Local Tax Club - Melbourne & Geelong

Small Business Restructuring

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Ali Erskine,
Harwood Andrews

Introduction

1. Historical Development of the SBR Regime
2. Eligibility Criteria for SBR
3. Impact of Appointment on the Business
4. Assessment of the Regime's Success to Date
5. Current Trends and Proposed Reforms
6. Relevant Case Law

History

SBR was introduced in January 2021. The objective of the regime was to help small businesses recover and importantly survive.

The SBR process is designed to allow small businesses, who are insolvent, to restructure their affairs and enter into a plan with their creditors which enables the company to survive.

The Regime

The regime itself provides a mechanism for a company to put forward a *plan* to creditors to repay those creditors either in full or in part over a period of up to 3 years.

Unlike other insolvency appointments under the *Corporations Act*, the main difference with SBR is that it is a *debtor in possession* regime. The company remains under the control of the directors throughout the process, and it is permitted to trade as it would normally. This is called trading in *the ordinary course of business*.

The restructuring practitioner is appointed to guide and assist in administering the process. Importantly, unlike other forms of insolvency administration, they do not assume control of the company.

Certain transactions that fall outside the ordinary course of business require the restructuring practitioner's prior approval. Examples include the sale or transfer of the business, payment of dividends, or other significant disposals. However, aside from these exceptions, the company remains free to trade as usual throughout the process. The ability to continue operations is a key benefit for small businesses.

The legislative framework for SBR is set out in the *Corporations Act* and the *Corporations Regulations*. Part 5.3B of the Act establishes the core structure of the regime, covering the:

- appointment process and eligibility criteria;
- role of the restructuring practitioner;
- role of directors during the process;
- conduct of business during SBR (including the ability to continue normal trading);
- impact on the company and on third parties;

- rights of secured creditors and limitations on enforcement; and
- role of the Court.

The framework is detailed, and anyone operating in this area should be thoroughly familiar with this part of the Act.

The *Corporations Regulations* provide the operational specifics, including timeframes and practical requirements. The Regulations set out the eligibility test that determines whether a company can access the regime.

Eligibility

Under the current framework, a company is eligible to access the SBR regime only if its total liabilities do not exceed $1 million. This liability threshold includes related-party debts, adopting the definition of "admissible debt" in section 553(c) of the Corporations Act.

To be eligible, the directors must form the view that the company is insolvent or likely to become insolvent. The regime is not intended for companies unwilling, but able, to pay their debts; it targets businesses that are genuinely insolvent but have a viable future.

Before making an appointment, the company must:

- pass a resolution under the *Corporations Act* stating it is insolvent;
- be up to date with all tax lodgements (often the most common cause of delays in appointments);[1]
- have paid all outstanding employee entitlements;[2] and
- ensure the directors make the required declarations to the restructuring practitioner.

The restructuring practitioner (RP) must be satisfied that these declarations are accurate (or can be met within the strict timelines) before accepting the appointment.

Exclusions

A company is ineligible if:

- Any of its current directors has been a director of another company that has undertaken an SBR or Simplified Liquidation in the past seven years; or
- The company itself has undergone restructuring within that 7 year period.

This effectively makes SBR a “one-time opportunity” for small businesses.

[1] Lodgments must be lodged before the plan is sent to creditors (20 Business days after the appointment)
[2] Employee entitlements must be paid before the plan is sent to creditors (20 Business Days after the appointment) – noting that its only priority claims (i.e. director and related parties are limited to the s556 exclusions)

Timeframes

The *Corporations Regulations* set out strict and short deadlines, including:

- notifications to creditors and ASIC at appointment, upon plan termination, and upon outcome;
- voting periods for the restructuring plan; and
- dispute resolution timelines.

These accelerated timeframes are deliberate. Because the company continues trading while insolvent during the process, matters must progress quickly to minimise trading risk.

Role of the Restructuring Practitioner

The RP must be a registered liquidator with ASIC. In the pre-appointment phase, the RP assesses:

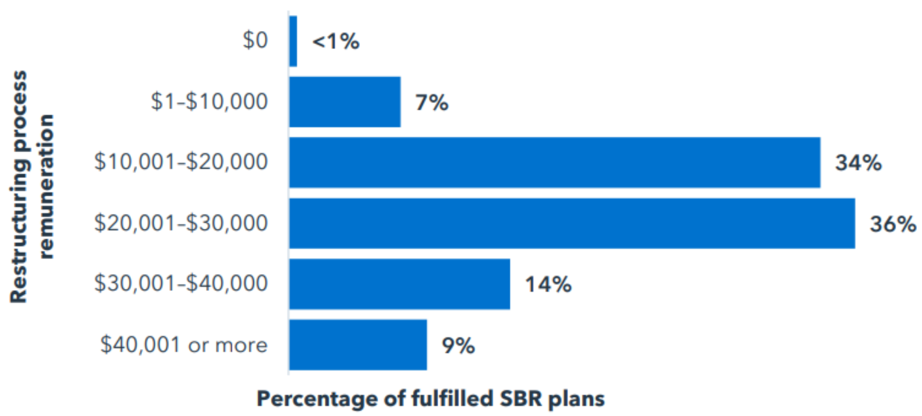
- whether the company meets all eligibility requirements; and
- whether the proposed plan is achievable.

Once appointed, the RP:

- acts as the company's agent;
- communicates the plan to creditors;
- certifies that the company can meet its commitments under the plan;
- administers the plan, including distributing funds to creditors.

Remuneration for RPs is typically a flat fee prescribed in the regulations plus a percentage of amounts paid to creditors. This has drawn criticism, as some restructuring plans are complex and the regulated fees may not reflect the actual work involved.

Figure 8: Remuneration for overall restructuring process for finalised and fulfilled plans



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Standard Plan Terms

The regulations also prescribe standard terms that must be included in any plan proposed to creditors under the SBR regime.

Impact of Appointment on the Company

Once a restructuring practitioner (RP) is appointed, the company may continue trading in the ordinary course of business. However, it cannot:

- sell it's business;
- undertake significant transactions outside the ordinary course of business without the RP's consent;
- repay debts prior to approval of the restructuring plan; or
- pay dividends.

Routine payments to suppliers and other expenses necessary for ongoing operations are permitted. However, paying out a particular creditor outside the ordinary course of business would require RP approval, which is unlikely to be granted.

Disclosure Requirements

During the restructuring period, all public documents must state: *"subject to a restructuring practitioner appointed."* Failure to do so is a strict liability offence.

Creditor Enforcement

While restructuring is underway:

- unsecured creditors are prohibited from commencing or continuing enforcement proceedings;
- enforcement of personal guarantees given by directors is also stayed;
- secured creditors are unaffected unless they choose to vote on the plan.

If a secured creditor participates in the vote, they are deemed to have surrendered their security, mirroring other insolvency regimes. In practice, secured creditors generally participate only in relation to the unsecured portion of their debt.

ATO Director Penalty Notices (DPNs)

The effect of an SBR appointment on DPNs issued by the Australian Taxation Office depends on timing:

- **Lockdown DPNs** – If the DPN is a "lockdown" DPN (issued because the company failed to lodge BAS, IAS, or SGC statements within three months of their due dates), the director remains personally liable despite the appointment. Even if the restructuring plan results in part payment to the ATO, the director remains liable for any shortfall.
- **Non-Lockdown DPNs** – If the company has lodged its returns and the appointment occurs within the 21-day compliance period, the director's personal liability is remitted.

In the context of SBR, companies must be up to date with their ATO lodgements. As a result, the regime will generally only apply where all required lodgements have been made.[3]

Outcomes of the Process

Once the appointment occurs and the restructuring plan is issued to creditors, it must be approved by a majority in value of creditors for it to proceed. If creditor approval is obtained, the plan is executed.

If the plan does not secure the required majority, the SBR process ends. Notably, the *Corporations Act* is silent on whether the company automatically transitions to liquidation or voluntary administration in such circumstances, despite the company having publicly declared itself insolvent.

Conclusion and Termination of the Plan

A restructuring plan will end if:

- it is completed in accordance with its terms;
- it is rejected by creditors; or
- it is terminated due to non-compliance.

There is a process in the regime for rectifying certain breaches. However, if a plan is terminated early, unsecured creditors are not released from their claims. A release of unsecured debts only occurs upon *successful* completion of the plan.

Process Timeline

The SBR process can be viewed in three distinct phases:

<u>Pre-Appointment Phase</u>

- Considerations and decision by directors to appoint a restructuring practitioner (RP).
- Appointment period: 20 business days, extendable by up to 10 business days.

<u>Restructuring Phase</u>

- Preparation and distribution of the restructuring plan.
- Assessment of debts and claims: 15 business days for creditors to review and respond.

<u>Plan Phase</u>

- Receipt of affected creditor statements.
- Creditor vote on the plan.
- Determination of the outcome: plan approval and execution, or termination/rejection.

[3] There is certainly a risk that the appointment will not cure ant future lockdown DPN, and poor compliance makes it harder to get a Plan accepted by the ATO but we are seeing that Company will bring their tax lodgements up to date within the 20 Business Days.

Pre-Appointment Phase

During the pre-appointment phase, the restructuring practitioner (RP) undertakes eligibility checks, including whether:

- all required ATO lodgements have been made (lodgements to be made before the plan is sent to creditors);
- all employee entitlements have been paid (employee entitlements are to be paid before the plan is sent to creditors and noting that it is only priority claims);
- total liabilities are $1 million or less; and
- the creditor position has been accurately determined.

This phase can take considerable time. In some cases, it has extended to almost a year before the directors formally make the appointment.

Restructuring Phase

Once the appointment is made, the directors have 20 business days to finalise and submit the restructuring plan to creditors. In practice, the plan is often prepared in consultation with the RP during the pre-appointment phase.

The process is as follows:

1. **Plan Preparation and Circulation** – The RP sends the plan to creditors along with a schedule of admissible debts or claims. This schedule lists the affected creditors and the corresponding amounts of each debt.
2. **Creditor Review** – Creditors have a short period to dispute the recorded amount. If a creditor challenges the amount, the RP determines whether an adjustment is required.
3. **Creditor Voting** – If a creditor accepts the recorded amount, no action is required, and the creditor is entitled to vote. The plan must be approved by a majority in value of affected creditors to proceed.

Voting Timeline

Following circulation of the plan, creditors have 15 business days to vote. Approval requires a majority in value, after which the plan is executed.

Assessment of Admissible Debts

Section 553 of the *Corporations Act* governs which debts are admissible in the SBR process. It provides that all debts and claims payable by the company, present or future, certain or contingent, ascertained or sounding only in damages, are to be included as at the date of the restructuring practitioner's appointment.

Certain contingent debts are likely to be secured (e.g., obligations to financiers who have leased equipment or vehicles, or to landlords), even if the exact value of the security is unknown.

Related Party Creditors

Related party creditors are excluded from participating in the voting process, although they may still receive a dividend under the plan. This prevents related parties from influencing the voting outcome. The regime is designed to ensure equal treatment of all creditors, which is why selective payments, such as paying one creditor in full, are prohibited.

Plan Phase

Once creditors have voted and a majority in value has approved the restructuring plan:

- the company implements the plan;
- the restructuring practitioner (RP) administers distributions, either by interim payments or lump-sum payments; and
- the plan becomes binding on all unsecured creditors included in the plan.

While the plan is in effect, affected creditors cannot:

- recover debts;
- enforce judgment debts; or
- commence winding-up proceedings.

Upon completion of the plan, the company is released from all admissible debts covered by it.

Amendments to the Plan

Once the plan has been issued to creditors, it cannot be amended by the RP or the company. Only the Court can approve amendments, for example, if:

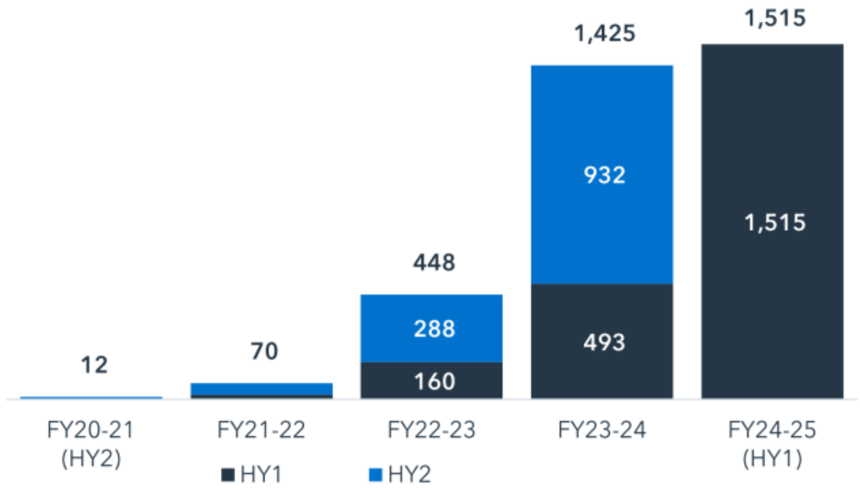
- additional creditors are identified after the plan is circulated; or
- there is a material change in the company's circumstances.

If the plan is rejected by creditors, there is no opportunity to submit an alternative plan under SBR, unlike in voluntary administration, where an amended Deed of Company Arrangement (DOCA) may be proposed.

If a new creditor is discovered after the plan is approved, the current ARITA guidance is that the schedule of debts cannot be amended without a Court application. For small businesses, the cost of such applications can be disproportionate to the debt in question, making this a practical challenge of the regime.

As of the 2025 financial year, there have been 3,388 SBR appointments. This represents a significant uptake of the regime.

Figure 1: Number of SBR appointments by financial year



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The Tax Institute

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)

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Success and Proposed Reform

When assessing the success of the SBR regime, it is clear that it has enabled many small businesses to remain operational. However, the reality of its application is more complex than originally anticipated during the drafting of the legislation.

For example, there is no mechanism within the regime to address creditors who are excluded from the plan, which has been a point of criticism. Another frequent concern relates to eligibility, specifically whether the $1 million liability threshold remains appropriate or should be increased.

The Australian Taxation Office (ATO) often plays a pivotal role in whether a restructuring plan is accepted, as it is frequently the largest creditor in many small business cases.

As of May 2025, the ATO's debt book stands at approximately $105 billion, with around half considered collectible debt. Notably, 65% of this collectible debt is owed by small businesses, placing this sector high on the ATO's priority list.

In response, the ATO encourages restructuring practitioners to engage with them prior to finalising a plan in order to seek feedback. The ATO provides a dedicated email address on its website for this purpose.

Practitioners are advised to submit relevant financial information, including accounts, asset details, and related-party loans, to obtain an indication of whether the ATO is likely to support the proposed plan.

This early engagement offers a valuable opportunity to gauge the likelihood of plan acceptance and facilitates a more collaborative process between creditors and practitioners.

Cases

1. *Deputy Commissioner of Taxation v Pope Joan Hospitality Pty Ltd* (Restructuring Practitioner Appointed)
2. *In the matter of Redback Engineering & Sales Pty Ltd* [2024] NSWSC 1108
3. *Benjamin Hornigold Ltd v John Bridgeman Limited* [2023] FCA 1195