

Welcome

# Local Tax Club Geelong

22 August 2025

Novotel Geelong



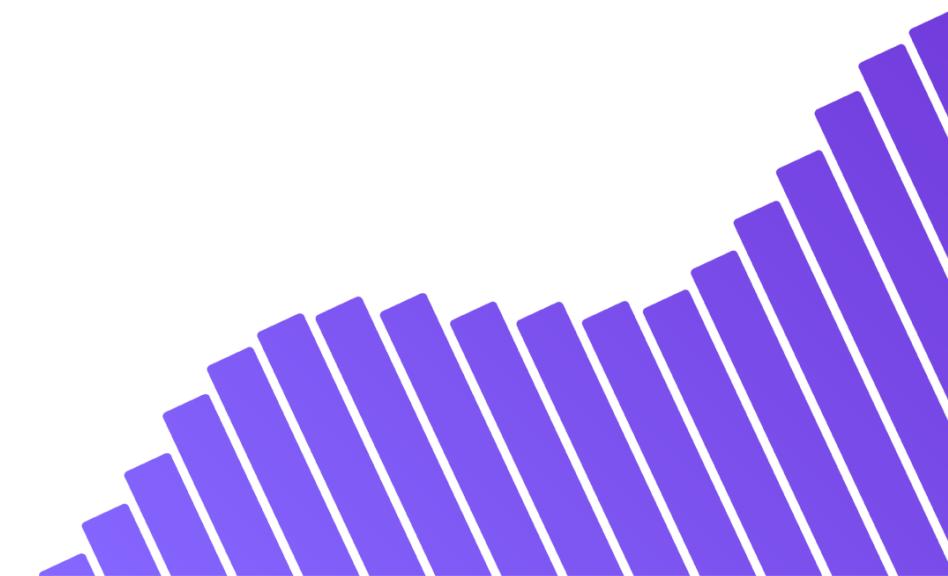
# Small Business Restructuring

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# Introduction

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- Small Business Restructuring (SBR) – What is it?
- Historical Developments
- Eligibility Criteria
- Assessment of SBR Success to Date
- Current Trends and Proposed Reforms
- Relevant Case Law
- Questions

# Small Business Restructuring – History

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- Australian Government announced new Insolvency Procedures September 2020
- Reforms became law on 1 January 2021
- Object of Reform
  - Provide restructuring process that allowed eligible companies:
    - To retain control while a plan to restructure with assistance of RP, and
    - To enter into a restructuring plan with creditors

# The Regime

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- Part 5.3B of the Act establishes the core structure of the regime, covering:
  - The appointment process and eligibility criteria;
  - The role of the restructuring practitioner;
  - The role of directors during the process;
  - The conduct of business during SBR (including the ability to continue normal trading);
  - The impact on the company and on third parties;
  - The rights of secured creditors and limitations on enforcement; and
  - The role of the Court.
- The *Corporations Regulations* provide the operational specifics, including timeframes and practical requirements. For example, they set out the eligibility test that determines whether a company can access the regime.

# Eligibility

- Total liabilities ≤ \$1m (including related parties)
- Directors resolve company is insolvent or likely to become insolvent
- Requirements:
  - Tax lodgments up to date\*
  - Employee entitlements paid\*
- \* Declarations must be made to RP that will be met before Plan is provided to creditors
- Exclusions: prior SBR/liquidation within 7 years

# Restructuring Practitioner

- Must be an ASIC-registered liquidator
- Pre-appointment:
  - confirm eligibility & viability
- Appointment:
  - acts as agent, communicates with creditors, certifies plan
  - Prepare its restructuring plan and restructuring proposal statement; and
  - Circulate the restructuring plan and restructuring proposal statement to creditors\*
    - \*This has turned into detailed report comparing plan to liquidation, history and why won't happen again
- Remuneration:
  - fixed + % of distributions (debated as too low for complex cases)

# Impact of appointment

- Company trades in *ordinary course of business*
- Restrictions:
  - Cannot sell business
  - Cannot pay dividends
  - Cannot repay debts
    - without RP approval.
- Public disclosure required: (*restructuring practitioner appointed*)
- Creditor enforcement stayed

# Process timeline

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- The Restructuring process has two phases:



- Moratorium - begins when the company enters the restructuring phase:
  - Unsecured creditors and some secured creditors are prohibited from taking action against the company
  - Personal guarantees cannot be enforced and there is a restriction on the operation of *ipso facto*
  - The company has some ‘breathing space’ to develop a plan that will provide for the continuation of the business and the estimated return for creditors given its financial circumstances

# Restructuring Phase

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- **Restructuring Phase**

- The restructuring phase begins when a small business restructuring practitioner is appointed by the company (the Restructuring Practitioner or RP).
- The RP will advertise their appointment and notify creditors.
- The company will then have to disclose (“*restructuring practitioner appointed*”).

# Plan Phase

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## Which Debts are included in the plan?

- All unsecured debts incurred prior to appointment – treated equally
- Exception is:
  - Employee entitlements
  - Debts incurred *after* company enters SBR
- **How do creditors vote on the plan?**
  - RP provides creditors with restructuring proposal statement
  - Have 15 business days to vote to accept or reject the plan
  - Plan is accepted if more than 50% of creditors (in value) that vote\*, vote to accept the plan
    - \* Note - Related Party creditors are excluded from voting on the restructuring plan

# Plan Phase

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## Plan

- Should creditors accept the restructuring plan, the RP manages the requirements set out in the plan, including:
  - Realising any recoveries as set out in the plan, and
  - Paying distributions to creditors in accordance with the plan.
- Payment terms of plan can be up to maximum 3 years, but is best for lump sum payment immediately

# Plan Phase

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## What happens if Plan is not accepted by creditors?

- Must be supported by more than 50% of creditors (in value) that vote
- If not accepted,
  - Restructuring process ends
  - Directors retain control of the company
  - Creditors free to enforce rights
  - No longer protected from Insolvent Trading
- Your client may wish to consider placing the company into Liquidation

# SBR and ATO enforcement activity

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- Correlates to the increased activity by the ATO
- ATO pursuing in excess of \$100B of outstanding tax debt, two thirds of which is owed by small businesses
- Increase in Director Penalty Notices being issued by the ATO. 18,500 + DPN's issues in FY2024

# Director Penalty Notices

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- Lockdown DPNs; and
- Traditional 21-day DPNs (Non-Lockdown DPNs)

The penalty in respect of each unpaid amount of the company's liability as detailed in Column 4 of the above table will be remitted if **within 21 days after the date of this notice**:

- (a) the company complies with its obligation to pay the unpaid amount to the Commissioner; or
- (b) an administrator of the company is appointed under section 436A, 436B or 436C of the *Corporations Act 2001*; or
- (c) a small business restructuring practitioner for the company is appointed under section 453B of that Act; or
- (d) the company begins to be wound up (within the meaning of the *Corporations Act 2001*).

The penalty in respect of each unpaid amount of the company's liability as detailed in Column 5 of the above table will be remitted if **within 21 days after the date of this notice** the company complies with its obligation to pay the unpaid amount to the Commissioner.

# Challenges

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- No capacity to change or amend the plan
- No opportunity for the company to offer an alternative plan
- What happens if another creditor comes forward after the plan has been accepted?

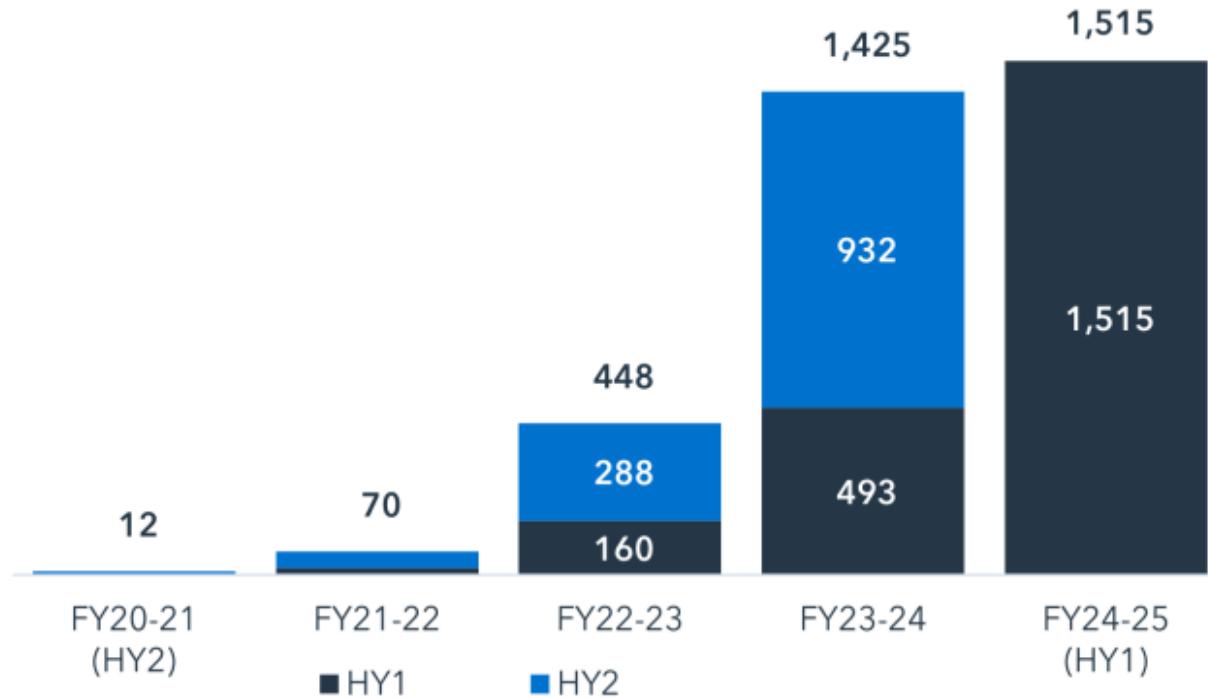
# Recent Discussions with ATO

- Consistently the largest creditor
- What does the ATO want to see:
  - What has caused the company to be in the current financial position
  - What has been done or will be done to correct the issues (including tax compliance)
  - An understanding of where the funds are coming from
  - Director loan accounts / Director drawings
  - Returns of 10-20c/\$ are gone

# SBR in FY25

- 3388!

Figure 1: Number of SBR appointments by financial year



## Review of small business restructuring process: at a glance

### Uptake

**Over review period – 1 July 2022 to 31 December 2024**

Significant increase in small business restructuring (SBR):

**3,388** commenced (total population)

46% of registered liquidators took an SBR role

This review period  
1 July 2022 to 31 December 2024

**82** commenced (total population)

6% of registered liquidators took an SBR role

Previous period  
1 January 2021 to 30 June 2022

### Outcomes



A substantial proportion of SBRs transitioned to an SBR plan.

However the proportion of SBRs that transitioned to a plan decreased from

88% for SBRs commenced in FY22–23

to 79% in FY24–25 (to 31 December)

Current company status of fulfilled plans\*



**93%** of 1,161 companies that fulfilled an SBR plan by 31 March 2025 remain registered as at 30 April 2025

\*finalised plans where the obligations under the plan have been fulfilled and all admissible debts or claims subject to the plan have been released

### Creditors

**\$359,082 median**

admissible unsecured creditor claims

Around 75% of companies with finalised SBR plans owed creditors less than \$600,000

### Dividends

Over \$101 million paid to unsecured creditors (finalised and fulfilled plans)

87% of funds distributed and classified as unsecured creditor payments were paid to the ATO (approx. \$88 million)



Median dividend rate paid was 20 cents in the dollar

### Remuneration

Median overall restructuring process remuneration:

**\$21,998**

This review period  
1 July 2022 to 31 December 2024

**\$22,055**

Previous period  
1 January 2021 to 30 June 2022

More remuneration was paid during the restructuring phase than the plan phase

Restructuring **\$16,137**

Plan **\$6,739**

Median remuneration paid to registered liquidators (where remuneration was reported)

# Success of SBR

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- Small businesses remain in the market
- Forces
  - Payment of Employee Entitlements (SCG)
  - Statutory Returns to be completed
- Generally supported by the ATO
- Early Intervention
- No second chance after plan put
- Avoids Liquidation
- Avoids Phoenixing

# Some disadvantages of SBR

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No certainty creditors paid for goods provided on credit during the period

No second chance after plan is put to creditors

7-year exclusion

Majority Rules – Small creditors may lose out

Does not cure a ‘Lockdown’ Directors Penalty Notice

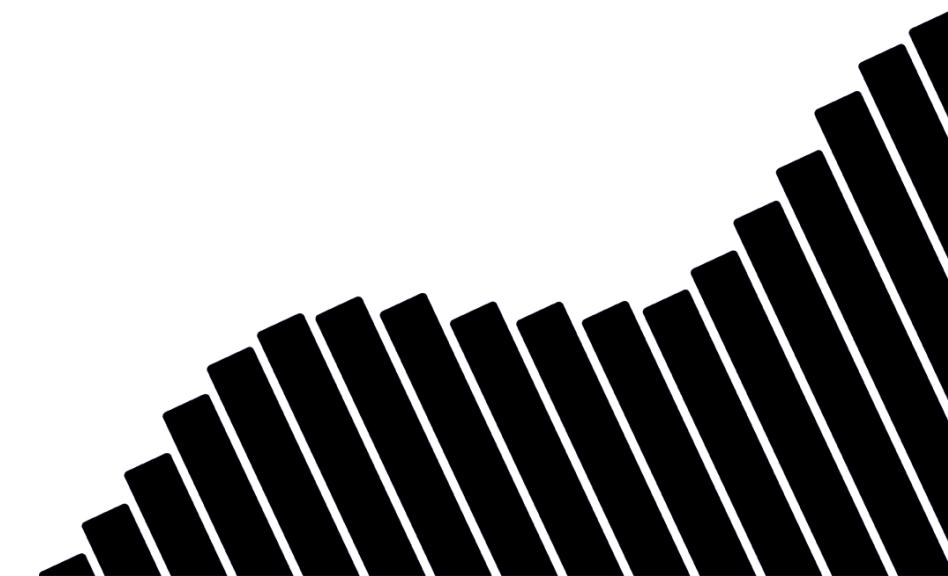
Is \$1m too low?

# Cases

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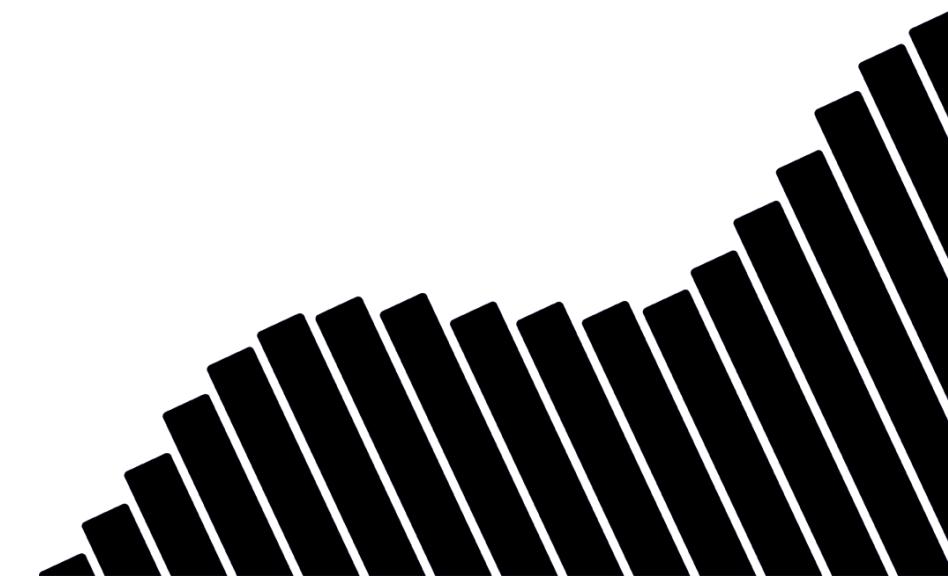
- *Deputy Commissioner of Taxation v Pope Joan Hospitality Pty Ltd (Restructuring Practitioner Appointed)*
  - No ability to amend plan once accepted (court order only)
- *In the matter of Redback Engineering & Sales Pty Ltd [2024] NSWSC 1108*
  - Same principals as section 440A if a winding up application is on foot
- *Benjamin Hornigold Ltd v John Bridgeman Limited [2023] FCA 1195*
  - Leave to proceed against a company in restructuring

# Questions?



# Thank you

Please complete your evaluation form



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# Upcoming Events

## **Local Tax Club**

19 September 2025 – Novotel Geelong

**Topic:** The hidden tax consequences of family law

**Speaker:** Andrew Henshaw, CTA, Velocity Legal

## **The Tax Summit**

3 – 5 September 2025 - MCEC Melbourne

## **Next Generation Tax Discussion**

25 September 2025 – Velocity Lega

## **Regional Masterclass**

9 – 10 October 2025 – Mineral Springs Hotel, Daylesford



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