

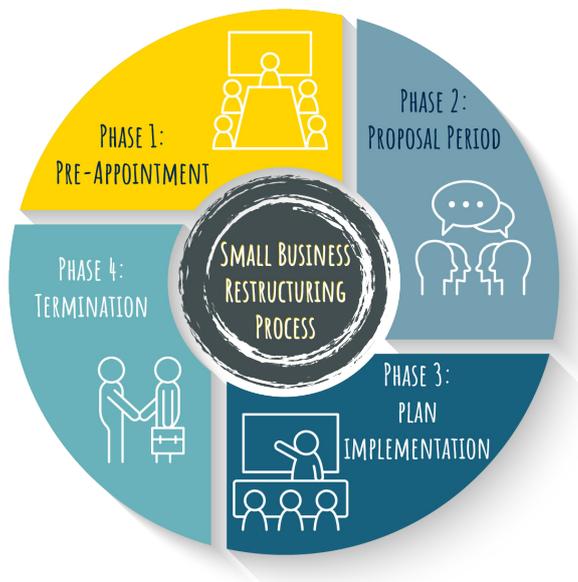
SMALL BUSINESS RESTRUCTURING

On 24 September 2020, the Federal Treasurer announced that the Australian Government intended to introduce amendments to the Corporations Act 2001 (Act) to encourage more directors of small businesses to use debt restructuring at an earlier time, with the hope of increasing a company's long-term viability.

The new laws, which came into effect on 1 January 2021 are an alternative to voluntary administration which is normally cost prohibitive for small businesses with minimal debt exposure.

The new procedure is a debtor-in-possession model which allows the directors to retain control of the company.

Small Business Restructuring has four distinct phases.



PHASE 1: PRE-APPOINTMENT

During this phase, the following must occur:

- ▶ Assessment of the eligibility criteria:
 - Debts, not including employees' entitlements and certain other claims, must not exceed \$1 million; and
 - Neither the company, nor its directors (including any that have resigned within 12 months), have utilised either restructuring or the simplified liquidation process within the last 7 years (allowance is made for a company within a group structure, in which a 20 business day rule applies).
- ▶ At a meeting, directors must resolve that:
 - the company is insolvent or likely to become insolvent at some future time; and
 - a Restructuring Practitioner (RP) should be appointed (the RP must have consented in writing at or prior to the passing of the resolution and the RP must be a registered liquidator); and

- the remuneration of the RP for the proposal period is set at a fixed amount as well as setting a method for dealing with remuneration for any unexpected proceedings to which the board consents in writing.

PHASE 2: PROPOSAL PERIOD

The proposal period can be split into two distinct stages being:

STAGE ONE – DEVELOPMENT OF PLAN

The proposal period commences when the directors appoint the RP in writing. This period is generally 20 business days (or such period as allowed by the RP).

During the proposal period the company:

- ▶ can continue to trade under the directors' control subject to the RP authorising any transactions not in the "ordinary course of business";
- ▶ must disclose on its public documents and negotiable instruments, the words, "restructuring practitioner appointed"; and
- ▶ must pay all employee entitlements that are outstanding, eg. superannuation and lodge all outstanding returns or other documents as required by taxation laws, prior to the distribution of the plan to creditors.

Within 5 business days of appointing the RP, all directors must sign and give to the RP, a declaration stating whether in the directors' opinion:

- ▶ the eligibility criteria for restructuring are met at the time the restructuring began, setting out reasons for that opinion; and
- ▶ whether or not the company entered into any voidable transactions other than an unfair preference.

During the period, the company develops a Restructuring Plan (Plan) which must comply with the requirements of the Act.

The Plan may be conditional for no longer than 10 business days after the date of acceptance by creditors.

The company must also prepare a Restructuring Proposal Statement (RPS) to accompany the Plan. The RPS must:

- ▶ include a schedule of debts and claims.
- ▶ contain the information required by the approved form.

The RP must give creditors a copy of the:

- ▶ Plan;
- ▶ restructuring plan standard terms;
- ▶ company's RPS;
- ▶ Declaration prepared by the RP.

BROADLY, THE PLAN MUST:

- ▶ be set out in the approved form;
- ▶ identify the company's property to be dealt with;
- ▶ specify how that property is to be dealt with;
- ▶ specify the date on which the directors signed the plan;
- ▶ not provide for transfer of any property (other than money) to a creditor;
- ▶ not exceed 3 years from acceptance;
- ▶ provide for the remuneration of the RP for the Plan.

STAGE TWO – ACCEPTANCE BY CREDITORS

The RP must invite each affected creditor within 15 business days of the date on which the RP provides the above information to:

- ▶ give a written statement setting out whether or not the Plan should be accepted;
- ▶ verify that the amount included in the schedule of debts and claims is correct; or
- ▶ challenge the amount recorded in the company's records by notifying the RP of the actual claim and providing detailed particulars of the debt or claim including, where appropriate, a statement of account and the vouchers by which the statement can be substantiated;

At the end of the acceptance period, the Plan is adopted if a majority in value of affected creditors vote in its favour. Excluded creditors, principally related entities, are not entitled to vote.

A person commits an offence where that person gives, agrees or offers to give an affected creditor any valuable consideration with the intent of securing that affected creditor's acceptance or otherwise of the Plan.

PHASE 3: PLAN IMPLEMENTATION

The final phase is the implementation of the accepted Plan, which is made on the day after the end of the acceptance period and is binding on:

- ▶ all creditors with an admissible debt or claim;
- ▶ the company, its officers and members;
- ▶ the RP.

A secured creditor or owner or lessor of property is able to deal with their security/assets unless:

- ▶ it accepted the Plan and the terms of the Plan prevent it from dealing with the security/assets; or
- ▶ the Court so orders.

On the application of a relevant party an application to Court may be

made to vary, void or terminate the Plan.

Within 2 business days of becoming aware of the circumstances, directors must notify the RP of any contraventions or likely contraventions of the Plan and the RP must give notice to creditors within a further 2 business days.

The functions of the RP of the Plan are:

- ▶ to receive money and to hold that money on trust in accordance with the Plan;
- ▶ realise the property as provided for in the Plan if requested by the company;
- ▶ to pay money to creditors in accordance with the Plan.

PHASE 4: TERMINATION

The plan is terminated when its terms are satisfied and in such a circumstance the company is released from its admissible debts.

The Plan may also be terminated early where:

- ▶ a Court orders the termination of the Plan;
- ▶ a condition within the Plan is not met within the specified period of 10 business days;
- ▶ a contravention of the Plan is not rectified within 30 business days;
- ▶ a voluntary administrator is appointed; or
- ▶ a liquidator or provisional liquidator is appointed.

Where any of the above occurs, the company is not released from its admissible debts and complete control of the company and any money held by the RP is returned to the company.

The directors may then choose to:

- ▶ call a meeting of members to place the company into liquidation by way of creditors voluntary liquidation;
- ▶ appoint a voluntary administrator;
- ▶ or continue to trade and await the actions taken by affected creditors as regards a Court liquidation.

COSTS

The RP's remuneration for the period from appointment until the Plan's acceptance by creditors is set by resolution of the directors on or before the day on which the RP is appointed.

The RP's remuneration for the implementation of the Restructuring Plan must be set in the Plan by specifying remuneration as a percentage of payments made to creditors within the terms of the Plan. Accordingly, creditors are approving the remuneration for this period.

