41.4% for the restructuring process overall: see Table 10.

Table 10: Average remuneration as a percentage of total dividends paid (to 30 September 2022)

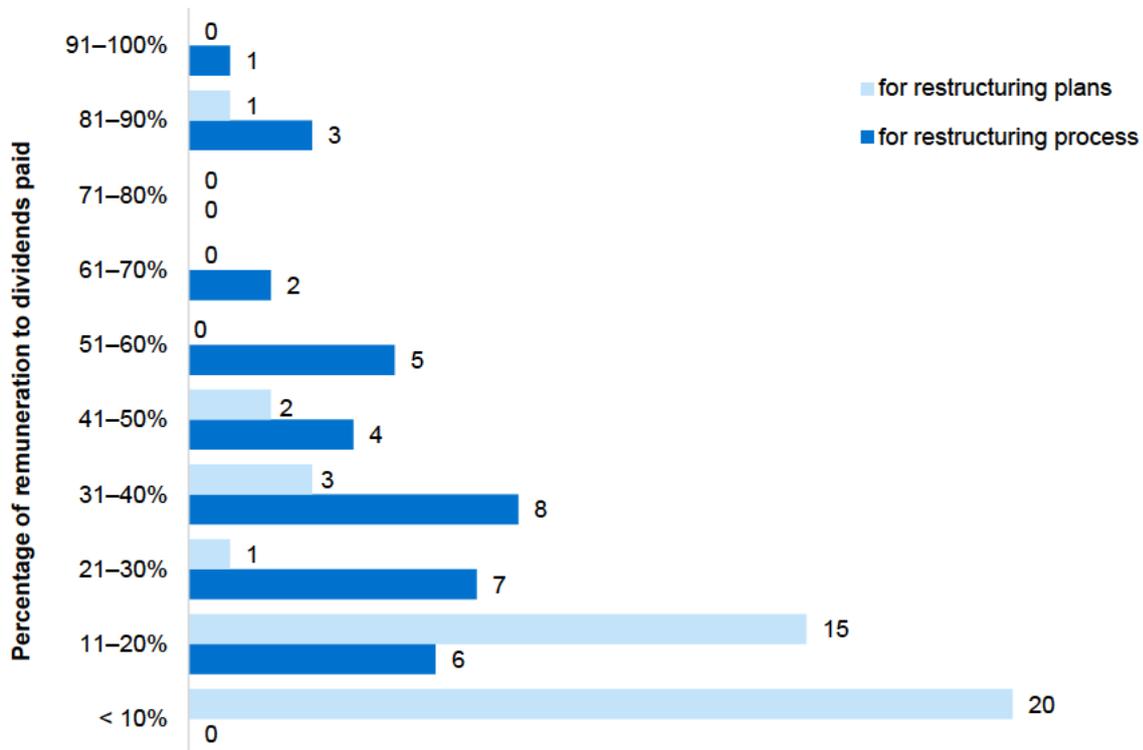
Average remuneration as a percentage of total dividends	Count	Median	Average
Remuneration for restructuring plans (only)	42	10.5%	13.8%
Remuneration for restructuring and restructuring plans	36	37.7%	41.4%

Source: [Form 5603](#) and [Form 5602](#) when lodged.

Note: Forty restructuring plans are not included, as either dividend or remuneration data was not disclosed.

55 For most restructuring plans, the percentage of remuneration to dividends was less than 10% and between 11% and 20%. For the process overall, remuneration to dividends was between 21% and 40%: see Figure 15.

Figure 15: Percentage of remuneration to dividends paid



Source: [Form 5603](#) and [Form 5602](#) when lodged.

Note 1: Excludes 40 companies for restructuring plans and excludes 46 companies for the restructuring process (because they are ongoing with no information available, incorrect information was lodged, the plan was not accepted by creditors or the company was not eligible for a plan or entered external administration).

Note 2: See Table 24 for an accessible version of this figure.

C Observations on ASIC lodgements by registered liquidators

Key points

Through our review of the restructuring information and data, we compiled observations on the lodgement of ASIC forms by registered liquidators.

We will publish further information to promote consistency in the way ASIC forms lodged by registered liquidators for small business restructuring are completed.

Observations on ASIC lodgements

- 56 As part of our review, we compiled general observations on form lodgements with ASIC in relation to restructurings and restructuring plans.
- 57 There is no statutory requirement to prepare or lodge with ASIC a report to creditors about the proposed restructuring plan or provide an opinion on the proposed restructuring plan. Therefore, we do not have access to other information provided to creditors or to the practitioner's opinion (if given) on the proposed restructuring plan unless the practitioner elects to lodge a copy of the report with other information required to be given to ASIC.
- 58 For restructuring plans with a longer contribution period, we did not identify within the documents lodged any ongoing monitoring by the plan practitioner.
- 59 We identified that some practitioners did not:
- (a) disclose their restructuring remuneration in [Form 5603](#) *End of administration return* for either type of appointment period (i.e. restructuring practitioner and restructuring plan practitioner). We therefore assume that no remuneration was paid during the period of the end of administration return;
 - (b) complete the dividend paid sections of Form 5603; or
 - (c) lodge some of the mandatory ASIC forms (these non-lodgements are usually dealt with through our liquidator compliance activities).

Copies of restructuring documents given to affected creditors and notice of restructuring plan

- 60 Under the Corporations Act, practitioners must lodge a copy of the proposed restructuring plan sent to affected creditors. We provided restructuring practitioners with the template [Restructuring Plan—Approved Form](#) to be lodged with [EX04](#) (Form 5614) *Copies of restructuring documents given to*

affected creditors. This template sets out the information that must be included in a restructuring plan as prescribed by the *Corporations Regulations 2001*. We also request practitioners lodge a copy of the accepted restructuring plan with [Form 5612 Notice of restructuring plan](#).

- 61 As part of our review, we observed the following in relation to the completed template [Restructuring Plan—Approved Form](#):
- (a) Provision of information by practitioners was at times *inconsistent*. For example, under ‘company property to be dealt with under the plan’, some practitioners listed company property that would be excluded under the plan rather than the property that would be included.
 - (b) Wording was sometimes *unclear*. For example, some practitioners described the details of third-party contributions or funding but did not specify that funding would, in effect, be from future trading profits. Instead, they detailed directors forgoing repayment of their loans to the company as a form of contribution.
 - (c) Descriptions *could be improved*. For example, a description required further calculations by the creditor—that is, the estimated amount for distribution creditors was described as ‘\$35,000 less remuneration for the restructuring practitioner’.
- 62 The template is lodged with ASIC as a PDF attachment (i.e. unstructured data). Accordingly, the collection and analysis of the information within the template can only be performed manually.

Information on ASIC lodgements

- 63 [Information Sheet 29 External administration, controller appointments and schemes of arrangement: Most commonly lodged forms \(INFO 29\)](#) was updated in February 2022 to include [Flowchart 14: Restructuring practitioner of a company](#) and [Flowchart 15: Restructuring practitioner of a restructuring plan for a company](#).
- 64 ASIC has published articles on form lodgements for restructurings in the [Corporate Insolvency Update \(CIU\)](#) including:
- (a) Issue 25, September 2022—‘Dividends paid in a restructuring plan’; and
 - (b) Issue 20, June 2021—‘Lodgements for restructuring practitioner transition’.
- 65 We will publish further information to promote consistency in the way the template [Restructuring Plan—Approved Form](#) is completed.
- 66 We are currently updating information to assist registered liquidators to prepare [Form 5602](#) and [Form 5603](#), including what remuneration and dividend information needs to be included when completing the forms.

Appendix: Accessible versions of figures

67 This appendix is for people with visual or other impairments. It provides the underlying information for the figures presented in this report.

Table 11: Number of restructuring practitioner appointments by state/territory (for review period)

State/territory	Number
NSW	36
VIC	28
Qld	10
WA	5
SA	2
ACT	1
NT	0
Tas	0
Total	82

Note: This table shows the data contained in Figure 1.

Table 12: Number of restructuring practitioner appointments by industry (for review period)

Industry	Number
Accommodation and food services	18
Administrative and support services	5
Arts and recreation services	3
Construction	17
Education and training	2
Electricity, gas, water and waste services	1
Health care and social assistance	2
Information media and telecommunications	5
Manufacturing	1
Other services	6

Industry	Number
Professional, scientific and technical services	6
Retail trade	13
Transport, postal and warehousing	1
Wholesale trade	2
Total	82

Note: This table shows the data contained in Figure 2.

Table 13: ATO debt as a proportion of total estimated admissible creditor claims

Proportion of ATO debt	No. of plans
0%	8
1–24%	2
25–49%	5
50–74%	13
75–89%	8
90–99%	18
100%	18
Total	72

Note: This table shows the data contained in Figure 3.

Table 14: Number of affected creditors (for review period)

Number of affected creditors	Unrelated creditors	Related creditors
0 creditors	1	54
1–2 creditors	36	13
3–5 creditors	20	5
6–15 creditors	9	0
16–25 creditors	4	0
25–40 creditors	2	0
Total	72	72

Note: This table shows the data contained in Figure 4.

Table 15: Total plan contribution amounts (for review period)

Contribution amount	Restructuring plans (%)
\$0–\$5,000	1%
\$5,001–\$15,000	4%
\$15,001–\$50,000	40%
\$50,001–\$200,000	48%
\$200,001–\$500,000	7%
Total	100%

Note: This table shows the data contained in Figure 5.

Table 16: Total plan contributions as a proportion of total estimated admissible creditor claims (for review period)

Plan contribution as a proportion of total estimated admissible creditor claims	Number of plans
0–10%	9
11–30%	48
31–50%	12
50–70%	1
71–100%	1
Total	71

Note: This table shows the data contained in Figure 6.

Table 17: Sources of plan contributions (for review period)

Sources of plan contributions	Amount (\$)	Percentage
Other company assets	393,718	6.2
Cash at bank	511,020	8.0
Future trading profits and other contributions	520,412	8.2
Future trading profits	2,114,528	33.3
Director(s) and others	2,817,355	44.3
Total	6,357,033	100%

Note: This table shows the data contained in Figure 7.

Table 18: Remuneration for restructuring

Remuneration	No. of restructuring practitioner appointments	Restructuring practitioner appointments (%)
\$0	12	14.8%
\$1–\$5,000	3	3.7%
\$5,001–\$10,000	16	19.8%
\$10,001–\$15,000	14	17.3%
\$15,001–\$20,000	13	16.0%
\$20,001–\$25,000	15	18.5%
\$25,001–\$30,000	6	7.4%
\$30,001–\$35,000	2	2.5%
Total	81	100%

Note: This table shows the data contained in Figure 9.

Table 19: Remuneration for a restructuring plan

Remuneration	No. of restructuring plans	Restructuring plans (%)
<\$2,500	13	27.7%
\$2,501–\$4,500	10	21.3%
\$4,501–\$6,500	7	14.9%
\$6,501–\$8,500	5	10.6%
\$8,501–\$10,500	2	4.3%
\$10,501–\$12,500	4	8.5%
\$12,501–\$14,500	0	0.0%
\$14,501–\$16,500	3	6.4%
\$16,501–\$18,500	2	4.3%
\$18,501–\$20,500	1	2.1%
Total	47	100%

Note: This table shows the data contained in Figure 10.

Table 20: Remuneration for restructuring process

Remuneration	No. of restructuring plans	Percentage of restructuring plans
\$0–\$4,000	0	0.0%
\$4,001–\$8,000	5	10.6%
\$8,001–\$12,000	5	10.6%
\$12,001–\$16,000	3	6.4%
\$16,001–\$20,000	7	14.9%
\$20,001–\$24,000	8	17.0%
\$24,001–\$28,000	7	14.9%
\$28,001–\$32,000	5	10.6%
\$32,001–\$36,000	3	6.4%
\$36,001–\$40,000	3	6.4%
\$40,001–\$44,000	1	2.1%
Total	47	100%

Note: This table shows the data contained in Figure 11.

Table 21: Proposed dividend rate

Proposed dividend	No. of restructuring plans	Percentage of restructuring plans
<10c	12	18%
10–20c	29	43%
20–30c	20	29%
30–40c	6	9%
40–45c	1	1%
Total	68	100%

Note: This table shows the data contained in Figure 12.

Table 22: Actual dividend rate

Remuneration	Number of restructuring plans	Percentage of restructuring plans
< 10c	13	30%
10–20c	16	36%
21–30c	12	27%
30–35c	3	7%
Total	44	100%

Note: This table shows the data contained in Figure 13.

Table 23: Timing of proposed dividend

Timing	Number of restructuring plans	Percentage of restructuring plans
At the restructuring practitioner's discretion	13	18%
After plan has been accepted by creditors	3	4%
As soon as possible after acceptance of plan	5	7%
Not disclosed/unknown	4	6%
Within 14–15 days of acceptance	3	4%
Within 1 month of acceptance/plan being made	11	15%
Within 1–2 months of acceptance	9	13%
Within 3–3.5 months of acceptance	3	4%
Within 4–4.5 months of acceptance	2	3%
Within 6 months of acceptance	2	3%
Within 12 months of acceptance	5	7%
Within 12–15 months of acceptance	2	3%
Within 36–37 months of acceptance	3	4%
Within 1 week of receiving last contribution	2	3%
Within 1 month of receiving last contribution	2	3%
Other	3	4%
Total	72	100%

Note: This table shows the data contained in Figure 14.

Table 24: Percentage of remuneration to dividends paid

Remuneration to dividends paid %	For restructuring process	For restructuring plans
<10	0	20
11–20	6	15
21–30	7	1
31–40	8	3
41–50	4	2
51–60	5	0
61–70	2	0
71–80	0	0
81–90	3	1
91–100	1	0
Total	36	42

Note: This table shows the data contained in Figure 15.

Key terms

Term	Meaning in this document
affected creditor	Any creditor (related or unrelated) that would be bound by a restructuring plan
ATO	Australian Taxation Office
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
data	Structured data that is stored in a predefined format and can be easily extracted electronically
effectuated	When a plan is complete
eligibility criteria for a restructuring	To be eligible for a restructuring, on the day on which the restructuring practitioner is appointed: <ul style="list-style-type: none"> total liabilities of the company must not exceed \$1 million no person who is a director of the company, or who has been a director of the company within the 12 months before the appointment of the restructuring practitioner, has been a director of another company that has been under restructuring or subject to the simplified liquidation process within the period of the preceding seven years, unless they are exempt under the regulations the company must not have undergone restructuring or been the subject of a simplified liquidation process within the preceding seven years
excluded creditors	Creditors (including related creditors, the restructuring practitioner and a related entity of the restructuring practitioner) who are excluded from voting on the plan but are otherwise bound by the plan (they are an affected creditor—see above)
external administrators	A defined term for a registered liquidator formally appointed to control the affairs of a company and its property. Includes a provisional liquidator, liquidator, voluntary administrator and an administrator of a deed of company arrangement. It also includes a restructuring practitioner for a company and for a restructuring plan even though they do not control the affairs of the company. It does not include receivers or controllers
EX04	Form 5614 <i>Copies of restructuring documents given to affected creditors</i>
EX05	Form 5608 <i>Notice of ending of restructuring</i>
EX06	Form 5610 <i>Notice of termination of restructuring plan</i>

Term	Meaning in this document
FY	Financial year
information	Unstructured data that has no predefined format and requires manual collection processing or analysis
INFO 29 (for example)	An ASIC information sheet (in this example numbered 29)
plan	A plan to restructure the debts of a small business under Chapter 5.3B of the Corporations Act
related creditor	Creditors (such as spouses, relatives and other entities controlled by the directors/shareholders of an eligible company) who are owed money by the company
restructuring	From the commencement of the appointment of a restructuring practitioner to a company to the termination of the restructuring or the acceptance of a restructuring plan
Restructuring Plan—Approved Form	ASIC template for a company's restructuring plan, to be lodged with EX04 (Form 5614) <i>Copies of restructuring documents given to affected creditors</i> and Form 5612 <i>Notice of making restructuring plan</i>
restructuring practitioner of a company	A person (registered liquidator) appointed by a company to assist with the formulation of a restructuring plan to restructure an eligible company conducting a small business
restructuring practitioner of a restructuring plan	A person (registered liquidator) appointed by a company to implement an approved restructuring plan to restructure an eligible company conducting a small business
restructuring process	From the commencement of the appointment of a restructuring practitioner to a company to its finalisation including the restructuring plan, if applicable
review period	Restructuring practitioner appointments from 1 January 2021 to 30 June 2022

Related information

Admissible creditor claims, affected creditors, ASIC lodgements, ATO, cash flow projections, Corporations Act, creditors, directors, dividend, dividend rate, eligible small business, external administration, industries, outcome of restructuring plans, plan contributions, plan contribution sources, plans effectuated, plans terminated, proposal period, registered liquidator, related creditors, remuneration, restructuring plan, restructuring plan practitioner, restructuring practitioner, restructuring process, small business, small business restructuring, state of incorporation, trading profits, unrelated creditors.

Information sheets

[INFO 29](#) *Flowchart 14: Restructuring practitioner of a company*

[INFO 29](#) *Flowchart 15: Restructuring practitioner of a restructuring plan for a company*

[INFO 80](#) *How to interpret ASIC insolvency statistics*

Legislation

Corporations Act 2001

Corporations Regulations 2001

ASIC forms

[EX04](#) (Form 5614) *Copies of restructuring documents given to affected creditors*

[EX05](#) (Form 5608) *Notice of ending of restructuring*

[EX06](#) (Form 5610) *Notice of termination of restructuring plan*

[Form 505](#) *Notification of appointment or cessation of an external administrator*

[Form 5602](#) *Annual administration return*

[Form 5603](#) *End of administration return*

[Form 5612](#) *Notice of making of restructuring plan*

[Form 6010](#) *Application for voluntary deregistration of a company*

[Restructuring Plan—Approved Form](#) (Word 42 KB)

Other ASIC publications

[Restructuring and the restructuring plan](#)