

Welcome

# Local Tax Club Geelong

22 August 2025

Novotel Geelong



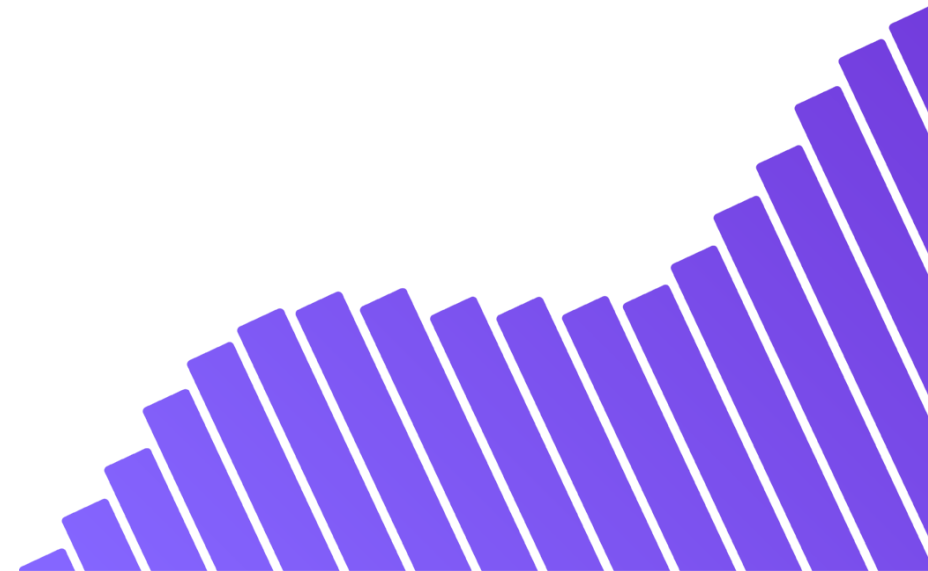
# Small Business Restructuring

**Presenters:**

Ali Erskine, Harwood Andrews

Alex Mendez, Rodgers Reidy

David Holton, Rodgers Reidy



# Introduction

---

- 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

---

- 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

---

- 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  $\leq$  \$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 debtswithout RP approval.
- Public disclosure required: (*restructuring practitioner appointed*)
- Creditor enforcement stayed



# Process timeline

- 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

---

- 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

---

## 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

---

## 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

---

## 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

---

- 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

---

- 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

---

- 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?



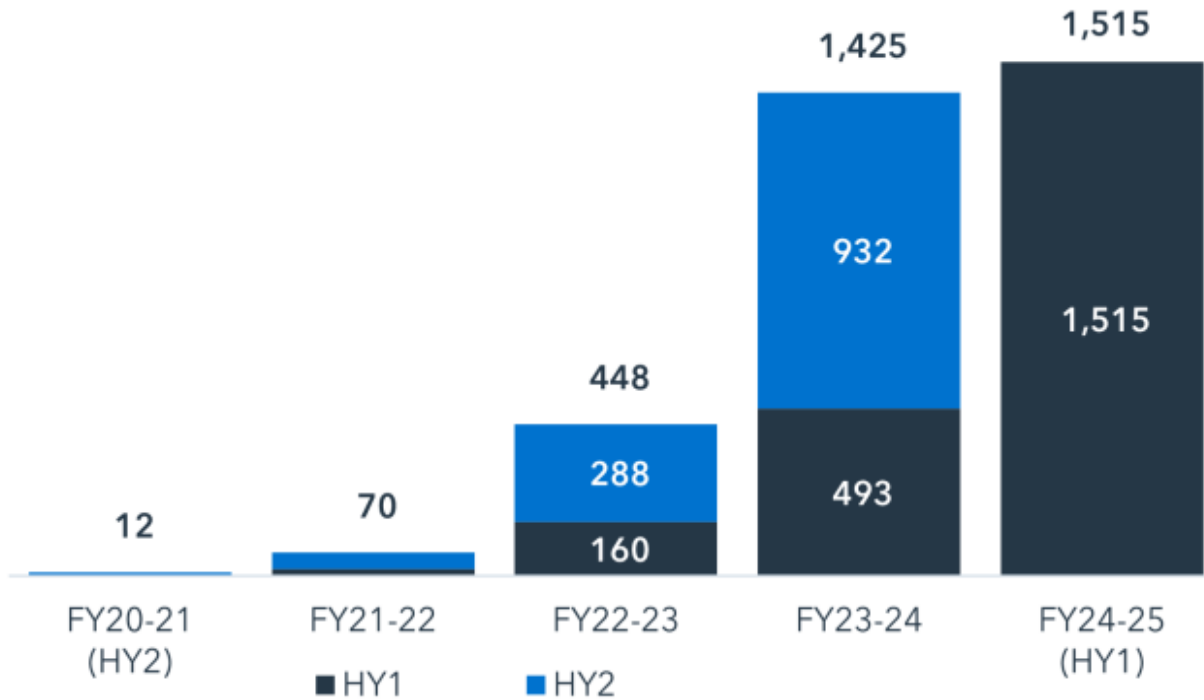
# Recent Discussions with ATO

- 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\*

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



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

### 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

---

- 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

---

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

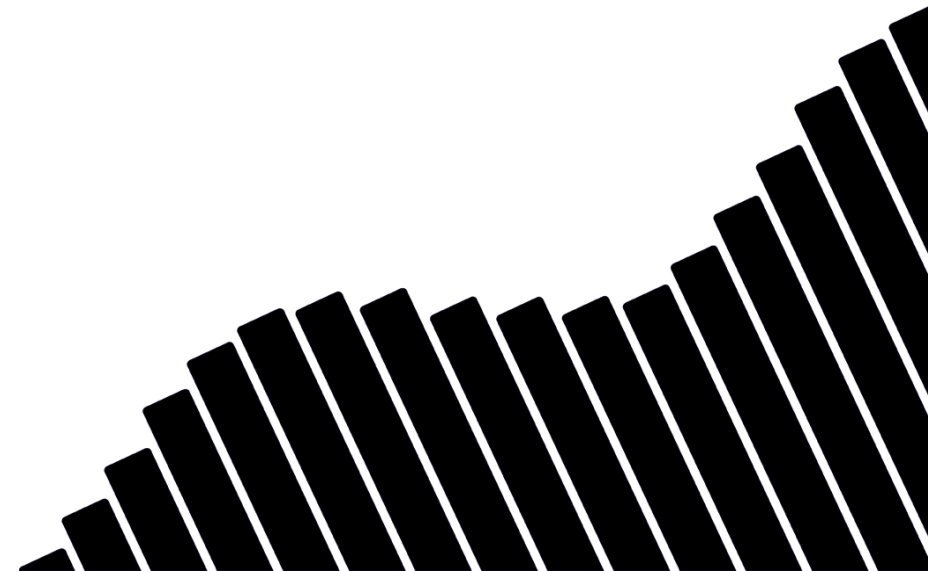
Is \$1m too low?

# Cases

---

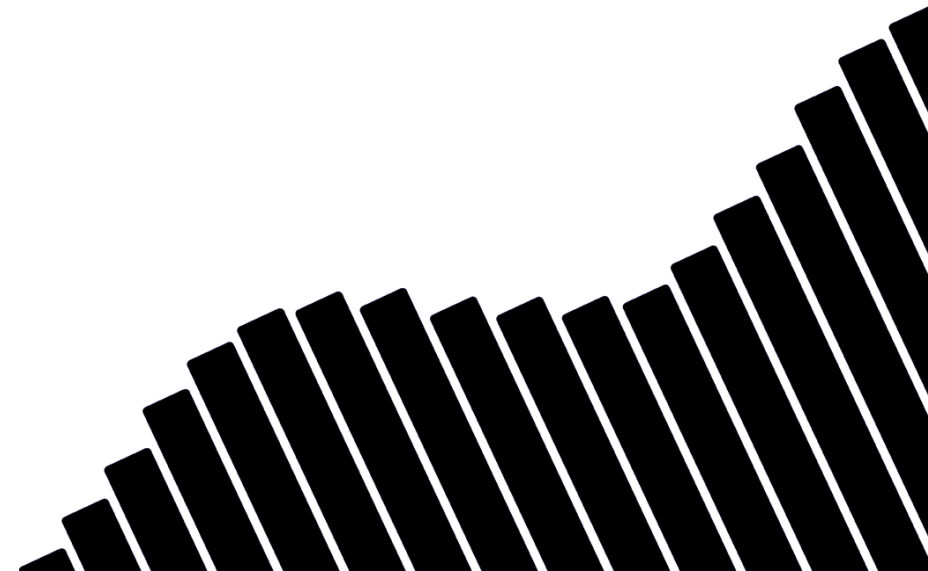
- *Deputy Commissioner of Taxation v Pope Joan Hospitality Pty Ltd (Restructuring Practitioner Appointed)*
  - No ability to amend plan once accepted (court order only)
- *In the matter of Redback Engineering & Sales Pty Ltd* [2024] NSWSC 1108
  - Same principals as section 440A if a winding up application 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





© Ali Erskine 2025

**Disclaimer:** The material and opinions in this paper are those of the author and not those of The Tax Institute. The Tax Institute did not review the contents of this presentation and does not have any view as to its accuracy. The material and opinions in the paper should not be used or treated as professional advice and readers should rely on their own enquiries in making any decisions concerning their own interests.

Liability limited by a scheme approved under professional standards legislation.

# 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 Legal

## **Regional Masterclass**

9 – 10 October 2025 – Mineral Springs Hotel, Daylesford



[taxinstitute.com.au](http://taxinstitute.com.au)

