



ASIC
Australian Securities &
Investments Commission

Restructuring and the restructuring plan

The information in these FAQs is a summary only, providing basic information about the small business restructuring process. It does not cover all the relevant law regarding this topic, and is not a substitute for professional advice.

You should also note that because these FAQs avoid using legal language where possible, they may include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases, your circumstances should be considered when determining how the law applies to you.

If you need help to understand the small business restructuring process, you should consider engaging a suitably qualified adviser, such as a financial counsellor, accountant, lawyer or registered liquidator.

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1. Restructuring

What is a restructuring for companies operating small businesses experiencing financial difficulties?

The restructuring process allows eligible companies to:

- retain control of the business, property, and affairs of the company while it develops a plan to restructure the company's affairs with the assistance of a restructuring practitioner
- enter into a restructuring plan with creditors.

What are the eligibility criteria for restructuring?

To be eligible for a restructuring, on the day on which the restructuring practitioner is appointed:

- total liabilities of the company must not exceed \$1 million
- no person who is a director of the company, or who has been a director of the company within the 12 months before the appointment of the restructuring practitioner, has been a director of another company that has been under restructuring or subject to the simplified liquidation process within the period of the preceding seven years, unless they are exempt under the regulations
- the company must not have undergone restructuring or been the subject of a simplified liquidation process within the preceding seven years

The exemptions prescribed by the regulations are:

- if, the other company is a related body corporate of the company; and
 - the other company is, or has been, under restructuring - the restructuring practitioner for that company was appointed no more than 20 business days before the day on which the restructuring of the company for which the eligibility criteria are to be met began
 - the other company is, or has been the subject of a simplified liquidation process – the other company began to follow the simplified liquidation process no more than 20 business days before the day on which the restructuring of the company for which the eligibility criteria are to be met began.

Who is an affected creditor?

An affected creditor is a creditor who is:

- in relation to a proposal to vary or terminate a company's restructuring plan – a creditor of the company who is a party (as creditor) to the plan
- in relation to a proposal by a company to make a restructuring plan - a person who would be a party to the restructuring plan, if it were made.

Who is an excluded creditor?

The following are excluded as creditors of the company under a restructuring:

- the restructuring practitioner for the company
- a creditor who was a related creditor of the company at the time the restructuring began
- a creditor who was, on becoming an affected creditor, a related entity of the restructuring practitioner.

What is an admissible debt or claim?

A debt or claim that would be admissible to proof against the company under section 553(1), if:

- the company were wound up
- the relevant date is:
 - if the company is under restructuring – the beginning of the restructuring
 - if the company has made a restructuring plan – the beginning of the restructuring that ended when the plan was made.

It does not include employee entitlements or debts/claims that would be admissible under section 553(1A). Section 553(1A) provides for circumstances where a debt or claim is admissible against a company even though the circumstances giving rise to that debt or claim occur on or after the relevant date.

2. Appointing a restructuring practitioner

Important considerations before appointing a restructuring practitioner

Before appointing a restructuring practitioner, directors should consider whether, at the time a restructuring plan is to be proposed to creditors, the company will have (or substantially complied with the requirement to have):

- paid the entitlements of employees that are due and payable
- given returns, notices, statements, applications or other documents as required by taxation laws (within the meaning of the Income Tax Assessment Act 1997).

Unless the two criteria above have been satisfied the company cannot propose a restructuring plan.

The above criteria exclude employee entitlements that are not currently due to be paid. Additionally, tax debts do not need to be paid – only the required returns given.

Appointment process

The directors of a company appoint a restructuring practitioner in writing. The company directors can do this, if:

- the company meets the eligibility criteria for restructuring on the day the appointment is made
- the board has resolved that:
 - in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time
 - a restructuring practitioner for the company should be appointed.

The directors of a company must not appoint a restructuring practitioner if:

- the company is already under restructuring
- the company has made a restructuring plan that has not yet been terminated
- the company is under administration
- the company has executed a deed of company arrangement that has not yet terminated
- a person holds an appointment as liquidator, provisional liquidator or administrator of the company.

Who can act as a restructuring practitioner?

Only a person registered with ASIC as a “registered liquidator” can act as a restructuring practitioner of a company or for a restructuring plan.

Can the appointment of a restructuring practitioner be revoked?

No.

Can more than one person be appointed as a restructuring practitioner to a company?

Yes, two or more restructuring practitioners may be appointed to act. This is often referred to as a ‘joint and several’ appointment.

Can creditors vote to appoint a different restructuring practitioner?

No.

What fees are paid to the restructuring practitioner?

The directors of the company determine the remuneration of the restructuring practitioner.

The determination must be made:

- by resolution of the board
- on or before the day on which the restructuring practitioner is appointed.

The determination may only specify:

- an amount of remuneration

- a method for working out an amount of remuneration that, in the event the board consents in writing to beginning or proceeding with proceedings relating to the restructuring of the company, the restructuring practitioner would be entitled to receive for necessary work properly performed in relation to the proceedings.

What is the role of the restructuring practitioner?

The restructuring practitioner does not take control of the day-to-day affairs of the company.

The role of the restructuring practitioner is to:

- provide advice to the company about the restructuring
- assist the company prepare a restructuring plan
- make a declaration to creditors about the restructuring plan proposed by the company:
 - stating whether the restructuring practitioner believes on reasonable grounds that:
 - the eligibility criteria are met and that, if a restructuring plan is made, the company is likely to be able to discharge the obligations created by the plan as and when they become due and payable
 - all the information required to be set out in the restructuring proposal statement has been set out in that statement
 - identifying any matter about which the restructuring practitioner could not form a belief on reasonable grounds that either the eligibility criteria are met, the company will be able to discharge its obligations created by the plan or that the restructuring proposal statement includes all required information and setting out the reasons for their conclusion
 - specifying the name of any affected creditor that is a related entity of the restructuring practitioner and the nature of the relationship.
- perform other functions, duties and powers given to the restructuring practitioner under the Corporations Act 2001, including whether to terminate the restructuring, give consent to transactions or dealings outside the ordinary course of business and resolve disputes over the amount of a creditor's debt or claim disclosed in the restructuring proposal statement.

The restructuring practitioner acts as the company's agent.

3. What is the role of the directors during a restructuring?

During the restructuring period, the directors remain in control of the company and may enter into a transaction or dealing with company assets if it is in the ordinary course of the company's business.

The consent of the restructuring practitioner is required before the directors can enter into a transaction or dealing with company assets that is outside of the ordinary course of the company's business.

The following circumstances are deemed not to be in the ordinary course of the company's business:

- a transaction or dealing for the purpose of satisfying an admissible debt or claim
- if the transaction or dealing relates to the sale or transfer of the whole or a part of the business
- a transaction or dealing that relates to the payment of a dividend.

Directors of a company must develop and propose a restructuring plan and a restructuring proposal statement, and then execute the restructuring plan during the proposal period. The company's restructuring proposal statement also includes a Schedule of Debts and Claims compiled by the directors.

The directors must also attend on, and assist, the restructuring practitioner and give them such information about the company's business, property, affairs and financial circumstances as reasonably required by the restructuring practitioner.

4. Who has control of the company during a restructuring?

The directors of the company have control of the company's business, property and affairs.

The restructuring practitioner acts as the company's agent.

5. What effect does the appointment of a restructuring practitioner have on creditors?

Unsecured creditors

While the company is in restructuring, unsecured creditors cannot begin, continue or enforce their claims against the company without the restructuring practitioner's consent or the court's permission.

On winding up applications

During a restructuring, the court is to adjourn the hearing of an application to wind up the company if the court is satisfied that it is in the interests of the company for it to continue under a restructuring rather than be wound up.

If the court is satisfied that it is in the interests of the company's creditors for the company to continue under restructuring, the court is also not to appoint a provisional liquidator to the company.

On third parties including secured creditors

Third parties (such as creditors) cannot exercise their property rights (including enforcing any security interests) without the restructuring practitioner's written consent or with leave of the court.

This is generally the case for a secured party in relation to the property, or possessory security interests in the property of the company, an owner or lessor of property used or occupied by or in possession of the company (including a PPSA secured party in relation to PPSA security interests in goods arising from the lease of goods).

The law relating to third party and secured creditor rights depends on the circumstances of the security or right and may require additional consideration by directors before they appoint a restructuring practitioner.

On personal guarantees

A creditor cannot enforce any personal guarantees held against a director or their spouse or relative in relation to a liability of the company, except with the leave of the court and if leave of the court is obtained, in accordance with the terms (if any) the court may impose.

This moratorium on taking action against guarantors stops once the restructuring plan is entered into or the restructuring otherwise ends.

6. What notice of the restructuring must be provided in public documents?

Every public document and every negotiable instrument must set out the phrase ("restructuring practitioner appointed") after the company's name where it first appears. Not doing so, is an offence of strict liability.

7. How long does the restructuring proposal period last?

The restructuring proposal period generally lasts for 20 business days beginning on the day the restructuring begins unless it is ended earlier or is extended.

8. Can the restructuring proposal period be extended?

Yes, the restructuring practitioner may extend the proposal period by no more than 10 business days at the request of the company or the court may, on application of the company, extend the proposal period. The restructuring practitioner may only extend the proposal period once.

9. How does a restructuring come to an end?

The restructuring of a company ends if:

- the directors of the company make a declaration that the restructuring is to end on a specified day for any reason
- the company fails to propose a restructuring plan within 20 business days beginning on the day the restructuring begins or any period extended by the restructuring practitioner at the request of the company or the court on application of the company
- the company's proposal to make a restructuring plan lapses because it is not accepted by creditors or the restructuring practitioner cancels the proposal to make a restructuring plan
- the restructuring practitioner terminates the restructuring because they believe on reasonable grounds that:
 - the company does not meet the eligibility criteria for restructuring
 - it would not be in the interests of creditors to make a restructuring plan
 - it would be in the interests of creditors for the restructuring to end
 - it would be in the interests of creditors for the company to be wound up
- the court orders the restructuring is to end
- a voluntary administrator, liquidator or provisional liquidator is appointed
- if the company is a general insurer (within the meaning of the Insurance Act 1973) – management of the general insurer vests in a judicial manager of the company appointed by the Federal Court under Part VB of the Insurance Act 1973
- if the company is a life company (within the meaning of the Life Insurance Act 1995) – management of the life company vests in a judicial manager of the life company appointed by the Federal Court under Part 8 of the Life Insurance Act 1995.

10. The restructuring plan

Who prepares the restructuring plan?

The directors of the company prepare the restructuring plan in the approved form with the assistance of the restructuring practitioner.

What is in the restructuring plan?

The restructuring plan must:

- identify the company property to be dealt with
- specify how that property is to be dealt with
- provide for the remuneration of the restructuring practitioner for the plan
- specify the date on which the restructuring plan was executed.

The restructuring plan may also:

- authorise the restructuring practitioner for the plan to deal with the identified property in a way specified in the plan
- provide for any matter relating to the company's affairs
- be expressed to be conditional on the occurrence of a specified event within a specified period. The specified period cannot be longer than 10 business days after the day the proposal to make the restructuring plan is accepted.

The restructuring plan must not:

- provide for the transfer of property (other than money) to a creditor
- provide for the company to make payments under the plan in respect of an admissible claim, after three years beginning on the day the plan is accepted.

Are creditors treated equally under a restructuring plan?

All admissible debts and claims rank equally under a restructuring plan. No creditor, or class of creditor, receives priority in repayment of their debts or claims.

Prerequisites to the making of a plan

Before a restructuring plan proposal is sent by the restructuring practitioner to creditors, the company must have (or substantially complied with the requirement to have):

- paid the entitlements of employees that are due and payable; and
- given returns, notices, statements, applications or other documents as required by taxation laws (within the meaning of the Income Tax Assessment Act 1997).

Unless the two criteria above have been satisfied the company cannot propose a restructuring plan.

This excludes employee entitlements that are not currently due to be paid. Further, tax debts do not need to be paid – only the required returns etc. given.

How is a restructuring plan proposed?

A company under restructuring proposes a restructuring plan if:

- the company prepares a restructuring plan and restructuring proposal statement that complies with the requirements of the law
- the company executes the restructuring plan during the proposal period (generally, this is the period of 20 business days beginning on the day the restructuring begins)
- the restructuring practitioner prepares and signs a declaration
- the restructuring practitioner gives a copy of the restructuring plan, restructuring plan standard terms, restructuring proposal statement and the restructuring practitioner's declaration to creditors as soon as practicable after the company executes the restructuring plan
- immediately before the restructuring practitioner gives copies of these documents to creditors, the company has or has substantially complied with the following obligations:
 - paid the entitlements of employees that are due and payable
 - given returns, notices, statements, applications or other documents as required by the taxation laws (within the meaning of the Income Tax Assessment Act 1997).

The restructuring plan is proposed on the date the restructuring practitioner gives the required documents to creditors.

Deciding whether to accept a plan

A decision about whether a restructuring plan should be accepted is made by affected creditors who are given the following documents by a restructuring practitioner:

- a. the company's restructuring plan
- b. restructuring plan standard terms
- c. the company's restructuring proposal statement
- d. a declaration from the restructuring practitioner about whether the eligibility criteria for restructuring are met, whether the company is likely to be able to discharge the plan obligations, and statements about the practitioners belief about the completeness of information set out in the company's restructuring proposal statement

These documents must be accompanied by a request from the restructuring practitioner to an affected creditor to:

- e. give a written statement to the restructuring practitioner about whether or not the restructuring plan should be accepted
- f. if the affected creditor agrees with the assessment of the creditor's admissible debts or claims – verify the creditor's admissible debts or claims as set out in the restructuring proposal statement
- g. if the affected creditor does not agree with the assessment of the creditor's admissible debts or claims set out in the restructuring proposal statement – notify the restructuring practitioner under Corporations Regulation 5.3B.22.

The practitioner must tell affected creditors who to return their statements (above) to, and that the statements need to be returned, usually before the end of 15 business days beginning on the day the restructuring practitioner gives the documents at a. – d. above (acceptance period). The acceptance period of 15 business days may be longer in circumstances where affected creditors disagree with the schedule of debts and claims in the restructuring proposal statement.

A plan is accepted if, at the end of 15 business days (or any longer acceptance period), the majority in value of affected creditors who returned statements to the restructuring practitioner stated that the plan should be accepted. Corporations Regulation 5.3B.25 provides for calculation of the value of an affected creditor.

The restructuring plan is then taken to have been made on the day after the end of the acceptance period or on the day that a specified event (according to the plan) has occurred.

Who is the restructuring practitioner of the plan?

The restructuring practitioner(s) of the company will be the restructuring practitioner(s) of the restructuring plan unless the company, by resolution of the board, appoints another registered liquidator(s) to be the restructuring practitioner(s) for the plan.

What notice of the restructuring plan must be provided in public documents?

Once the creditors accept the restructuring plan, there is no statutory requirement to add additional words after the company name in any document.

11. What effect does a restructuring plan have on creditors?

Who is bound by the plan if it is accepted?

A plan that is made is binding on:

- a. the company
- b. the company's officers and members
- c. the restructuring practitioner for the plan
- d. subject to specific provisions about secured creditors (see below) - a creditor of the company to the extent that the creditor has an admissible debt or claim in relation to the plan

A plan is binding on a secured creditor (including an owner or lessor of PPSA retention of title property of the company):

- a. if the value of the creditor's security interest is less than the value of the creditor's admissible debts or claims—only to the extent of the difference between the values; and
- b. if the value of the creditor's security interest is equal to or more than the value of the creditor's admissible debts or claims—only to the extent that the creditor consents to be bound by the plan.

The fact that a restructuring plan has been made does not prevent a secured creditor from realising or otherwise dealing with the security interest, unless:

- a. the secured creditor accepted the proposal to make the plan and the plan prevents the secured creditor from doing so

- b. the court so orders.

The fact that a restructuring plan has been made does not affect a right that an owner or lessor of property (other than an owner or lessor of PPSA retention of title property of the company) has in relation to that property, unless:

- a. the owner or lessor accepted the proposal to make the plan and the plan affects that right
- b. the court so orders.

Effect on rights of a person bound by the plan

Until a restructuring plan terminates, a person bound by the plan cannot:

1. make an application for an order to wind up the company based on an admissible debt or claim
2. proceed with such an application made before the plan became binding on the person
3. begin or proceed with a proceeding against the company or in relation to any of its property to recover an admissible debt or claim
4. begin or proceed with an enforcement process in relation to property of the company to recover an admissible debt or claim

except in the case of 3 and 4:

- a. with the leave of the court
- b. in accordance with such terms (if any) as the court imposes

Effect on creditors if the terms of the plan are fully satisfied

If all of the following conditions are satisfied:

- i. the company's obligations under the plan have been fulfilled
- ii. the obligations of any other party to the plan have been fulfilled
- iii. all admissible debts or claims have been dealt with in accordance with the plan

the restructuring plan terminates on the day on which all of the conditions are satisfied, the company is released from all admissible debts or claims and the company is entitled to any property that was not required by the plan to be distributed to creditors.

Effect on creditors if the terms of the plan are not fully satisfied

If a company's restructuring plan terminates other than because the conditions above are met, any admissible debt or claim that has not been dealt with in accordance with the plan is taken to be due and payable on the business day after the day on which the termination occurs.

12. What is the role of the restructuring plan practitioner?

The role of the restructuring practitioner for the company's restructuring plan is:

- to receive money from, and hold money on trust for, the company
- to pay the money to creditors in accordance with the plan
- if requested to do so by the company's directors:
 - realise property of the company that is available to pay creditors in accordance with the plan
 - distribute the proceeds of the realisation of the property among the creditors in accordance with the plan
- to answer questions about the performance or exercise of any of the restructuring practitioner's functions and powers as restructuring practitioner for the plan
- to do anything incidental to the performance or exercise of those functions and powers

- to do anything else that is necessary or convenient for the purpose of administering the plan.

13. What fees are paid to the restructuring practitioner for the restructuring plan?

The restructuring plan approved by creditors specifies the remuneration that the restructuring practitioner is entitled to receive.

The restructuring plan may specify the restructuring practitioner's remuneration only by specifying:

- an amount of remuneration as a specified percentage of payments made to creditors in accordance with the plan
- a method for 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 restructuring practitioner would be entitled to receive for necessary work properly performed in relation to the proceedings.

14. How is a restructuring plan terminated?

A company's restructuring plan terminates (whichever happens first):

- on the day on which the company's obligations under the plan, and the obligations of any other party to the plan, have been fulfilled and all admissible debts or claims have been dealt with in accordance with the plan
- if the court terminates the plan – on the day the court determines and specifies in the order
- if the plan is expressed to be subject to the occurrence of a specified event within a specified period (the specified period cannot be longer than 10 business days after the day on which the plan is accepted) and that event does not occur – on the next business day after the end of that specified period
- if there has been a contravention of the plan by a person bound by the plan that has not been rectified within 30 business days of the contravention occurring – on the next business day after the end of that 30 day period
- on the day a voluntary administrator, liquidator or provisional liquidator is appointed.

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