

**Baker  
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# **Australia's new insolvency regimes for small business**

Commenced 1 January 2021



## Table of Contents

<b>Part A - Restructuring</b> .....	<b>4</b>
1. Eligibility Criteria .....	5
2. How does Restructuring commence?.....	5
3. Initial notices to creditors and the Australian Securities & Investments Commission (" <b>ASIC</b> ").....	6
4. Development of the Restructuring Plan.....	7
5. Prerequisites for putting the Restructuring Plan to creditors.....	8
6. Putting the Restructuring Plan to creditors .....	9
7. Voting on Restructuring Plan and disputing Company's assessment of admissible debts and claims .....	9
8. Making the Restructuring Plan .....	11
9. Ending the Restructuring and consequences .....	11
10. Effect on key stakeholders .....	13
11. RP - Remuneration and liability.....	16
12. Transitional protections for eligible companies that could not find a RP in early 2021 .....	18
<b>Part B - Simplified Liquidation Process</b> .....	<b>19</b>
1. Eligibility.....	20
2. What will be different from a normal CVL? .....	21
3. Safeguards to prevent misuse.....	21
<b>Resources</b> .....	<b>23</b>

### In brief



On 1 January 2021, the Federal Government's post-COVID small business restructuring reform package<sup>1</sup> came into effect. This package introduced into the *Corporations Act 2001* (Cth) ("**Corporations Act**"):

- two new insolvency regimes for companies with liabilities of less than \$1 million, namely:
  - a "debtor in possession" restructuring and restructuring plan process ("**Restructuring**"); and
  - a simplified liquidation process ("**Simplified Liquidation**"); and
- temporary insolvency relief for companies (and their officers) that wished to enter Restructuring, but could not find a registered liquidator able to act as the Restructuring Practitioner ("**RP**") for the Restructuring during the period 1 January 2021 to 31 March 2021, including:
  - a temporary insolvent trading safe harbour for directors in respect of debts incurred in the ordinary course of business; and
  - a temporary increase to statutory demand thresholds of \$20,000 and 6 months (otherwise \$2,000 and 21 days, respectively).

<sup>1</sup> *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth); *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020* (Cth) and *Insolvency Practice Rules (Corporations) Amendment (Corporate Insolvency Reforms) Rules 2020* (Cth)

A low-angle, upward-looking photograph of several modern skyscrapers with glass facades. The buildings are arranged in a way that creates a strong sense of height and perspective, with lines converging towards the top of the frame. The sky is a clear, pale blue with a few wispy clouds. The overall color palette is dominated by blues and greys.

# Part A - Restructuring

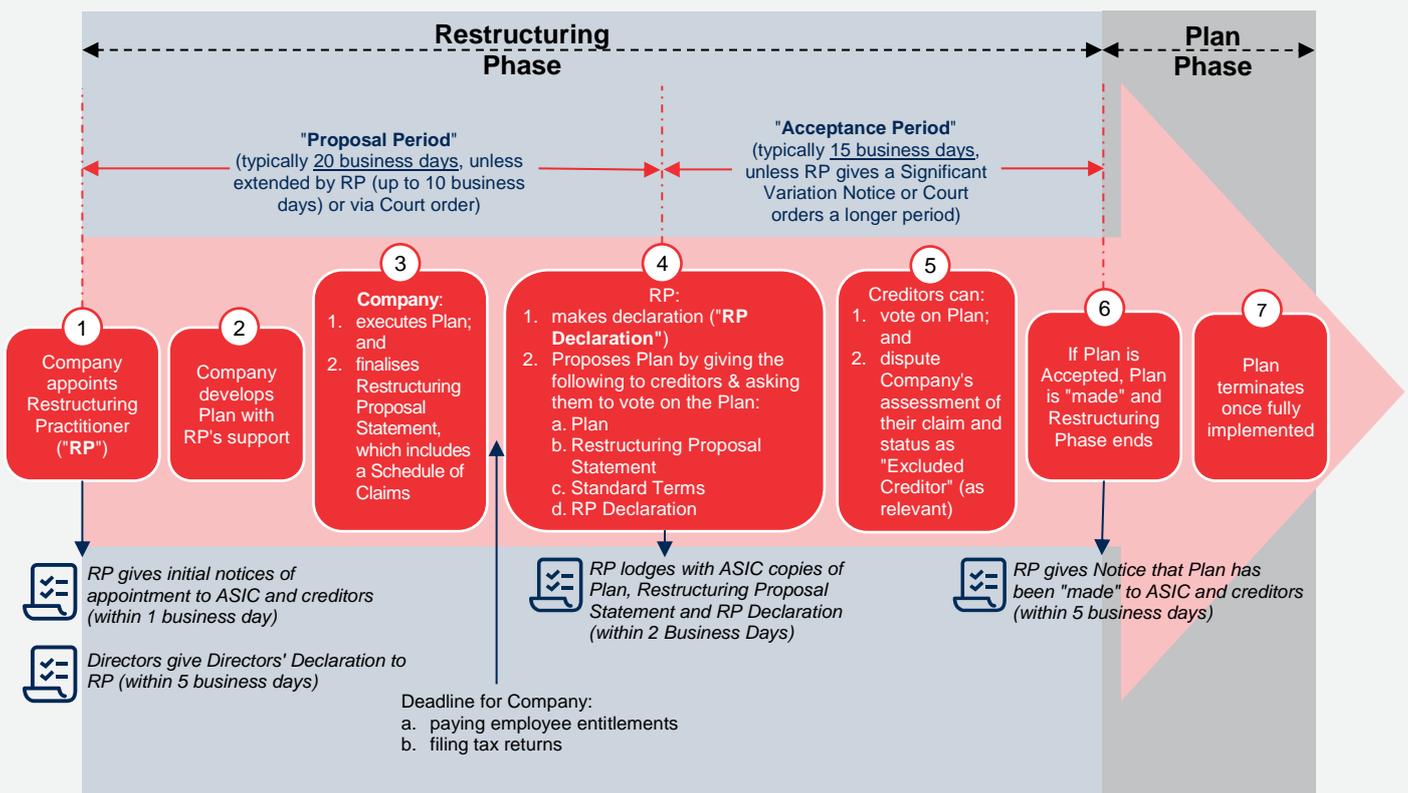


## Part A - Restructuring

The Restructuring process provides a framework for eligible small businesses to work together with an RP to develop and propose to creditors a debt restructuring plan which if accepted, will bind the Company, its officers, members and certain creditors. It is designed to be a debtor-in-possession model, and as such, day-to-day management of the Company remains with the board throughout the process.

There are 2 key phases of the Restructuring, namely:

- the **Restructuring** phase, which commences on the appointment of the RP and ends in certain circumstances outlined in *Section 9 Ending the Restructuring* (below), including when a Restructuring Plan is "made";<sup>2</sup> and
- the **Restructuring Plan** phase, which commences when the Restructuring Plan is "made" and ends when that Restructuring Plan is terminated for any of the reasons outlined in *Section 9 Ending the Restructuring* (below), including when the Restructuring Plan is fully implemented.<sup>3</sup>



<sup>2</sup> Corporations Act, s 453A and Corporations Regulations, reg 5.B.02

<sup>3</sup> Corporations Regulations, regs 5.3B.26(2) and 5.3B.31

## 1. Eligibility Criteria

A Company can use the Restructuring process if it satisfies the following (the "**Eligibility Criteria**"):

- its total liabilities<sup>4</sup> do not exceed \$1 million;<sup>5</sup> and
- no person who is (or has been within the preceding 12 months) a director of the Company, has been a director of another company that has undertaken a Restructuring or Simplified Liquidation within the preceding 7 years, unless that other company:
  - i. was a related body corporate of the Company; and
  - ii. its Restructuring or Simplified Liquidation commenced not more than 20 days before the day on which the Restructuring of the Company began;<sup>6</sup> and
- the Company itself has not undertaken a Restructuring or Simplified Liquidation process within the last 7 years.<sup>7</sup>

In addition, the Company must not already be under Restructuring, be subject to a Restructuring Plan that has not yet terminated, be under administration, subject to a deed of company arrangement, or in liquidation or provisional liquidation.

Before appointing an RP, directors should also consider whether at the time the Restructuring Plan is to be put to creditors, the Company will be able to comply with the "Pre-Requisites" specified below (see *Section 5. Prerequisites for putting the Restructuring Plan to creditors*).<sup>8</sup>

## 2. How does Restructuring commence?

The Restructuring of a Company which satisfies the Eligibility Criteria is commenced by the Company appointing the RP in writing.<sup>9</sup>

This instrument of appointment can only be signed if:

- the RP has first consented to act in writing, and not withdrawn that consent;<sup>10</sup> and
- the Company's board of directors has resolved to the effect that:
  - i. in their opinion the Company is insolvent or likely to become insolvent at some future time; and
  - ii. the RP should be appointed to the Company.<sup>11</sup>

Only registered liquidators can consent to act as a RP.<sup>12</sup> In addition, if they are connected<sup>13</sup> with the Company, a registered liquidator cannot seek or accept the appointment or act as the RP for that Company, without the leave of the Court.<sup>14</sup>

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<sup>4</sup> "Liability" means any liability to pay a debt or claim that would be admissible to proof under s553(1) of the *Corporations Act* were the company being wound up on the day the Restructuring commenced, other than employee entitlements and debts incurred during a DOCA (*Corporations Regulations*, reg 5.3B.03(5) and the definition of "admissible debt or claim" in reg 5.3B.01). An early case suggests the quantum of contingent claims within this cap are assessed on a "just estimate" basis: *Re Dessco Pty Ltd* [2021] VSC 94 (26 February 2021)

<sup>5</sup> *Corporations Act*, s 453B(1)(a) and 453C(1)(a) and *Corporations Regulations*, reg 5.3B.03(1)

<sup>6</sup> *Corporations Act*, s 453B(1)(a) and 453C(1)(b) and (c) and *Corporations Regulations*, reg 5.3B.03(2)-(4)

<sup>7</sup> *Corporations Act*, s 453C(1)(c)

<sup>8</sup> *Corporations Act*, s 453B(2)

<sup>9</sup> *Corporations Act*, s 453A(a) and 453B(1)

<sup>10</sup> *Corporations Act*, s 456A

<sup>11</sup> *Corporations Act*, s 453B(1)(b). It would also be prudent for the resolution to confirm that the Company meets the Eligibility Criteria and specify the RP's remuneration.

<sup>12</sup> *Corporations Act*, s 456B

<sup>13</sup> A person will be "connected" to a company in the circumstances set out in s 456C(1) of the *Corporations Act*, which are the same as those in s 448C of the *Corporations Act* applicable in voluntary administration

<sup>14</sup> *Corporations Act*, s 456C(1). Failure to comply with this requirement is a strict liability offence: *Corporations Act*, s 456C(2)

To ensure there is a sufficient number of registered liquidators who can perform this role, a new class of registered liquidators who practice solely as RPs has been created. To be registered in this new class, an applicant must be a recognised accountant, have demonstrated the capacity to satisfactorily perform the functions and duties of an RP and be able to satisfy any additional conditions imposed under the Insolvency Practice Schedule.<sup>15</sup>

Within 5 business days of the RP's appointment (or such longer period as the RP allows), each director of the Company must also sign and give the RP a declaration ("**Directors' Declaration**") stating whether, in the directors' opinion, there are reasonable grounds to believe that:

- the Company has entered into a transaction that would be voidable under section 588FE of the *Corporations Act* (other than an unfair preference) if the Company were being wound up; and
- the Eligibility Criteria were met in relation to the Company at the time the Restructuring began, and set out the reasons for that opinion.<sup>16</sup>

### 3. Initial notices to creditors and the Australian Securities & Investments Commission ("**ASIC**")

Within 1 business day of their appointment, the RP must:

- publish notice of their appointment on the ASIC Published Notices website;<sup>17</sup> and
- send notice of their appointment and certain accompanying information (including an explanation of the process and the process of making a Restructuring Plan) to as many of the Company's creditors as reasonably practicable.<sup>18</sup>

Further, during the Restructuring phase, every public document and negotiable instrument must set out the phrase ("restructuring practitioner appointed") after the Company's name where it first appears.<sup>19</sup>

The RP must also sign a Declaration of Relevant Relationships and Interests ("**DIRRI**") and ensure a copy is provided to creditors and lodged with ASIC as soon as practicable after being appointed.<sup>20</sup> In addition, if the DIRRI becomes out-of-date or the RP becomes aware of an error in it, the RP must, as soon as practicable, make a replacement DIRRI and provide copies to creditors and ASIC.<sup>21</sup>

<sup>15</sup> *Insolvency Practice Rules (Corporations) 2016 (IPR)*, r 20-2

<sup>16</sup> *Corporations Regulations*, reg 5.3B.49(2)(b) & (c).

<sup>17</sup> *Corporations Regulations*, reg 5.3B.50(1); see also ASIC Published Notices website: <https://publishednotices.asic.gov.au/>

<sup>18</sup> *Corporations Regulations*, reg 5.3B.50(2)

<sup>19</sup> *Corporations Act*, s 457B(1)

<sup>20</sup> *Corporations Act*, s 453D(1)-(3)

<sup>21</sup> *Corporation Act*, s 453D(4)-(6)

## 4. Development of the Restructuring Plan

Following the RP's appointment, the Company has 20 business days beginning on the day the Restructuring begins ("**Proposal Period**")<sup>22</sup> to prepare<sup>23</sup> and execute<sup>24</sup> a restructuring plan ("**Restructuring Plan**" or "**Plan**") with the assistance of the RP.<sup>25</sup>

This Proposal Period can be extended:

- by the RP (once and by no more than 10 business days) if the RP is satisfied on reasonable grounds that requiring the Company to give a Restructuring Plan within the Proposal Period would not be reasonable in the circumstances;<sup>26</sup> or
- by the Court on application by the Company.<sup>27</sup>

If the Proposal Period is extended, the RP must lodge with ASIC notice of the extension and give a copy of the notice to as many of the Company's creditors as reasonably practicable, in each case, within 2 business days after the extension is granted.<sup>28</sup>

### **Contents of the Restructuring Plan**

The Restructuring Plan must:<sup>29</sup>

- be in the **approved form**;<sup>30</sup>
- identify what Company property is to be dealt with under the Restructuring Plan and how that property will be dealt with;
- provide for the remuneration of the RP for the Restructuring Plan; and
- specify the date on which the Restructuring Plan was executed.

The Restructuring Plan will be taken to contain the prescribed Standard Terms (see the box *Standard Terms for a Plan* for what this requires)<sup>31</sup> which are designed to ensure all creditors are treated fairly.<sup>32</sup> A Restructuring Plan is void to the extent that it is inconsistent with any of the Standard Terms.<sup>33</sup>

The Restructuring Plan may:<sup>34</sup>

- authorise the RP to deal with the identified property in the manner specified in the Restructuring Plan;
- provide for any matter relating to the Company's affairs; and

### **Standard Terms for a Plan**

(Reg 5.3B.27)

1. all admissible debts and claims rank equally;
2. if the total amount paid by the Company under the plan in respect of those debts and claims is insufficient to meet those debts or claims in full, those debts and claims will be paid proportionately;
3. no creditor is entitled to receive, in respect of their admissible debt or claim, more than the amount of that debt or claim;
4. the amount of an admissible debt or claim will be ascertained as at the time immediately before the Restructuring began; and
5. a secured creditor will be a creditor only to the extent the value of its claim exceeds the value of its security (or, if the secured creditor realises security while the Plan is in force, to the extent any balance remains due to the creditor after deducting the net amount realised).

<sup>22</sup> Corporations Regulations, reg 5.3B.17(1)

<sup>23</sup> Corporations Regulations, reg 5.3B.15(1)

<sup>24</sup> Corporations Regulations, reg 5.3B.14(1)(b)

<sup>25</sup> Corporations Act, s 453E(1)(b)

<sup>26</sup> Corporations Regulations, reg 5.3B.17(2) and (3)

<sup>27</sup> Corporations Regulations, reg 5.3B.17(4)

<sup>28</sup> Corporations Regulations, reg 5.3B.17(5)

<sup>29</sup> Corporations Regulations, reg 5.3B.15(2)

<sup>30</sup> ASIC has released a word version Template of the approved form. <https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-directors/restructuring-and-the-restructuring-plan/>

<sup>31</sup> Corporations Regulations, reg 5.3B.27

<sup>32</sup> Corporations Regulations, reg 5.3B.27

<sup>33</sup> Corporations Regulations, reg 5.3B.27(2)

<sup>34</sup> Corporations Regulations, reg 5.3B.15(3)

- be conditional on the occurrence of a future event (i.e. a condition precedent), provided the Restructuring Plan specifies that event and by when it needs to occur (which cannot be more than 10 business days after the Restructuring Plan is accepted by creditors).

The Restructuring Plan must not:<sup>35</sup>

- provide for the transfer of property (other than money) to a creditor; or
- provide for the Company to make payments under the plan in respect of an admissible claim, more than three years after the Restructuring Plan is made.

### **No third party releases**

Given Restructuring Plans can only bind creditors of the Company to the extent that the creditor has an admissible debt or claim,<sup>36</sup> Restructuring Plans cannot release claims against third parties, such as guarantors.

### **Employees**

Unlike a DOCA,<sup>37</sup> there is no requirement for a Restructuring Plan to give priority to eligible employee creditors. This is consistent with payment of all employee entitlements being a prerequisite for putting a Restructuring Plan to creditors (see *Section 5. Prerequisites for putting the Restructuring Plan to creditors* below).

### **Restructuring Proposal Statement**

The Restructuring Plan must also be accompanied by a Restructuring Proposal Statement that includes a schedule of debts and claims ("**Schedule of Claims**"), which is in the **approved form**<sup>38</sup> and contains such information as that form requires.<sup>39</sup>

## **5. Prerequisites for putting the Restructuring Plan to creditors**

Before the Restructuring Plan can be put to creditors:

- (**Execution**) the Restructuring Plan must be signed by the Company within the Proposal Period;<sup>40</sup>
- (**RP Declaration**) the RP must (as soon as practicable after the Restructuring Plan is executed) prepare and sign a declaration ("**RP Declaration**"),<sup>41</sup> which:
  - a. states whether the RP believes on reasonable grounds that:
    - the Company meets the Eligibility Criteria;
    - if the Restructuring Plan is made, the Company is likely to be able to discharge the obligations created by the Restructuring Plan as and when they become due and payable; and
    - all information required to be set out in the Restructuring Proposal Statement has been set out;
 and where the RP does not hold this belief, states that and sets out the reasons for that conclusion; and

<sup>35</sup> Corporations Regulations, reg 5.3B.15(4)

<sup>36</sup> Corporations Regulations, reg 5.3B.29(2)(a)

<sup>37</sup> Corporations Act, s 444DA

<sup>38</sup> ASIC has released a word version Template of the approved form. <https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-directors/restructuring-and-the-restructuring-plan/>

<sup>39</sup> Corporations Regulations, reg 5.3B.14(1)(a)(ii) and 5.3B.16

<sup>40</sup> Corporations Regulations, reg 5.3B.14(1)(b)

<sup>41</sup> Corporations Regulations, reg 5.3B.14(1)(c)

- b. identifies the name of any creditor who would be a party to the Restructuring Plan if made ("**Affected Creditor**")<sup>42</sup> that is a related entity of the RP (and the nature of their relationship);<sup>43</sup> and
- (**Employee entitlements & Tax Returns**) the Company must have (or substantially have):
  - paid all employee entitlements<sup>44</sup> that are payable; and
  - given all returns, notices, statements, applications or other documents as required by taxation laws within the meaning of the *Income Tax Assessment Act 1997* (Cth),<sup>45</sup> although tax debts do not need to have been paid – only the required returns need to have been given.

## 6. Putting the Restructuring Plan to creditors

Assuming the above mentioned prerequisites are met, a Company can "**propose**" the Restructuring Plan to creditors during the Proposal Period, which involves the RP:

- sending to as many Affected Creditors as reasonably practicable a copy of the Restructuring Plan, the Standard Terms, the Restructuring Proposal Statement and the RP Declaration; and
- asking each Affected Creditor other than those who are the RP, or related to the Company or the RP ("**Excluded Creditors**") to vote on the Restructuring Plan in writing and verify/dispute the Company's assessment of its admissible debt or claim in the Schedule of Claims.<sup>46</sup>

The RP must also lodge a copy of the Restructuring Plan, the Restructuring Proposal Statement and RP Declaration with ASIC within 2 business days.<sup>47</sup>

## 7. Voting on Restructuring Plan and disputing Company's assessment of admissible debts and claims

Creditors typically have 15 business days commencing on the date the Restructuring Plan, the Restructuring Proposal Statement and RP Declaration are given to creditors ("**Acceptance Period**") to vote on the Restructuring Plan and verify or dispute the Company's assessment of their admissible debts or claims.

This Acceptance Period may be longer than 15 business days if:

- the RP issues a Significant Variation Notice in respect of the Schedule of Claims (see below under "*Creditors may dispute Schedule of Claims / status as 'Excluded Creditor'*"), in which case the Acceptance Period will be the *longer* of the 15 business day period and the period commencing on the date the Restructuring Plan, the Restructuring Proposal Statement and RP Declaration are given to creditors and ending 5 business days after the Significant Variation Notice is given; or
- the Court orders that the Acceptance Period be extended (in which case, as long as the Court so orders).<sup>48</sup>

<sup>42</sup> *Corporations Regulations*, reg 5.3B.01

<sup>43</sup> *Corporations Regulations*, reg 5.3B.18

<sup>44</sup> Employee entitlements is defined in s 596AA(2) and (3) of the *Corporations Act* and includes superannuation contributions payable by the Company

<sup>45</sup> *Corporations Regulations*, reg 5.3B.14(1)(e) and 5.3B.24

<sup>46</sup> *Corporations Regulations*, regs 5.3B.14(1)(d) and (2) and 5.3B.21

<sup>47</sup> of the RP giving copies of those documents to Affected Creditors: *Corporations Regulations*, reg 5.3B.52

<sup>48</sup> *Corporations Regulations*, reg 5.3B.21(3) and 5.3B.60

## **Creditors may dispute Schedule of Claims / status as "Excluded Creditor"**

If a creditor disagrees with the Company's assessment of its debt or claim in the Schedule of Claims included in the Restructuring Proposal Statement or its status as an "Excluded Creditor", the creditor may give written notice of the disagreement to the RP ("**Dispute Notice**") within 5 business days of receiving or becoming aware of the Restructuring Plan.<sup>49</sup>

A Dispute Notice may be submitted outside this initial 5 business day period, however, the creditor would need to explain the reason for the delay.<sup>50</sup> Where this occurs and the RP is not satisfied that the creditor took all reasonable steps to issue the Dispute Notice within the required 5 business day period, the RP may refuse to consider the Dispute Notice,<sup>51</sup> in which case the RP must notify the Company and relevant creditor of this refusal and the RP will be taken to have recommended that the Schedule of Claims not be varied.<sup>52</sup>

Otherwise, the RP must adjudicate the Dispute Notice and notify the Company and Creditor of their recommendation for resolving the dispute as well as their reasons.<sup>53</sup> If that "recommendation" is to vary the Schedule of Claims, the Company must vary the Schedule of Claims as soon as practicable,<sup>54</sup> and if the RP considers that the variation is significant, the RP must also notify the Company and all Creditors of the variation and remind Creditors that they can change their vote on the Restructuring Plan at any time before the Acceptance Period expires ("**Significant Variation Notice**").<sup>55</sup>

Where the Company or a creditor is dissatisfied with the RP's decision in respect of a Dispute Notice, they can apply to the Court for an order requiring the RP to consider the Dispute Notice and make a recommendation in respect of it, that the Schedule of Claims be varied and, or in the alternative, that the Acceptance Period be extended.<sup>56</sup>

## **Voting**

The vote on a Restructuring Plan will be determined by a simple majority (in value) of Affected Creditors (other than Excluded Creditors<sup>57</sup>) who vote within the Acceptance Period, with all creditors voting as a single class.<sup>58</sup> This is in contrast to the voting in voluntary administration, which requires a majority in both value and number, with the administrator having a casting vote.

The value of an Affected Creditor's vote will generally be determined by reference to the value of its admissible debts or claims at the time the Restructuring began.<sup>59</sup> However, if a person is an Affected Creditor *because they purchased another creditor's debt or claim*, the value of that Affected Creditor's vote will be determined by reference to the value of the *purchase price* of that debt or claim.<sup>60</sup> This is another clear contrast to voting in a voluntary administration. It will be important for debt collectors and other debt traders to bear this in mind, particularly if they are in the business of buying debt at below par.

It is an offence for any person to give, agree or offer to give, an Affected Creditor any valuable consideration with the intention of securing their vote for or against a Restructuring Plan.<sup>61</sup>

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<sup>49</sup> Corporations Regulations, reg 5.3B.22(1)-(3)  
<sup>50</sup> Corporations Regulations, reg 5.3B.22(3)(a)(iii)  
<sup>51</sup> Corporations Regulations, reg 5.3B.22(5)  
<sup>52</sup> Corporations Regulations, reg 5.3B.22(6)  
<sup>53</sup> Corporations Regulations, reg 5.3B.22(7)  
<sup>54</sup> Corporations Regulations, reg 5.3B.22(8)  
<sup>55</sup> Corporations Regulations, reg 5.3B.22(7) and 5.3B.23(2)  
<sup>56</sup> Corporations Regulations, reg 5.3B.60(2)  
<sup>57</sup> Corporations Regulations, reg 5.3B.25(2)(c)  
<sup>58</sup> Corporations Regulations, reg 5.3B.25(1)  
<sup>59</sup> Corporations Regulations, reg 5.3B.25(2)(a)(i)  
<sup>60</sup> Corporations Regulations, reg 5.3B.25(2)(a)(ii)  
<sup>61</sup> Corporations Regulations, reg 5.3B.25(3)

## 8. Making the Restructuring Plan

If a majority of creditors (in value) who vote during the Acceptance Period, vote to accept the Restructuring Plan, the Restructuring Plan is taken to have been "made" on:

- (if the Restructuring Plan is expressed to be conditional upon the occurrence of a specified event within a specified period, and the event occurs within that period) the day after the specified period ends; and
- (otherwise) the day after Acceptance Period ends.<sup>62</sup>

Upon the Restructuring Plan being made, the Restructuring phase ends,<sup>63</sup> the RP of the Company becomes the RP for the Restructuring Plan (unless the Board resolves to appoint someone else)<sup>64</sup> and the Restructuring Plan becomes binding on the Company, its officers, members and creditors to the extent of their admissible debts or claims (with some exceptions).<sup>65</sup> The Restructuring Plan has the same force and validity as if it were a deed executed by each of the parties to the Restructuring Plan.<sup>66</sup>

Once made, a Restructuring Plan can only be varied by court order on the Court's own initiative or on the application of the Company, an Affected Creditor, the RP or ASIC.<sup>67</sup>

## 9. Ending the Restructuring and consequences

The Restructuring and Restructuring Plan phases will end in the circumstances specified below, in each case, whichever occurs first:

Phase	Circumstances where Phase will terminate
Restructuring	<ul style="list-style-type: none"> <li>▪ <b>(Restructuring Plan is made)</b> if Restructuring Plan is "made" by the Company;<sup>68</sup></li> <li>▪ <b>(Director declaration to end)</b> if Directors declare in writing that the Restructuring will end on a specified day, and provide a copy of that declaration to the RP and creditors before the specified day;<sup>69</sup></li> <li>▪ <b>(No Restructuring Plan proposed)</b> if the Company fails to "propose" a Restructuring Plan within the Proposal Period;<sup>70</sup></li> <li>▪ <b>(Proposal lapses because Restructuring Plan not accepted)</b> if the Company's proposal to make a Restructuring Plan lapses, because it is not accepted by majority of creditors (in value) within the Acceptance Period;<sup>71</sup></li> <li>▪ <b>(Proposal lapses because RP cancels the Proposal)</b> if the Company's proposal to make a Restructuring Plan lapses because the RP has cancelled the proposal (before the Restructuring Plan is made) as the RP became aware that:               <ul style="list-style-type: none"> <li>a. information in the Restructuring Plan is inaccurate or incomplete and the matter will likely affect Company's ability to meet its obligations under the Restructuring Plan if made;<sup>72</sup></li> <li>b. the Restructuring Proposal Statement did not disclose one or more Affected Creditors;<sup>73</sup></li> <li>c. the Restructuring Proposal Statement was deficient because of material error or omission;<sup>74</sup> or</li> </ul> </li> </ul>

<sup>62</sup> Corporations Regulations, reg 5.3B.26

<sup>63</sup> Corporations Regulations, reg 5.3B.02(1)(j)

<sup>64</sup> Corporations Regulations, reg 5.3B.33

<sup>65</sup> Corporations Regulations, reg 5.3B.26(2)

<sup>66</sup> Corporations Regulation, reg 5.3B.26

<sup>67</sup> Corporations Regulations, reg 5.3B.61

<sup>68</sup> Corporations Act, s 453A(b) and Corporations Regulations, reg 5.3B.02(1)(j)

<sup>69</sup> Corporations Act, s 453A(b) and Corporations Regulations, reg 5.3B.02(1)(a)

<sup>70</sup> Corporations Act, s 453A(b) and Corporations Regulations, reg 5.3B.02(1)(b)

<sup>71</sup> Corporations Act, s 453A(b) and Corporations Regulations, reg 5.3B.02(1)(c) and 5.3B.20(1)(a)

<sup>72</sup> Corporations Act, s 453A(b) and Corporations Regulations, reg 5.3B.02(1)(c) and 5.3B.20(1)(b) and (2)(a)

<sup>73</sup> Corporations Act, s 453A(b) and Corporations Regulations, reg 5.3B.02(1)(c) and 5.3B.20(1)(b) and (2)(b)

<sup>74</sup> Corporations Act, s 453A(b) and Corporations Regulations, reg 5.3B.02(1)(c) and 5.3B.20(1)(b) and (2)(c)

Phase	Circumstances where Phase will terminate
	<ul style="list-style-type: none"> <li>d. there has been a material change in the Company's circumstances, which was not foreshadowed in the Restructuring Proposal Statement and is capable of affecting an Affected Creditor's vote;<sup>75</sup></li> <li>▪ <b>(RP terminates Plan)</b> if the RP terminates the Restructuring by notice to the Company and creditors, because the RP believes on reasonable grounds that: <ul style="list-style-type: none"> <li>a. the Company does not meet the Eligibility Criteria;</li> <li>b. it is not in the creditors' interests to make a Restructuring Plan;</li> <li>c. it is in the creditors' interests for the Restructuring to end; or</li> <li>d. it is in the creditors' interests for the Company to be wound up;<sup>76</sup></li> </ul> </li> <li>▪ <b>(Court order)</b> if a court orders the Restructuring to end;<sup>77</sup></li> <li>▪ <b>(Administrator or Liquidator)</b> if an administrator, liquidator or provisional liquidator is appointed to the Company.<sup>78</sup></li> </ul>
Restructuring Plan	<ul style="list-style-type: none"> <li>▪ <b>(Satisfaction)</b> if all obligations of the Company and other parties to the Restructuring Plan have been fulfilled and all admissible claims or debts have been dealt with in accordance with the Restructuring Plan - on the date this occurs;<sup>79</sup></li> <li>▪ <b>(Court order)</b> if the Court makes an order terminating the Restructuring Plan - on the date specified in the Court order;<sup>80</sup></li> <li>▪ <b>(Failure of condition precedent)</b> if the Restructuring Plan is subject to a condition being satisfied within a specified period (being a period not longer than 10 business days), and that condition is not met within that period - on the next business day;<sup>81</sup></li> <li>▪ <b>(Unrectified breach)</b> if there has been breach of the Restructuring Plan that remains unrectified for 30 business days - on the next business day;<sup>82</sup></li> <li>▪ <b>(Administrator or Liquidator)</b> if an administrator, liquidator or provisional liquidator is appointed to the Company - on the date the appointment occurs.<sup>83</sup></li> </ul>

If the Restructuring Plan terminates on account of the Restructuring Plan being fully satisfied:

- the Company can retain any property not required to be distributed to creditors under the Plan; and
- the Company is released from all admissible debts and claims that arose before the Restructuring commenced.<sup>84</sup>

However, if the Restructuring Plan terminates for any of the other reasons, any admissible debt or claim that has not been dealt with in accordance with the Restructuring Plan is taken to be due and payable on the first business day after the day on which the termination occurs.<sup>85</sup>

<sup>75</sup> Corporations Act, s 453A(b) and Corporations Regulations, reg 5.3B.02(1)(c) and 5.3B.20(1)(b) and (2)(d)

<sup>76</sup> Corporations Act, s 453A(b) and 453J and Corporations Regulations, reg 5.3B.02(1)(d).

<sup>77</sup> Corporations Act, s 453A(b) and Corporations Regulations, reg 5.3B.02(1)(e).

<sup>78</sup> Corporations Act, s 453A(b) and Corporations Regulations, reg 5.3B.02(f) and (g)

<sup>79</sup> Corporations Regulations, reg 5.3B.31(1)(a)

<sup>80</sup> Corporations Regulations, reg 5.3B.31(1)(b)

<sup>81</sup> Corporations Regulations, reg 5.3B.31(1)(c)

<sup>82</sup> Corporations Regulations, reg 5.3B.31(1)(d)

<sup>83</sup> Corporations Regulations, reg 5.3B.31(1)(e) and (f)

<sup>84</sup> Corporations Regulations, reg 5.3B.31(2)

<sup>85</sup> Corporations Regulations, reg 5.3B.31(3)

## 10. Effect on key stakeholders

The implications for a Company's key stakeholders of the Company entering into Restructuring or becoming subject to a Restructuring Plan, are summarised below:

	Restructuring phase	Restructuring Plan phase
Officers	<p><b>Insolvent Trading Safe Harbour</b></p> <p>A director's duty to prevent insolvent trading in s 588G(2) of the <i>Corporations Act</i> does <u>not</u> apply in respect of debts that are incurred by the Company:</p> <ul style="list-style-type: none"> <li>during the Restructuring phase; and</li> <li>in the ordinary course of the Company's business or with the consent of the RP or leave of the court.<sup>86</sup></li> </ul> <p><b>Directors remain in control (mostly)</b></p> <p>The powers of the Company's officers are not suspended, and the Company remains in control of its business, property and affairs.<sup>87</sup></p> <p>However,</p> <ul style="list-style-type: none"> <li><b>(Transactions not in ordinary course)</b> Directors require the RP's consent or leave of the Court before they can approve or enter into on behalf of the Company, transactions or dealings affecting Company property that are not in the ordinary course of the Company's business.<sup>88</sup> Transactions entered into in breach of this requirement are void, unless the Court orders otherwise.<sup>89</sup></li> <li><b>(Duty to assist RP)</b> Directors are required to assist the RP by attending on them, providing the RP with information about the Company's business, property, affairs and financial circumstances and permitting the RP to inspect and take copies of the Company's books.<sup>90</sup></li> </ul>	<p><b>No insolvent trading safe harbour</b></p> <p>No specific provisions apply to vary the application of the standard insolvent trading prohibition in s 588G(2) of the <i>Corporations Act</i> while a Company is subject to a Restructuring Plan.</p> <p><b>Bound by Plan</b></p> <p>Officers of the Company are bound by Restructuring Plan,<sup>91</sup> but they remain in control of the Company during the Restructuring Plan phase.</p>
Shareholders	<p><b>Stay on share transfers and other alterations</b></p> <p>A transfer of shares in a company, or an alteration of the status of its shareholders, during the Restructuring is void unless done with the consent of the RP or pursuant to an order of the Court.<sup>92</sup></p>	<p><b>No stay on share transfer and other alterations</b></p> <p><b>Bound by Restructuring Plan</b></p> <p>Shareholders are bound by a Restructuring Plan.<sup>93</sup></p>
Secured Creditors	<p><b>Unperfected security interests vest in Company</b></p>	<p><b>No moratorium on enforcement</b></p>

<sup>86</sup> *Corporations Act*, s 588GAAB

<sup>87</sup> *Corporations Act*, s 453K(1)

<sup>88</sup> *Corporations Act*, s 453L(1)

<sup>89</sup> *Corporations Act*, s 453L(5)

<sup>90</sup> *Corporations Act*, s 453F

<sup>91</sup> *Corporations Regulations*, reg 5.3B.29(2)(c)

<sup>92</sup> *Corporations Act*, s 453P

<sup>93</sup> *Corporations Regulations*, reg 5.3B.29(2)(c)

	Restructuring phase	Restructuring Plan phase
	<p>When a Company enters Restructuring, all PPSA security interests granted by the Company which remain unperfected as at the date the Company enters Restructuring, will be taken to have vested in the Company immediately prior to the Restructuring commencing.<sup>94</sup></p> <p><b>Moratorium on enforcement</b></p> <p>Secured creditors cannot enforce their security interest during the Restructuring,<sup>95</sup> unless:</p> <ul style="list-style-type: none"> <li>the RP consents or the Court grants leave;<sup>96</sup></li> <li>the secured creditor has security over the whole or substantially the whole of the Company's assets and enforces its security interest within 13 business days of being notified that the Restructuring has commenced ("<b>Decision Period</b>");<sup>97</sup></li> <li>the secured creditor commenced enforcement before the Restructuring began;<sup>98</sup> or</li> <li>the secured creditor's security interest is over perishable property.<sup>99</sup></li> </ul> <p><b>Court may order secured party not to realise security</b></p> <p>Subject to s 454C, Court may (on the RP's application) order a secured creditor not to realise or otherwise deal with its security interest, except as permitted by order, but only if realising that security interest would have a material adverse effect on achieving the purposes of a Plan and the secured creditor's interest will be adequately protected<sup>100</sup></p>	<p><b>Court can still order Secured Party not to realise security</b></p> <p><b>Bound by Restructuring in limited circumstances</b></p> <p>Secured creditors (including owners or lessors of PPSA retention of title property) will only be bound by a Restructuring Plan:</p> <ul style="list-style-type: none"> <li>to the extent their debt cannot be satisfied out of the realisable value of their security interest(s); or</li> <li>they voted in favour of the Restructuring Plan.<sup>101</sup></li> </ul> <p>In addition, secured creditors remain free to realise and otherwise deal with their security, unless they voted in favour of a Restructuring Plan that prevents them from doing so or the Court so orders.<sup>102</sup></p> <p><b>Limits on RP powers to deal with secured property</b></p> <p>The RP cannot dispose of encumbered property (other than PPSA retention of title property), unless:</p> <ul style="list-style-type: none"> <li>the disposal is in the ordinary course of the Company's business;<sup>103</sup></li> <li>the secured party consents in writing;<sup>104</sup> or</li> <li>with the Court's leave (which can only be granted if the Court is satisfied that arrangements have been made to adequately protect the secured party's interests).<sup>105</sup></li> </ul>
<b>Owners and Lessors</b>	<p><b>Moratorium on enforcement</b></p> <p>Owners and lessors of property being used by or in the possession of the Company - including leased premises and goods subject to retention of title or PMSI<sup>106</sup> security interests - are prohibited from:</p> <ul style="list-style-type: none"> <li>taking possession or otherwise recovering that property;</li> </ul>	<p><b>No moratorium on enforcement</b></p> <p><b>Generally, property rights remain unaffected</b></p> <p>A Restructuring Plan will not affect any right that an owner or lessor of property (other than an owner or lessor of PPSA retention of title property) has <i>in relation to that property</i>, unless they voted in favour of a Restructuring Plan that affects that right or the Court so orders.<sup>108</sup></p>

<sup>94</sup> *Personal Property Securities Act 2009 (Cth) ("PPSA")*, s 267(1)(a)(iia), 267(1)(b)(ii) and *Corporations Act* s 513CA

<sup>95</sup> *Corporations Act*, s 453R(1) and item 1 of the table

<sup>96</sup> *Corporations Act*, s 453R(2)

<sup>97</sup> *Corporations Act*, s 454C and definition of "Decision Period" in s 9

<sup>98</sup> *Corporations Act*, s 454D. Note: under s 454F, a court may (on an application brought by RP) limit the power of secured party to continue with such enforcement if satisfied that the secured party's interests will be adequately protected.

<sup>99</sup> *Corporations Act*, s 454E

<sup>100</sup> *Corporations Regulations*, reg 5.3B.64

<sup>101</sup> *Corporations Regulations*, reg 5.3B.29(2)(a), (3) and (4).

<sup>102</sup> *Corporations Regulations*, reg 5.3B.29(4) and 5.3B.64(2).

<sup>103</sup> *Corporations Regulations*, reg 5.3B.39(2)(a)

<sup>104</sup> *Corporations Regulations*, reg 5.3B.39(2)(b)

<sup>105</sup> *Corporations Regulations*, reg 5.3B.39(2)(c) and (3)

<sup>106</sup> Purchase Money Security Interests for the purposes of the *PPSA*

<sup>108</sup> *Corporations Regulations*, reg 5.3B.29(5) and (6).

	Restructuring phase	Restructuring Plan phase
	<ul style="list-style-type: none"> <li>carrying out distress for rent;</li> <li>(if the owner or lessor is a PPSA Secured Party) otherwise enforcing the security interest,</li> </ul> <p>in each case, without the RP's consent or an order of the Court.<sup>107</sup> This is the case, even if they have a contractual right to do so.</p> <p><b>No priority for rent payable during Restructuring</b></p> <p>Unlike administrators, RPs are not personally liable for any rent payable in respect of property used by the Company during the Restructuring. As such, rent referable to the Restructuring Period will not be paid as a priority expense.</p>	<p>As a creditor though, they can still be bound to the extent of their admissible debt or claim.</p> <p><b>Limits on RP powers to deal with third party property</b></p> <p>The RP for a Restructuring Plan cannot dispose of property used or occupied by the Company which is owned by a third party, unless:</p> <ul style="list-style-type: none"> <li>the disposal is in the ordinary course of the Company's business;</li> <li>the secured party consents; or</li> <li>with the Court's leave.<sup>109</sup></li> </ul>
<b>Contracts and Ipsso Facto Protection</b>	<p>The appointment of a RP to a Company does not, <i>of itself</i>, constitute a repudiation of contracts to which the Company is a party.</p> <p>Ipsso facto protections apply, which impose an automatic stay on counterparties enforcing against the Company contractual rights and self-executing provisions, triggered purely by reason of (amongst other things):</p> <ul style="list-style-type: none"> <li>the Company being in Restructuring;</li> <li>the Company's financial position if it is in Restructuring,</li> </ul> <p>subject to a range of exclusions.<sup>110</sup></p>	<p>Entry into a Restructuring Plan does not <i>of itself</i> constitute a repudiation of contracts to which the Company is a party.</p> <p>There are no specific ipso facto protections in respect of contractual rights triggered by reason of the Company entering a Restructuring Plan. However, the automatic stay arising from entry into Restructuring (mentioned left) is permanent.</p>
<b>Court proceedings and director guarantees</b>	<p>There is a moratorium that:</p> <ul style="list-style-type: none"> <li>requires Courts to adjourn winding up applications and not appoint provisional liquidators, if the Court is satisfied that it is in creditors' interests for the Company to continue the Restructuring rather being wound up or to have a provisional liquidator appointed to it;<sup>111</sup></li> <li>prohibits any: <ul style="list-style-type: none"> <li>court proceeding against the Company or its property; or</li> <li>enforcement process in relation to the Company's property,</li> <li>being commenced or proceeded with, without the RP's consent or the Court's leave;<sup>112</sup></li> </ul> </li> <li>requires Court officers (such as a sheriff or registrar) who have received written notice of the RP's appointment, to:</li> </ul>	<p>Moratorium ceases to apply.</p>

<sup>107</sup> Corporations Act, s 453R(2) and (3)

<sup>109</sup> Corporations Regulations, reg 5.3B.39

<sup>110</sup> Corporations Act, s 454N and 454R

<sup>111</sup> Corporations Act, s 453Q. Early applications by RPs for adjournment of an existing winding up application under this provision suggest the test is similar to that for adjournment during a voluntary administration: *Re Dessco Pty Ltd* [2021] VSC 94 (26 February 2021); *Re DST Project Management and Construction Pty Ltd* [2021] VSC 108 (9 March 2021)

<sup>112</sup> Corporations Act, s 453S and 453T

	Restructuring phase	Restructuring Plan phase
	<ul style="list-style-type: none"> <li>○ cease taking action to sell Company property and distributing proceeds; and</li> <li>○ deliver to the RP all Company property and sale proceeds that are in the court officer's possession / paid into court (less court officer's costs);<sup>113</sup></li> <li>▪ prevents creditors enforcing guarantees against directors of the Company (and their spouses and relatives) without the Court's leave.<sup>114</sup></li> </ul>	
<b>Public documents</b>	Must include in every public document and negotiable instrument the phrase ("restructuring practitioner appointed") after the Company's name where it first appears. <sup>115</sup>	No notice required.
<b>Presumption of insolvency</b>	The Company will be taken to be insolvent if it proposes a Restructuring Plan to its creditors. <sup>116</sup>	The Company will be taken to be insolvent if it proposes a Restructuring Plan to its creditors. <sup>117</sup>

## 11. RP - Remuneration and liability

### Remuneration

An RP for a Company is entitled to be remunerated for necessary work properly performed in relation to the Restructuring<sup>118</sup> and the Restructuring Plan.<sup>119</sup>

In relation to the Restructuring phase, the amount of remuneration and method for working out the RP's remuneration must be set out in a resolution of the board, passed on or before the date the RP is appointed.<sup>120</sup>

In relation to the Restructuring Plan phase, the Plan must specify the remuneration that the RP is entitled to receive and may only do this by specifying:

- an amount of remuneration as a specified percentage of payments made to creditors in accordance with the Restructuring Plan; and
- a method of working out an amount of remuneration that, in the event the board consents in writing to beginning or proceeding with proceedings relating to the plan, the RP would be entitled to receive for necessary work properly performed in relation to the proceedings.<sup>121</sup>

### Liability

An RP (during both the Restructuring and Restructuring Plan phases) is an agent of the Company, and is not personally liable for anything done, or omitted to be done, in good faith and without negligence in the exercise or performance (or purported exercise or performance) of their powers, functions or duties.<sup>122</sup> This

<sup>113</sup> Corporations Act, s 453U

<sup>114</sup> Corporations Act, s 453W

<sup>115</sup> Corporations Act, s 457B(1)

<sup>116</sup> Corporations Act, s 455A(2).

<sup>117</sup> Corporations Act, s 455A(2).

<sup>118</sup> Insolvency Practice Rules, r 60-1B(1)

<sup>119</sup> Insolvency Practice Rules, r 60-1C(1)

<sup>120</sup> Insolvency Practice Rules, r 60-1B(2) and (3)

<sup>121</sup> Insolvency Practice Rules, r 60-1C(2) and (3)

<sup>122</sup> Corporations Regulations, reg 5.3B.11 (in respect of Restructuring) and 5.3B.42 (in respect of Restructuring Plan).

is in obvious contrast to administrators under Part 5.3A of the *Corporations Act* who are personally liable for certain debts which they cause the Company to incur during the voluntary administration period<sup>123</sup> and certain rent in respect of property which the Company continues to use during the voluntary administration period.<sup>124</sup>

That being said - like administrators - RPs are entitled to be indemnified out of the Company's property (other than retention of title property subject to a PPSA security interest) for:

- any debts or liabilities incurred, or damages or losses sustained, in good faith and without negligence, in the performance (or purported performance) of their functions, duties and powers; and
- their remuneration,<sup>125</sup>

which indemnity has priority over certain debts<sup>126</sup> and is secured by a lien over the Company's property.<sup>127</sup>

## 12. Transitional protections for eligible companies that could not find a RP in early 2021

The Federal Government's reform package also provided temporary relief for companies and their directors, who wished to enter Restructuring, but were unable to find a registered liquidator to act as RP between 1 January 2021 and 31 March 2021. This reflected a concern (which appears to have been misplaced) that when the Federal Government's temporary COVID-19 related protections for distressed companies came to an end on 31 December 2020 (discussed [here](#)), there would be a large number of small businesses wishing to access Restructuring and an insufficient number of registered liquidators available to accept the appointments in the period immediately after the commencement of Part 5.3B.

The temporary relief:

- provided directors with relief from insolvent trading in respect of debts incurred in the ordinary course of business, where the Company had taken all reasonable steps to appoint an RP before the debt was incurred; and
- increased the thresholds for statutory demands - specifically, the monetary threshold for issuing a statutory demand against an eligible company was increased from \$2,000 to \$20,000 and the period which eligible companies have to respond to statutory demands was increased from 21 days to 6 months.<sup>128</sup>

For a Company to have been eligible for this temporary restructuring relief, the Company's directors must have made and published on the ASIC Published Notices website between 1 January 2021 and 31 March 2021, a written declaration (**Declaration**) in the prescribed form stating that:

- there were reasonable grounds to believe that:
  - the Company was insolvent, or was likely to become insolvent before the Declaration expired; and
  - the Eligibility Criteria (see above under "1. Eligibility Criteria") would be met on the date the Declaration was published and any day afterwards on which the Declaration had not expired;
- the board of the Company had resolved that an RP should be appointed; and
- no RP or other insolvency practitioner had been appointed.<sup>129</sup>

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<sup>123</sup> *Corporations Act*, s 443A

<sup>124</sup> *Corporations Act*, s 443B

<sup>125</sup> *Corporations Act*, s 456J (in respect of Restructuring) and *Corporations Regulations*, reg 5.3B.43 (in respect of Restructuring Plan)

<sup>126</sup> *Corporations Act*, s 456K (in respect of Restructuring) and *Corporations Regulations*, reg 5.3B.44 (in respect of Restructuring Plan)

<sup>127</sup> *Corporations Act*, s 456L (in respect of Restructuring) and *Corporations Regulations*, reg 5.3B.45 (in respect of Restructuring Plan)

<sup>128</sup> *Corporations Regulations*, reg 5.4.01AAA

<sup>129</sup> *Corporations Act*, s 458E(1)

Once published, the Declaration (and temporary relief) lasted for 3 months, and for a fourth month if all matters in the Declaration remain true and the directors have taken all reasonable steps to appoint a RP but have been unable to do so and publish a further declaration to that effect ("**Further Declaration**").<sup>130</sup>

The temporary relief ends when:

- the three (or four) month period expires;
- directors fail to provide ASIC with a copy of their Declaration or Further Declaration within 5 business days;
- an RP, administrator, liquidator or provisional liquidator is appointed by the Company;
- the directors make and publish a declaration that the Company is not, or is not to be treated as, eligible for temporary restructuring relief; or
- the Court orders that the Company is not eligible for temporary restructuring relief.<sup>131</sup>

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<sup>130</sup> *Corporations Act*, s 458E(2)

<sup>131</sup> *Corporations Act*, s 458E(5)



# **Part B - Simplified Liquidation Process**



## Part B - Simplified Liquidation Process

The Federal Government's reform package also introduced a simplified liquidation process (**Simplified Liquidation**) with reduced investigation and meeting requirements and more streamlined reporting. This process is designed to offer a cheaper and faster liquidation process for companies with liabilities less than \$1 million.

### 1. Eligibility

A liquidator may adopt the Simplified Liquidation process in any creditors' voluntary liquidation (**CVL**) where they believe on reasonable grounds that certain "eligibility criteria" ("**Simplified Liquidation Eligibility Criteria**") are satisfied,<sup>132</sup> including that:

- a "triggering event" has occurred in relation to the Company (which term includes most of the events that would trigger a normal creditors voluntary liquidation (**CVL**));<sup>133</sup>
- the Company's total liabilities do not exceed \$1 million, where liability is defined to mean "any liability or obligation";<sup>134</sup>
- the Company will not be able to pay its debts in full within 12 months after the CVL commenced;<sup>135</sup>
- no person who is (or has been within the preceding 12 months) a director of the Company, has been a director of another company that has undertaken Restructuring or the Simplified Liquidation process within the preceding 7 years, unless that other company:
  - i. was a related body corporate of the Company, and
  - ii. its Restructuring or Simplified Liquidation commenced not more than 20 days before the day on which the Company began to follow the Simplified Liquidation process;<sup>136</sup>
- the Company has not been subject to a Restructuring or a Simplified Liquidation within the preceding 7 years (unless the Company has been under a Restructuring which terminated no more than 20 business days before the day on which the Company began to follow the Simplified Liquidation process;<sup>137</sup> and
- the Company has lodged all tax returns, notices, statements, applications or other documents required by taxation laws.<sup>138</sup>

Within 2 business days after the day a liquidator adopts the simplified liquidation process, the Liquidator must lodge with ASIC a notice of that adoption (together with a copy of SL Director Declaration (defined below)).<sup>139</sup>

### 2. What will be different from a normal CVL?

The Simplified Liquidation process preserves and applies most of the framework that applies to a normal CVL. However, with a simplified liquidation, particular aspects of the regular CVL process do not apply.<sup>140</sup> Critically:

<sup>132</sup> *Corporations Act*, s 500A(1)

<sup>133</sup> *Corporations Act*, s 500AA(1)(a) and definition of "triggering event" in s 489F.

<sup>134</sup> *Corporations Act*, s 500AA(1)(d) and *Corporations Regulations*, reg 5.5.03(1)

<sup>135</sup> *Corporations Act*, s 500AA(1)(c)

<sup>136</sup> *Corporations Act*, s 500AA(1)(e) and *Corporations Regulations*, reg 5.5.03(2)

<sup>137</sup> *Corporations Act*, s 500AA(1)(f) and 2(c) and *Corporations Regulations*, reg 5.5.03(3) and (5)

<sup>138</sup> *Corporations Act*, s 500AA(1)(g)

<sup>139</sup> *Corporations Regulation*, reg 5.5.06(2)

<sup>140</sup> *Corporations Act*, s 500AE

- **(Reduced circumstances in which a liquidator can seek to claw back unfair preferences from unrelated creditors)** Unfair preferences will not be voidable under s 588FE of the *Corporations Act* where:
  - the relevant transaction was entered into, or an act for the purposes of giving effect to it occurred, prior to the day that is 3 months before the relation-back day, and no creditor under the transaction is a related entity of the Company; or
  - the relevant transaction was entered into, or an act for the purposes of giving effect to it occurred, during the 3 month period ending on the relation-back date (or after that date but on or before the day the liquidation began), the transaction results in the creditor receiving from the Company no more than \$30,000 in value (whether in one transaction or in total from a series of related transactions), and no creditor under the transaction is a related entity of the Company;<sup>141</sup>
- **(Reduced investigation and reporting requirements)** liquidators will not be required to submit section 533 reports to ASIC, unless there are reasonable grounds to believe there has been corporate misconduct;<sup>142</sup>
- **(No meetings or committees of inspection)** there will be no requirement to call creditors' meetings or the ability to form committees of inspection;<sup>143</sup>
- **(Reduced circumstances for review)** ASIC and creditors cannot appoint a reviewing liquidator to carry out a review of the liquidation.<sup>144</sup> However, Courts still retain the power to appoint a reviewing liquidator and also inquire into the liquidation either on their own initiative or on the application of the Company, the liquidator, ASIC, or a person with a financial interest in the external administration (such as a creditor of the Company).
- **(Simplified proof process)** there is also provision for regulations to be passed which stipulate a more simplified proof of debt and dividend process,<sup>145</sup> however at the time of writing, such regulations have not been passed.

### 3. Safeguards to prevent misuse

The Simplified Liquidation regime includes some safeguards to prevent misuse of the process.

#### ***SL Director Declaration***

Within 5 business days after the CVL's commencement, the Directors are required to give the liquidator a declaration if they believe, on reasonable grounds, that the Simplified Liquidation Eligibility Criteria will be met in relation to the Company ("**SL Director Declaration**").<sup>146</sup>

#### ***Notice to all members and creditors***

At least 10 business days before adopting the Simplified Liquidation process, the liquidator must provide all members and creditors with a notice, that includes:

- a statement that the liquidator believes on reasonable grounds that the Simplified Liquidation Eligibility Criteria will be met in relation to the Company when the process is adopted;
- an outline of the Simplified Liquidation process; and

<sup>141</sup> *Corporations Regulations*, reg 5.5.04

<sup>142</sup> *Corporations Act*, s 500AE(2)(a) and (3)(f); *Corporations Regulation*, reg 5.5.05

<sup>143</sup> *Corporations Act*, s 500AE(2)(b)-(e)

<sup>144</sup> *Corporations Act*, s 500AE(2)(f)

<sup>145</sup> *Corporations Act*, s 500AE(3) and (e)

<sup>146</sup> *Corporations Act*, s 498

- a statement that liquidator will not adopt the Simplified Liquidation Process if at least 25% (in value) of the creditors direct the liquidator not to use it.<sup>147</sup>

### **Restrictions on using process and transitioning back to a normal CVL**

A liquidator must not use the Simplified Liquidation process if:

- more than 20 business days have passed since the CVL commenced;<sup>148</sup>
- the liquidator failed to give the notice referred to above;<sup>149</sup> or
- at least 25% (in value) of the Company's creditors have requested the liquidator not to follow the Simplified Liquidation process.<sup>150</sup> For the purposes of assessing whether the 25% in value test has been met, the value of the creditors at a particular time is to be worked out by reference to the value of the creditors' claims against the company that are known at the time. However, creditors who are related entities of the company are not to be taken into account.<sup>151</sup>

A liquidator must also cease using the Simplified Liquidation process if:

- the Simplified Liquidation Eligibility Criteria are no longer met in relation to the Company;<sup>152</sup> or
- the Liquidator believes on reasonable grounds that the Company (or its directors) engaged in fraudulent or dishonest conduct that has had or is likely to have a material adverse effect on creditors' interests (whether as a whole or a particular class).<sup>153</sup>

Where a liquidator ceases following the Simplified Liquidation process because of one of the circumstances described above, the liquidation will continue as a regular CVL. However, in addition, the liquidator is required to:

- lodge notice of the cessation of the Simplified Liquidation process with ASIC within 2 business days;<sup>154</sup> and
- lodge a section 533 Report within 6 months of the Simplified Liquidation ceasing, if at any time during the simplified liquidation process, it appeared to the liquidator that any of the circumstances that would normally have to be reported in a section 533 Report, existed.<sup>155</sup>

Cessation of the Simplified Liquidation process does not affect the validity of anything that was done in good faith in relation to the Company before the cessation.<sup>156</sup>

<sup>147</sup> Corporations Act, s 500A(3)

<sup>148</sup> Corporations Act, s 500A(2)(a)

<sup>149</sup> Corporations Act, s 500A(2)(b) and (3)

<sup>150</sup> Corporations Act, s 500A(2)(c) and 500AB

<sup>151</sup> Corporations Act, s 500AD; Corporations Regulation, reg 5.5.09

<sup>152</sup> Corporations Act, s 500AC(1)(a)

<sup>153</sup> Corporations Act, s 500AC(1)(b); Corporations Regulation, reg 5.5.07

<sup>154</sup> Corporations Act, s 500AC(2); Corporations Regulations, reg 5.5.08(2)

<sup>155</sup> Corporations Act, s 500AC(2); Corporations Regulations, reg 5.5.08(4)

<sup>156</sup> Corporations Act, s 500AC(2); Corporations Regulations, reg 5.5.08(3)



# Resources

## Resources



### **ASIC Resources and Guides**

**ASIC Published Notices website:**

<https://publishednotices.asic.gov.au/browsesearch-notices/>

**Restructuring Plan Process:**

<https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-directors/restructuring-and-the-restructuring-plan/>

**Simplified Liquidation:**

<https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-directors/simplified-liquidation/>

**Temporary restructuring relief:**

<https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-directors/temporary-restructuring-relief/>

### **Legislation / Regulations / Rules**

**Corporations Amendment (Corporate insolvency Reforms) Act 2020 (Cth):**

<https://www.legislation.gov.au/Details/C2020A00130>

**Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020 (Cth):**

<https://www.legislation.gov.au/Details/F2020L01678>

**Insolvency Practice Rules (Corporations) Amendment (Corporate Insolvency Reforms) Rules 2020 (Cth):**

<https://www.legislation.gov.au/Details/F2020L01678>

### **Baker McKenzie Publication**

**Statutory Demands:**

[https://insightplus.bakermckenzie.com/bm/restructuring-insolvency\\_2/australia-new-small-business-insolvency-reforms-how-statutory-demands-will-change-from-1-january-2021](https://insightplus.bakermckenzie.com/bm/restructuring-insolvency_2/australia-new-small-business-insolvency-reforms-how-statutory-demands-will-change-from-1-january-2021)

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