

Insolvency reforms

- *What credit professionals need to know*

What are the reforms

The reforms passed on 10 December 2020 commenced on 1 January 2021 and include:

- A new Debt Restructuring Process for small businesses;
- Temporary restructuring relief; and
- A new Simplified Liquidation Process for small businesses.

Why were these reforms implemented

On 24 September the government announced its intention to implement these reforms and provided [this fact sheet](#) stating *“The changes will enable more Australian small businesses to quickly restructure and to survive the economic impact of COVID-19. Where restructure is not possible, businesses will be able to wind up faster, enabling greater returns for creditors and employees.”*

Significant to note:

- There was no formal industry consultation on these initiatives prior to their announcement;
- The reforms have been labelled the biggest reform to insolvency law in 30 years; and
- Only 77 days elapsed between announcement and legislation being passed into law.

AICM's involvement in these reforms

AICM has been actively representing members with industry and government agitating for reform to the insolvency system for many years.

Specifically, the AICM championing the need for change to the unfair preference claim regime which

has been recognised by the new Simplified Liquidation process restricting circumstances a preference claim can be pursued. This is clear recognition that the pursuit of preference claims can take up time, money and resources, and have the potential to outweigh any benefit that might flow through to creditors.

AICM has provided 28 pages of commentary across 2 submissions on the reforms and engaged extensively with other industry bodies including the Australian Restructuring Insolvency and Turnaround Association (ARITA), Australian Finance Industry Association (AFIA) and Australian Chamber of Commerce and Industry (ACCI).

While we will continue to lobby for improvements to the reforms, this work means your AICM is positioned to help you navigate these changes.

1. A new Debt Restructuring Process for small businesses *Executive summary*

This new process is designed to allow companies to restructure their debts and achieve a better outcome than from the current insolvency processes e.g. Administration or Liquidation.

Directors remain in control of the business and are able to continue trading.

Creditors can't initiate legal action (including windup) during the restructuring period.

The company, with assistance of the Restructuring Practitioner (RP), prepares and sends a proposal to creditors 20 business days after commencement.

Once a plan is approved all unsecured creditors and some secured creditors of the company are bound by the plan.

High level steps of the new process for credit professionals

1. Commences when directors appoint an RP.

The RP will notify as many creditors as reasonably possible and ASIC (notice on published notices website) within 1 business day of appointment.

To be eligible the company must:

- Meet the \$1M liability test (excluding employee entitlements);
- Be insolvent or likely to become insolvent;
- The company has not previously been subject to debt restructuring or simplified liquidation process within the last 7 years (exceptions apply)
- No director (or former director in last 12 months) has previously used the debt restructuring or simplified liquidation process within the last 7 years (exceptions apply); and
- Not already subject to an insolvency administration.

WHAT YOU NEED TO KNOW:

Certain aspects of the process commence once the directors appoint an RP which may be prior to you being notified, this may expose you to additional risks without knowledge.

2. Like the existing voluntary administration process, once commenced:

- Creditors cannot enforce against the company;
- Creditors cannot enforce guarantees for a Director or their relations;
- Creditors cannot enforce security interests (including PPSA) unless you have possession of the property (there are limited exemptions);
- Goods subject to unperfected PPSR registrations will vest in the company; and
- The company can deal with goods subject to PPSR registrations in the ordinary course of business.

WHAT YOU NEED TO KNOW:

- **Unlike in an Administration (where the administrator has personal liability) the RP is not liable for supplies made during this period.**
- **Trade creditors should consider withdrawing credit facilities and moving to cash before delivery or similar terms if continuing to supply.**

3. There is no requirement for meetings of creditors but creditors do have rights to request information, reports and documents as allowed in other insolvency processes. The RP may also choose to hold a meeting if they believe exceptional circumstances warrant one.

4. Creditors receive a plan 20 business days after the appointment of an RP (RP can extend this period by 10 business days)

- Directors form a plan with the assistance of RP.
- RP makes a declaration that it is reasonable to expect the company will meet obligations under the plan as and when falls due.
- Within 20 business days of appointing RP, RP sends the plan to creditors (using electronic means if details are available).
- Plan includes the proposal and your value of debt included.
- Debts are valued as at the commencement of restructuring (appointment of the RP).

WHAT YOU NEED TO KNOW:

- **Once the proposal is sent to creditors the company is deemed insolvent.**
- **This may be the first opportunity you will have to verify the value of your debt**
- **The proposal is not required to include information such as:**
 - **The reason restructuring is needed,**
 - **Details of the company's assets,**
 - **How restructuring will enable the business to continue trading, or**
 - **What factors will support the company meeting obligations under the plan.**

5. Within 15 business days you are asked to:

- Advise if you accept or reject the proposal
- Verify the value of debt or dispute debt **(you have 5 business days from receipt to dispute the value of your debt, after this period the RP has the right not to deal with your dispute)**
- The 15 business day period to respond may be extended by up to 5 business days when values change.

WHAT YOU NEED TO KNOW:

- **Secured Debts** – the value of debt that is unsecured is included or you consent to the secured debt being included.
- **After the plan is made the process is not invalidated if the value of liabilities increases to >\$1m (excl employee entitlements).**
- **If your debt is not included in the proposal you should contact RP as soon as reasonably practicable.**

6. As soon as practical of the RP being advised of the correct debt value or submitting a new debt they must:
- Notify you of acceptance or rejection, including reasons, and
 - If there is significant variation in total claims all creditors must be notified

WHAT YOU NEED TO KNOW:

- **You are entitled to withdraw or recast your vote as many times as you like before acceptance period.**

7. The proposal will be accepted if >50% of creditors (by value, not including excluded creditors) that respond to the plan are in favour.
8. Once accepted:
- All unsecured creditors prior to commencement are bound and cannot enforce any part of the debt, including the amount compromised.
 - Company has 30 business days to rectify any breaches.
 - If terminated all amounts payable are due immediately.

WHAT YOU NEED TO KNOW:

- **The return you receive may change when debts are admitted after the plan is accepted and you are still bound.**

2. Temporary restructuring relief

As companies may be unable to appoint an RP and access the Debt Restructuring Process (due to the short time frame for RP's to be registered and trained) the company can access protections from insolvent trading liabilities and statutory demands by declaring their intention to use the process. It's important to note that any fully registered liquidator can act as an RP, however the legislation is bringing in a sub-category of liquidator registration which enables practitioners to ONLY do small business debt restructures.

Between 1 January 2021 and 31 March 2021, a company eligible to enter the Debt Restructuring process can declare its intention to access the debt restructuring process.

WHAT YOU NEED TO KNOW:

- **Notification:**
 - **Creditors will be able to identify companies accessing the relief as the notice will be publicly available on ASIC's published notices website.**
 - **However, creditors are not contacted directly and it will not be recorded on an ASIC company search.**
 - **Credit Bureau's are working to incorporate these notifications in credit reports and alerts. You can search the notice board [here](#).**
 - **Creditors should consider further trading and preference claim risk as you are on notice the business is insolvent or likely to become insolvent.**
- **The notice triggers:**
 - **Directors safe harbour protection from insolvent trading liabilities for 3 months from date the notice is published (if they have taken all reasonable steps to appoint an RP before the debt was incurred).**
 - **During the 3 month period creditors statutory demands subject to:**
 - * \$20,000 threshold
 - * 6 months for debtor to respond
- **Companies can obtain a further month if still unable to appoint a restructuring practitioner.**

3. A new Simplified Liquidation Process for small businesses

This process is intended to free up value for creditors and employees, and allow assets to be quickly reallocated elsewhere in the economy, supporting productivity and growth.

The simplified liquidation process will retain the general framework of the existing creditors voluntary liquidation process, with modifications to reduce time and cost. A simplified process cannot be used in Court liquidations.

As currently occurs, the small business can appoint a liquidator who will take control of the company and realise the company's remaining assets for distribution to creditors. The liquidator will also still investigate and report to creditors about the company's affairs and enquire into the failure of the company, however the extent of these enquiries is limited

The process restricts the circumstances where a liquidator can pursue an unfair preference claim. This change recognises that the pursuit of preference claims can take up time, money and resources, and have the potential to outweigh any benefit that might flow through to creditors.

What you need to know:

1. Simplified process is adopted when
 - Directors provide Liquidator notice of eligibility
 - Liquidator must make decision to adopt a simplified process within 20 business days of appointment
2. Creditors must be provided with 10 business days notice of the intention to adopt the simplified process. The liquidator may adopt the simplified process any time after the 10 business days notice and within the 20 business day window from appointment, unless creditors object.
3. Creditors (at least 25% in value of unrelated creditors) can object to the use of the simplified process any time during the 10 business day notification period and up to the time of adoption. Any objection will be ineffective after adoption.
4. Companies are eligible for simplified process if:
 - <\$1 million in liabilities, and
 - Tax lodgements are up to date
 - Directors or company have not used Debt Restructuring Process or Simplified Liquidation in prior 7 years (20 business day exemption for related companies)

5. The Liquidator has reduced investigation and reporting requirements i.e. where there is reasonable grounds that dishonest or fraudulent behaviour has or likely to have material adverse effect on all creditors or subset of creditors.
6. No meetings of creditors can be called by the liquidator
7. Liquidator may only declare and distribute a dividend once
8. Proof of debts not admitted prior to dividend are excluded.
9. Preference claims not to be pursued against third party creditors if:
 - a. >3 months prior to liquidation
 - b. <\$30,000 (includes a series of related payments)
Note: No reduction in 3 year limit to bring a claim.

Where can I find out more

The AICM will continue to work closely with the insolvency profession, legal profession, government, members and our extensive connections to bring you the information you need.

You are encouraged to ask any question via the *member only* Credit Network Forum ([here](#)) if our credit community can't answer the AICM will escalate your query to government.

[This page](#) will be populated with updates and information from AICM's partners and network.