

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Inquiry into corporate insolvency

2022 - 2023

**Division:** Market Conduct Division  
**Topic:** Small business restructuring and simplified liquidation process  
**Reference:** Spoken 13 December 2022  
**Senator:** Paul Scarr

**Question:**

Senator SCARR: You're a glass-half-full sort of guy, which I admire. I'm looking at those statistics, and they suggest to me it's been a bit of a flop. I want to quote from the submission of ARITA. Have you read their submission?

Mr Dickson: I've seen a summary of it.

Senator SCARR: I want to quote from page 43 of their submission:

Unfortunately, the Small Business Restructuring (SBR) legislative package has failed to live up to expectations due to the highly complex processes and legislation that have arisen from the lack of adequate consultation with the profession during the drafting phase. Like the simplified liquidation process discussed elsewhere in this submission, SBRs are simply not fit for purpose and have failed to deliver the cost-effective mechanism contemplated by the PC and the parliament.

How do you respond to that claim?

Mr Dickson: I don't really accept the claims that have been made. The—

Senator SCARR: We've got limited time. Can I ask Treasury to take that on notice, perhaps—I want to move on to the simplified liquidation process—and provide a formal response, because that is quite damning commentary from ARITA.

...

Senator SCARR: I understand. I've only got two minutes. I want to put to you a statement in relation to the simplified liquidation process, again from ARITA. Bear in mind there have only been 59 uses of the simplified liquidation process since March 2021. ARITA says on page 46 of its submission:

It is evident that the 'simplified' liquidation process is actually less efficient and more costly than a full creditors voluntary liquidation process. The fact is that only 59 creditors—so their statistic matches with yours—voluntary liquidations have adopted the simplified process since it commenced on 1 January 2021. For context this represents a mere 1% of the 5,862 creditors voluntary liquidations commenced in this period. The failure of the simplified liquidation process is attributable to poor legislative drafting and a poor information campaign conducted by ASIC.

It's damning commentary on this process. Can you understand why I'm looking at those figures? I can't come to any conclusion other than it's a flop.

Mr Dickson: First of all, people can choose the process they want to go through. If somebody wants to go through the simplified process, they can. If they want to go through the full process, they can do that too.

Senator SCARR: But the whole purpose of this was to introduce a system which had been more accessible and easier to access. When I look at these statistics they are damning. From your answers there appears to be absolutely no recognition whatsoever that there is a problem here. Do you want to take it on notice and come back?

Mr Dickson: I think my answers would be able to articulate why if I was given the opportunity to give you an answer.

Senator SCARR: I'm not being disrespectful to you; I'm short on time. I only have a few minutes. But I just want to make that point. I am happy for you to take it on notice and give a more fulsome answer, but, I must say, when I look at those statistics it's hard to come to a conclusion other than it is not working as intended. I am very keen to get Treasury's response in relation to the recommendations that have been made by ARITA, by the Law Council of Australia and by the Australian Small Business and Family Enterprise Ombudsman to potentially reform the processes. Some of the silver lining in the cloud is that it's thought that, with some reform, it could improve the process. I will give you an opportunity to give a more fulsome response and respond to those proposed amendments; is that okay?

Mr Dickson: Yes, thank you.

**Answer:**

The small business restructuring and simplified liquidation processes were designed for use by companies with simple affairs. The eligibility criteria include safeguards aimed at reducing the risk of the processes being used to facilitate illegal phoenix activity and other corporate misconduct. These processes are not intended to be a replacement for other pre-existing formal insolvency processes.

Regarding the small business restructuring process, the directors of the incorporated business remain in control of the company and can elect whether to utilise that process if the company meets the relevant eligibility criteria.

Regarding the simplified liquidation process, where a liquidator believes on reasonable grounds that a company in a creditors' voluntary winding up meets the eligibility criteria, the liquidator may adopt the simplified liquidation process instead of the regular liquidation process.

Take up should be considered in the context of lower overall numbers of companies that entered external administration. The number of companies that entered external administration was lower during the COVID-19 pandemic due to a range of factors including the provision of government support, and leniency and forbearance from creditors.

In 2020-21 and 2021-22, the number of companies that entered external administration was 4,235 and 4,912 respectively. This represents a 47 per cent and 38 per cent decrease respectively from the pre-pandemic baseline. The total number of companies entering external administration has only recently returned to around pre-pandemic levels.

In 2021-22, around 90 per cent of companies that entered into the small business restructuring process agreed a restructuring plan with their creditors.

The following table shows the number of companies in total that entered into the small business restructuring process from March 2021 to September 2022. Take up of this process has been steadily increasing over time with an uptick in recent months, indicating that the process took some time to gain momentum as awareness increased.

	Mar-2021	Jun-2021	Sep-2021	Dec-2021	Mar-2022	Jun-2022	Sep-2022	Total
<b>Companies entering small business restructuring</b>	5	7	8	13	9	40	83	<b>165</b>

By contrast, the take up of the simplified liquidation process has remained steady, as indicated by the below table showing the total number of companies where the registered liquidator has adopted the simplified liquidation pathway from March 2021 to September 2022.

	Mar-2021	Jun-2021	Sep-2021	Dec-2021	Mar-2022	Jun-2022	Sep-2022	Total
<b>Use of simplified liquidation pathway</b>	12	11	10	7	5	7	7	<b>59</b>

A question arises as to whether registered liquidators are incentivised to use the regular liquidation process over the simplified liquidation pathway based on how the liquidator is remunerated under each process.

A question that has also arisen from stakeholder feedback is whether the current total liabilities threshold of \$1 million strikes the right balance of being a proxy for simple affairs.