

EXPOSURE DRAFT

EXPOSURE DRAFT EXPLANATORY STATEMENT

Corporations Act 2001

Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020

Section 1364 of the *Corporations Act 2001* (the Corporations Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Corporations Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Corporations Act. Further, subject to passage of the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (the Insolvency Reforms Bill), the Corporations Act will enable regulations to be made in support of the new insolvency processes established under that Bill.

The purpose of the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020* (the Regulations) is to amend the *Corporations Regulations 2001* (the Corporations Regulations) to enable the new debt restructuring and simplified liquidation regimes proposed to be established by the Insolvency Reforms Bill. The Regulations also make further consequential amendments to the Corporations Regulations that are required as a result of the Insolvency Reforms Bill.

The economic consequences of the Coronavirus known as COVID-19 highlight the need for a system of external administration that can accommodate the needs of small businesses. In these situations, complex, lengthy and rigid procedures can be unsuitable.

In response to these challenges, the Australian Government announced a package of reforms to the corporate insolvency framework, including major changes to accommodate eligible small businesses. These new additions to the framework are designed to meet the needs of small businesses by reducing the complexity and costs in insolvency processes.

The framework of the reforms is being established through the Insolvency Reforms Bill. The framework provides for a formal debt restructuring process for eligible companies, extended temporary relief for eligible companies intending to undertake a formal debt restructuring process, a simplified liquidation process for eligible companies in a creditors' voluntary winding up, refinements to the requirements for registration as a liquidator, and greater use of electronic documents and electronic signatures in an external administration.

The Regulations amend the Corporations Regulations to enable the operation of the new external administration processes including by specifying:

- certain eligibility and other requirements for entry into the debt restructuring process and the simplified liquidation process;
- features of the two new insolvency processes, such as circumstances where a liquidator or small business restructuring practitioner must provide a report to ASIC;

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- how a company exits the debt restructuring process and the simplified liquidation including, circumstances in which the debt restructuring process ends, and circumstances where a company ceases to be eligible for the simplified liquidation process, and transitional arrangements; and
- requirements for a debt restructuring plan, including proposing, making, varying and terminating a restructuring plan.

Details of the Regulations are set out in Attachment A.

Not all of the amendments to the Corporations Regulations that comprise the corporate insolvency reforms are included in this Exposure Draft – see Attachment B.

The Corporations Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence in the following way:

- Schedule 1 to the Regulations commences on the day after this instrument is registered or the day on which Schedule 1 to the Insolvency Reforms Bill, once enacted, commences, whichever occurs later;
- Schedule 2 to the Regulations commences on the day after this instrument is registered or the day on which Schedule 2 to the Insolvency Reforms Bill, once enacted, commences, whichever occurs later;
- Schedule 3 to the Regulations commences on the day after this instrument is registered or the day on which Schedule 3 to the Insolvency Reforms Bill, once enacted, commences, whichever occurs later; and
- Schedule 4 to the Regulations commences on the day after this instrument is registered or the day on which Schedule 4 to the Insolvency Reforms Bill, once enacted, commences, whichever occurs later.

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ATTACHMENT A

Details of the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020*

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commence in the following way:

- Schedule 1 to the Regulations commences on the day after this instrument is registered or the day on which Schedule 1 to the Insolvency Reforms Bill, once enacted, commences, whichever occurs later;
- Schedule 2 to the Regulations commences on the day after this instrument is registered or the day on which Schedule 2 to the Insolvency Reforms Bill, once enacted, commences, whichever occurs later;
- Schedule 3 to the Regulations commences on the day after this instrument is registered or the day on which Schedule 3 to the Insolvency Reforms Bill, once enacted, commences, whichever occurs later; and
- Schedule 4 to the Regulations commences on the day after this instrument is registered or the day on which Schedule 4 to the Insolvency Reforms Bill, once enacted, commences, whichever occurs later.

Section 3 – Authority

The Regulations are made under the *Corporations Act 2001* (the Corporations Act), subject to passage of the *Corporations Amendment (Corporate Insolvency Reforms) Bill 2020* (the Insolvency Reforms Bill).

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to the Regulations will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to the Regulations has effect according to its terms.

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Schedule 1 – Amendments relating to debt restructuring

The *Corporations Amendment (Corporate Insolvency Reforms) Bill 2020* (the Insolvency Reforms Bill) proposes to establish a new formal debt restructuring process for incorporated small businesses. Subject to passage of that Bill through Parliament, the newly established process will enable eligible, financially distressed but potentially viable firms to restructure their existing debts.

Schedule 1 to the Regulations inserts Part 3B in the *Corporations Regulations 2001* (the Corporations Regulations) to provide for the operation of the new formal debt restructuring process.

The formal debt restructuring process allows an eligible company to restructure their debts and maximise their opportunity for survival. The formal debt restructuring process will allow a company director to retain control of their business, and its property and affairs, while developing a plan to restructure their debt with the assistance of a small business restructuring practitioner.

The restructuring process covers the period during which a plan is being developed by the company director(s), following the appointment of a small business restructuring practitioner. The restructuring process ends once creditors vote to accept or reject the plan.

The restructuring plan sets out an approach for a company under financial distress to repay its existing debts. The requirements relating to the debt restructuring plan are prescribed in Schedule 1 to the Regulations.

Legislative references in this Schedule are made to Schedule 1 to the Regulations unless otherwise specified.

Entering the debt restructuring process

Eligibility for the debt restructuring process

Section 453C of the Insolvency Reforms Bill specifies the eligibility criteria that a company must meet to enter into the formal debt restructuring process. The provision provides that a company or person will be eligible for restructuring where:

- the regulations prescribe a test for eligibility based on the liabilities of the company and the test has been satisfied; and
- no director of a company (or any former director who left the company within the last 12 months) has been a director of another company that has been under restructuring or been the subject of a simplified liquidation process; and
- the company has not been under restructuring or been the subject of a simplified liquidation process.

The provision also provides that the Regulations may prescribe exemptions to the prohibition on having previously been engaged in a simplified liquidation or restructuring process.

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Liabilities test of the company

Section 453C of the Insolvency Reform Bill empowers the Corporations Regulations to prescribe a test for eligibility based on the liabilities of the company.

The Regulations prescribe that a company is eligible to enter the restructuring process if the total liabilities of the company on the day that restructuring begins does not exceed \$1 million. The meaning of liabilities includes any liability or obligation that is not contingent. *[Schedule 1, item 1, regulation 5.3B.03(1) and (5)]*

Previous use more than seven years ago

Section 453C also provides that the Corporations Regulations will prescribe the period in which the previous use must not have occurred (hereafter referred to as the 'previous use rule').

The Regulations prescribe a period of seven years as the period in which the previous use rule applies. The effect is that a director or company is eligible for the formal debt restructuring process where the director or the company previously used either the restructuring process or the simplified liquidation process more than seven years prior to the company seeking to satisfy the eligibility criteria for the restructuring process. *[Schedule 1, item 1, regulation 5.3B.03(2) and (3)]*

Previous use by a related body corporate

The Regulations prescribe circumstances where the company seeking to undergo the restructuring process may be exempt from the requirements that neither a director (nor former director) of the company, nor the company itself, has been under restructuring or been the subject of a simplified liquidation process within a seven-year period. This occurs where:

- there is another company within the body corporate that is also undergoing restructuring or simplified liquidation—20 business days before the day on which the restructuring of the company began.
- there is another company, which is one of multiple related bodies corporate of the company undergoing restructuring or simplified liquidation, and the director of the company seeking to undergo restructuring is also a current or former director (within the last 12 months) of the other company—20 business days before the day on which the company began.
- the other company is one of multiple related bodies corporate of the company, and the director is also a current or former director (within the last 12 months) of the other company and at least one other related body corporate—20 business days before the day on which the restructuring of the company began.

[Schedule 1, item 1, regulation 5.3B.03(2) to (4)]

The intention is to allow different companies within a body corporate group to enter into the restructuring process at the same time. This reflects the likelihood that if multiple companies within a corporate group is insolvent or likely to become insolvent, some or all of the companies that comprise the group will need to

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restructure or liquidate at the same or roughly the same time. In many instances, these related companies will have common directors. The term ‘related body corporate’ includes a company that is a holding company or subsidiary of the other (see sections 9 and 50 of the Corporations Act).

Director’s declaration

The Regulations prescribe that within five business days after the restructuring of a company begins (or such a longer period as the company’s small business restructuring practitioner allows), the directors must provide the small business restructuring practitioner with a declaration. *[Schedule 1, item 1, regulation 5.3B.44(1)]*

The declaration must state:

- that the company has not entered into a transaction that would be voidable under section 588FE of the Corporations Act, excluding unfair preferences, in the event that the company were wound up;
- that, in the directors’ opinion, there are reasonable grounds to believe that the eligibility criteria for restructuring were met in relation to the company at the time the restructuring began; and
- the reasons for that opinion.

[Schedule 1, item 1, regulation 5.3B.44(2)]

This declaration must be signed by each director of the company. *[Schedule 1, item 1, regulation 5.3B.44(3)]*

This declaration is intended to safeguard against potential illicit behaviour in the lead up to restructuring. For example, it would prevent company directors from transferring assets out of the company for creditor defeating purposes. If a director provides false or misleading information in the declaration, the director may be subject to civil or criminal penalties under section 1308 of the Corporations Act. These existing penalties within the Corporations Act penalties framework provide an appropriate level of deterrence against directors providing false or misleading information to the small business restructuring practitioner in order to enter into the restructuring process.

The directors’ declaration must be made in the prescribed form. *[Schedule 1, item ##, regulation 5.3B.44(1)]*

Under section 350 of the Corporations Act, if no such form is prescribed ASIC may approve a form for this purpose.

Features of the restructuring process

The company entering into a transaction or dealing affecting the property of the company

Generally, where the company is under restructuring, the company or the directors on behalf of the company, must not purport to enter into a transaction or dealing

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affecting the property of the company. A director who breaches this requirement commits an offence, the penalty for which is six months imprisonment (see proposed section 453L(1) of the Insolvency Reforms Bill, and section 1311(1) and Schedule 3 of the Corporations Act).

However, this prohibition does not apply if:

- entering into the transaction or dealing was in the ordinary course of the company's business;
- the small business restructuring practitioner has consented to the transaction or dealing and, if any conditions are imposed on that consent, those conditions are met; or
- the transaction or dealing was entered into under an order of the Court.

Section 453L(4) specifies that the Corporations Regulations may prescribe circumstances in which entering into a transaction or dealing is, or is not, to be treated as 'in the ordinary course of business' for a company. The Regulations prescribe that the following transactions or dealings are not to be treated as 'in the ordinary course of business':

- payment of a liability of the company that was incurred before the restructuring of the company began (except where it relates to the payment of entitlements of the company's employees);
- the sale of whole or part of the business; and
- payment of a dividend.

[Schedule 1, item 1, regulation 5.3B.04]

Where a company wishes to enter into a transaction or dealing that is outside the ordinary course of business, the board of the company may request consent from the small business restructuring practitioner as per section 453L(2) of the Insolvency Reforms Bill.

If the small business restructuring practitioner consents to a transaction or dealing outside of the ordinary course of business, the practitioner must provide the company with a written record of their consent within two business days. *[Schedule 1, item 1, regulation 5.3B.05(1) to (3)]*

Consent may be provided orally by the restructuring practitioner if the practitioner is satisfied that the delay caused by giving consent in writing would not be in the best interests of the company's creditors. *[Schedule 1, item 1, regulation 5.3B.05(2)]*

Consent by the small business restructuring practitioner to transactions or dealings outside of the ordinary course of business is subject to proposed sections 453L(6) and (7) of the Insolvency Reforms Bill, which provide that consent can only be given where the practitioner believes on reasonable grounds that it would be in the interests of the company's creditors to enter into the transaction or dealing.

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The company must keep a record of the consent for five years. Failure to keep a record for the required period is an offence under section 1311(1) of the Corporations Act.

[Schedule 1, item 1, regulation 5.3B.05(4)]

Small business restructuring practitioner for company under restructuring

Under section 453B of the Insolvency Reforms Bill, a company will enter the restructuring process if and when the directors appoint a small business restructuring practitioner. The role of a small business restructuring practitioner will involve providing advice and assisting the company in the preparation of the proposed debt restructuring plan, among other things.

Within one business day of being appointed, the small business restructuring practitioner must provide notice of the appointment to ASIC in accordance with regulation 5.6.75(4). They must also give the following information, to as many of the company's creditors as reasonably practicable:

- the fact that the company has appointed the restructuring practitioner;
- the details of the company such as name, trading name, and ACN;
- the contact details of the restructuring practitioner;
- the date the practitioner was appointed;
- the restructuring process and the process of making a restructuring plan;
- how to obtain further information on the process or the making of a restructuring plan; and
- the right of creditors to request information, reports and documents.

[Schedule 1, item 1, regulation 5.3B.45]

Section 453E(2) of the Insolvency Reforms Bill provides that the Corporations Regulations may provide for and in relation to the functions, duties and powers of the small business restructuring practitioner for a company under restructuring.

[Schedule 1, item 1, regulation 5.3B.07]

Functions of the small business practitioner for a company under restructuring

The Regulations prescribe that the small business restructuring practitioner for a company under restructuring has the power to investigate the company's business, property, affairs, and financial circumstances for the purposes of:

- preparing a certificate to certify the restructuring plan;
- deciding whether to terminate the restructuring of the company;
- resolving a disagreement relating to a creditor's admissible debts or claims; or

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- performing or exercising any other function, duty or power as the small business restructuring practitioner for the company.

[Schedule 1, item 1, regulation 5.3B.08]

Qualified Privilege

The Regulations also specify that a person who is or has been a small business restructuring practitioner for a company has qualified privilege in respect of a statement made, orally or in writing, in the course of performing or exercising any of their functions and powers as a small business restructuring practitioner for the company. *[Schedule 1, item 1, regulation 5.3B.09]*

Restructuring practitioner for company not liable for things done in good faith

Similarly, the Regulations also specify that a small business restructuring practitioner appointed for the company is not liable to an action or other proceeding for damages in respect of anything done by that person, in good faith and without negligence, in the performance or exercise, or purported performance or exercise, of any of the small business restructuring practitioner's functions, powers or duties as small business restructuring practitioner for the company. *[Schedule 1, item 1, regulation 5.3B.10]*

End of the restructuring process

Section 453A of the Insolvency Reforms Bill specifies that the circumstances under which the restructuring process of a company ends are to be prescribed by the Corporations Regulations.

The Regulations prescribe that the restructuring of a company ends if:

- the company makes a declaration that restructuring is to end;
- the company fails to propose a restructuring plan within the proposal period;
- the company's proposal to make a restructuring plan lapses (discussed below);
- the small business restructuring practitioner for the company terminates the restructuring process under section 453J of the Insolvency Reforms Bill and provides a notice to that effect (discussed below);
- the Court orders that the restructuring of the company is to end;
- the company enters into another external administration process, and an administrator, liquidator or provisional liquidator is appointed to the company;
- 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

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company appointed by the Federal Court under Part 8 of the *Life Insurance Act 1995*; or

- the company makes a restructuring plan.

[Schedule 1, item 1, regulation 5.3B.02(1)]

Where the directors of a company under restructuring make a declaration to end that restructuring, the declaration must be in writing and specify the day on which restructuring is to end. The directors must give a copy of the declaration to the company's small business restructuring practitioner, the company's creditors and ASIC before the end day specified in the declaration. *[Schedule 1, item 1, regulation 5.3B.02(2)]*

Where the small business restructuring practitioner for a company terminates the restructuring process under section 453J of the Insolvency Reforms Bill, the practitioner must give notice of the termination, in writing, to the company and as many of its creditors as reasonably practicable. This notice must include certain information that is prescribed in the Corporations Regulations.

The Regulations prescribe that in the notice, the following information must be provided about the company:

- the name and the trading name of the company;
- the Australian Company Number (ACN) of the company;
- the address of the company's registered office;
- any website maintained by or on behalf of the company;
- the company's email address (if any).

[Schedule 1, item 1, regulation 5.3B.06(a)]

The Regulations also prescribe that the following details about the small business restructuring practitioner are to be provided in a notice of termination:

- the small business restructuring practitioner's name;
- the address and telephone number of the principal place where the small business restructuring practitioner practices as a registered liquidator;
- if the restructuring practitioner practises as a registered liquidator as a member of a firm or under a name or style other than their own name—the name of that firm or the name or style under which the practitioner practises;
- the small business restructuring practitioner's Registered Liquidator Number as specified on the Register of Liquidators;
- the day on which the restructuring of the company began;

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- the day on which the notice is given to the company for termination of the restructuring;
- the reason for terminating the restructuring;
- the signature of the small business restructuring practitioner; and
- any other information that the small business restructuring practitioner considers appropriate.

[Schedule 1, item 1, regulation 5.3B.06(b) to (g)]

Debt restructuring plan

Once a small business restructuring practitioner has been appointed to the company, the directors, on behalf of the company, will develop a debt restructuring plan. The debt restructuring plan must be proposed to the creditors within 20 business days of starting the restructuring process.

Section 455B of the Insolvency Reforms Bill provides for a range of regulation-making powers to prescribe matters relevant to a restructuring plan. *[Schedule 1, item 1, regulation 5.3B.11]*

To establish the legislative framework for debt restructuring plans under new Part 5.3B of the Insolvency Reforms Bill, the Regulations prescribe information relating to:

- proposing a restructuring plan;
- making, varying and terminating a restructuring plan;
- debts and claims in relation to a restructuring plan;
- contributories in relation to a restructuring plan;
- circumstances in which the restructuring plan is void and the consequences if all or part is void;
- circumstances that constitute a contravention of a restructuring plan and the consequences;
- the small business restructuring practitioner for a restructuring plan;
- information, reports or other documents in relation to a restructuring plan; and
- powers of the Court in relation to a restructuring plan.

These matters are discussed in further detail below.

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Proposing a restructuring plan

Section 455A of the Insolvency Reform Bill provides that a company proposes a restructuring plan to its creditors. In doing so, the company is taken to be insolvent. This section further provides that regulations may prescribe the time at which the company is taken to have proposed a restructuring plan.

The Regulations prescribe that the company is taken to have proposed a restructuring plan on the day the company's small business restructuring practitioner gives the proposed restructuring plan and associated documentation (described below) to affected creditors. *[Schedule 1, item 1, regulation 5.3B.12(2)]*

In this context, ***affected creditors*** are creditors who would be a party to the restructuring plan if it were made. Once the plan is made, all creditors who had admissible debts or claims when the plan was made, are affected creditors. *[Schedule 1, item 1, regulation 5.3B.01]*

Section 455B of the Insolvency Reforms Bill provides for a range of regulation-making powers to prescribe matters relevant to a restructuring plan, including how a restructuring plan is proposed to affected creditors.

The Regulations specify how a restructuring plan is proposed to affected creditors. This occurs if:

- the company prepares a compliant restructuring plan and restructuring proposal statement;
- the company executes the restructuring plan during the proposal period;
- the company's small business restructuring practitioner certifies the restructuring plan;
- the company's small business restructuring practitioner gives the restructuring plan and certificate to affected creditors; and
- before the restructuring plan and other documents required by regulation 5.3B.19 are provided to affected creditors, the company has paid all of the entitlements of its 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*).

[Schedule 1, item, 1, regulation 5.3B.12(1)]

Contents of the proposed restructuring plan

A company under restructuring must prepare a restructuring plan that complies with the requirements of the regulation. *[Schedule 1, item 1, regulation 5.3B.13(1)]*

To propose a restructuring plan, the company must prepare a restructuring plan that:

- is in the approved form;

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- identifies the company's property that is to be dealt with;
- specifies how the property is to be dealt with;
- provide for the remuneration of the small business restructuring practitioner for the plan; and
- specifies the date on which the restructuring plan was executed (signed by the company directors).

[Schedule 1, item 1, regulation 5.3B.13(2)]

The proposed restructuring plan may also:

- authorise the small business restructuring practitioner for the plan to deal with the property in a particular way;
- provide for any matter relating to the company's financial affairs; and
- be subject to the occurrence of a specified event that must occur within 10 business days of affected creditors accepting the draft restructuring plan .

[Schedule 1, item 1, regulation 5.3B.13(3)]

The proposed restructuring plan must not provide for the transfer of property (other than money) to a creditor, and the duration of the plan must not exceed five years from when the plan was made. *[Schedule 1, item 1, regulation 5.3B.13(4)]*

In addition to the prescribed contents of a restructuring plan as outlined above, each restructuring plan is taken to include a set of standard terms. These ***restructuring plan standard terms*** are prescribed as follows:

- all admissible debts and claims rank equally;
- if the total amount paid by the company under the plan in respect of those debts or claims is insufficient to meet those debts or claims in full, those debts or claims are paid proportionately;
- a creditor is not entitled to receive, in respect of an admissible debt or claim, more than the amount of the debt or claim;
- the amount of an admissible debt or claim is ascertained as at the time immediately before restructuring began;
- if a creditor is a secured creditor:
 - if the creditor does not realise the creditor's security interest while the plan is in force, the creditor is taken, for the purposes of working out the amount payable to the creditor under the plan, to be a creditor only to the extent (if any) by which the amount of the creditor's admissible debt or claim exceeds the value of the creditor's security interest; and

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- if the creditor realises the creditor's security interest while the plan is in force, the creditor is taken, for the purposes of working out the amount payable to the creditor under the plan, to be a creditor only to the extent of any balance due to the creditor after deducting the net amount realised.

[Schedule 1, item 1, regulation 5.3B.25(1)]

A restructuring plan is void to the extent that it is inconsistent with any of these standard terms. *[Schedule 1, item 1, regulation 5.3B.25(2)]*

The company must also prepare a **restructuring proposal statement** to accompany the restructuring plan. *[Schedule 1, item 1, regulations 5.3B.01 and 5.3B.14(1)]*

This statement must:

- include a schedule of debts and claims to be covered by the restructuring plan;
- be in the prescribed form (or, in the absence of a prescribed form, be in the form approved by ASIC for this purpose); and
- contain any specific information relating to the company or its directors that is required by the prescribed form.

[Schedule 1, item 1, regulation 5.3B.14(2)]

A schedule of debts and claims should comprise a list of known debts and claims owed by the company, including the names of creditors and information relating to the creditor's status such as if they are an excluded creditor.

The company finalises the proposed restructuring plan

Once a restructuring plan has been drafted, the company must execute the restructuring plan within the proposal period. The **proposal period** is 20 business days from the day the restructuring process began. *[Schedule 1, item 1, regulation 5.3B.15(1)]*

The company's small business restructuring practitioner may, on application by the company, extend the proposal period by up to 10 business days. The small business restructuring practitioner may only extend the proposal period if they are satisfied on reasonable grounds that it would not be reasonable, in the circumstances, to require the company to provide a restructuring plan within the proposal period. *[Schedule 1, item 1, regulation 5.3B.15(2)]*

For example, if an illness or other unforeseeable event significantly impacts the company directors' ability to finalise and execute the proposed plan within the 20 business day proposal period.

The proposal period may not be extended more than once by the small business restructuring practitioner. *[Schedule 1, item 1, regulation 5.3B.15(3)]*

The Court may also extend the proposal period as it considers appropriate, upon application by the company. *[Schedule 1, item 1, regulation 5.3B.15(4)]*

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The execution of a restructuring plan must be done in accordance with section 127 of the Corporations Act. Section 127 of the Corporations Act provides that a document is executed if it is signed by either two directors, a director and a company secretary, or one director only (if the company has a sole director who is also the sole company secretary).

Small business restructuring practitioner must certify the proposed restructuring plan

The small business restructuring practitioner is to prepare and sign a certificate, as soon as practicable, after the company executes a proposed restructuring plan.

[Schedule 1, item 1, regulation 5.3B.16(1) and (3)]

The purpose of the certificate is to provide the affected creditors with an assurance that the proposed restructuring plan contains all relevant information to enable the creditors to make an informed decision on whether to accept or reject the proposed restructuring plan. This is similar to the requirement for a debt agreement administrator's certificate contained in the Bankruptcy Act.

The certificate must state that the restructuring practitioner believes on reasonable grounds that:

- the company has met the eligibility criteria;
- the company is likely to be able to discharge the obligations created by the restructuring plan as and when they become due and payable; and
- all required information has been set out in the company's restructuring proposal statement.

[Schedule 1, item 1, regulation 5.3B.16(2)(a) and (b)]

Where the restructuring practitioner does not believe on reasonable grounds that the company has met the above-listed criteria, the practitioner must identify which criteria have not been met, as well as the reasons supporting their conclusions. *[Schedule 1, item 1, regulation 5.3B.16(2)(c)]*

Where the company has been referred to the small business restructuring practitioner by a **broker**, the certificate must also set out details of the relationship between the broker and the restructuring practitioner and, details of any past or future payments made to the broker by the restructuring practitioner in connection with that referral.

[Schedule 1, item 1, regulation 5.3B.16(2)(d)]

Where an affected creditor is also a related entity of the restructuring practitioner, the certificate must also specify the name of the affected creditor and the nature of the relationship between the affected creditor and the restructuring practitioner. *[Schedule 1, item 1, regulation 5.3B.16(2)(e)]*

The small business restructuring practitioner must make reasonable inquiries into, and take reasonable steps to verify the company's business, property, affairs and financial circumstances before certifying the proposed restructuring plan. A failure by the practitioner to do so when preparing a certificate is an offence of strict liability. The penalty for this offence is 50 penalty units. *[Schedule 1, item 1, regulation 5.3B.16(4) and (5)]*

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A strict liability offence is appropriate to provide an incentive for the small business restructuring practitioner to meet their duties, functions and obligations during the restructuring process thus ensuring the integrity of the process is maintained.

If a restructuring practitioner provides false or misleading information, or omits information that would render the certificate materially false or misleading, the practitioner may be subject to civil or criminal penalties under section 1308 of the Corporations Act. These are existing penalties within the Corporations Act penalties framework, and provide an appropriate level of deterrence in relation to the restructuring practitioner's obligation to certify the restructuring plan.

If at any time before the small business restructuring practitioner certifies the proposed plan, the practitioner becomes aware that information contained in the plan or the restructuring proposal statement is incomplete or inaccurate, and believes this is likely to affect the company's ability to meet its obligations under the plan, the restructuring practitioner must notify the company and provide an opportunity for the company to address their concerns. *[Schedule 1, item 1, regulation 5.3B.17(1)]*

A failure of the small business restructuring practitioner to provide notification to the company of this information is an offence of strict liability. The penalty for this offence is 50 penalty units. *[Schedule 1, item 1, regulation 5.3B.17(2)]*

The strict liability offences enhance the integrity of the certification by the restructuring practitioner of the proposed restructuring plan. The offence is not punishable by imprisonment, and carries a penalty of only 50 penalty units. In this way, the penalty is consistent with the Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement, Notices and Enforcement Powers (September 2011 Edition) (the Guide to Framing Commonwealth Offences).

Company must ensure employee entitlements and tax lodgements are up to date

Before the proposed restructuring plan can be given to affected creditors, the company must ensure that all employee entitlements and tax lodgements are up to date.

In particular, the company must have paid all employee entitlements which are payable, other than contingent entitlements. The company must have also lodged all tax returns, notices, statements, applications or other documents as required by taxation laws (within the meaning of the *Income Tax Assessment Act 1997*) to the Australian Taxation Office. *[Schedule 1, item 1, regulation 5.3B.22]*

Employee entitlements are defined in section 596AA(2) and (3) of the Corporations Act, and include wages, superannuation contributions, retrenchment payments as well as amounts due in respect of injury compensation. *[Schedule 1, item 1, Note to regulation 5.3B.22]*

This is an important safeguard that prevents a company with outstanding unpaid employee entitlements and outstanding tax lodgement obligations from obtaining the benefit of the debt restructuring process. These requirements are consistent with the eligibility criteria for the simplified liquidation process.

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A restructuring practitioner may cancel a company's proposal to make a restructuring plan

The company's small business restructuring practitioner may cancel the company's proposed restructuring plan if they become aware of any of the following before the plan is made:

- the information in the proposed restructuring plan is incomplete or inaccurate, and they believe on reasonable grounds that this incompleteness or inaccuracy is likely to affect the company's ability to meet their obligations under the plan;
- one or more affected creditors were not disclosed in the proposed restructuring plan;
- the company's restructuring proposal statement for the proposed restructuring plan was deficient because a material particular of the statement was either omitted or incorrect; or
- a material change in the company's circumstances that:
 - was not foreshadowed in the company's restructuring proposal statement for the proposed restructuring plan; and
 - in the opinion of the small business restructuring practitioner, is capable of affecting an affected creditor's decision whether or not to accept the proposed restructuring plan

[Schedule 1, item 1, regulations 5.3B.18(1)(b) and (2)]

A material change in the circumstances of the company includes a change that is more than trivial, such as a change that could reasonably be expected to affect the affected creditor's decision whether or not to accept the proposed restructuring plan.

If the small business restructuring practitioner cancels the proposed plan before it is made, the plan lapses and the company's restructuring process is terminated.

[Schedule 1, item 1, regulation 5.3B.02(1)(c)]

Where a proposed restructuring plan has lapsed, the small business restructuring practitioner for the company must, within five business days:

- notify as many creditors as reasonably practicable, in writing, that the proposed restructuring plan has lapsed and the reasons why; and
- lodge with ASIC, a notice in the prescribed form of the lapsing of the proposed plan.

[Schedule 1, item 1, regulation 5.3B.46]

Accepting a proposal for a restructuring plan

For the proposed restructuring plan to be made, the small business restructuring practitioner must provide the restructuring plan, along with accompanying

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documents to creditors. If this does not occur within the proposal period, the company's restructuring process is terminated. *[Schedule 1, item 1, regulation 5.3B.02(1)(b)]*

The affected creditors will have the opportunity to vote for the proposed restructuring plan. If a majority, by value, of the affected creditors who reply before the end of the acceptance period accept the proposed plan, the plan will be made. If the plan is rejected by a majority of the affected creditors who reply before the end of the acceptance period, or cancelled by the practitioner for another reason, the plan will lapse and the restructuring process will be terminated.

Excluded creditors do not vote on the plan, however, will still be party to the plan once the plan has been made. An **excluded creditor** is a creditor who is the restructuring practitioner, a related creditor of the company or a related entity of the restructuring practitioner. This includes company directors and members and their relatives. *[Schedule 1, item 1, regulation 5.3B.01]*

The term **related creditor** is a creditor of the company who is also a 'related entity' of the company as defined in section 9 of the Corporations Act. This reflects the view that a related creditor may have an incentive to control the vote in a way that is personally beneficial but detrimental to the creditors as a whole. *[Schedule 1, item 1, regulation 5.3B.01]*

Giving the proposed plan to affected creditors

As soon as practicable following the execution of the restructuring plan by the company's directors, the small business restructuring practitioner must give the proposed restructuring plan (and the other prescribed documents) to as many of the affected creditors as reasonably practicable. This includes a copy of:

- the company's proposed restructuring plan and restructuring proposal statement;
- the restructuring plan standard terms; and
- the certificate prepared by the small business restructuring practitioner.

[Schedule 1, item 1, regulation 5.3B.19(1)(a)]

The small business restructuring practitioner must also ask the affected creditors to:

- give a written statement of whether or not they accept the proposed restructuring plan; and
- if the creditor agrees with the company's assessment of the amount of the creditor's admissible debts or claims—verify the creditor's admissible debts or claims as set out in the restructuring plan; or
- if the creditor disagrees with the company's assessment of the amount of the creditor's admissible debts or claims—notify the restructuring practitioner in accordance with regulation 5.3B.20 (discussed below).

[Schedule 1, item 1, regulation 5.3B.19(1)(b)]

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The small business restructuring practitioner must inform the affected creditors of the person to whom the statement should be given and of the need to do so within the acceptance period. *[Schedule 1, item 1, regulation 5.3B.19(1)(c)]*

The *acceptance period* is:

- 15 business days beginning on the day the small business restructuring practitioner gives the proposed restructuring plan and other prescribed documents to creditors; or
- if the restructuring practitioner has provided a notice to creditors recommending that the schedule of debts and claims be varied because of a disagreement by a creditor concerning the amount of the creditor's admissible debts or claim—the longer of:
 - 15 business days beginning on the day the small business restructuring practitioner gives the required documents to creditors; and
 - the period beginning on the day the company's restructuring practitioner gives the required documents to creditors and ending on the last day of the period of five business days after the day on which the notice is given; or
- where a creditor applies to the Court because of a disagreement by the creditor with the schedule of debts or claim or because their status as an excluded creditor—such other period as is ordered by the Court.

[Schedule 1, item 1, regulation 5.3B.19(3)]

Since excluded creditors are unable to vote on the proposed restructuring plan, these creditors will be asked to verify their debt or claim, but will not be asked to provide a written statement to accept or reject the proposed restructuring plan. *[Schedule 1, item 1, regulation 5.3B.19(2)]*

Creditors' rights to dispute the schedule of debts and claims

The Regulations provide a system to allow a creditor to dispute matters set out in the schedule of debts and claims included with the company's restructuring proposal statement. This applies where:

- a company proposes to make a restructuring plan; and
- the plan has not been made; and
- the creditor of the company disagrees with the company's assessment of the creditor's admissible debts or claims or their status as an excluded creditor.

[Schedule 1, item 1, regulation 5.3B.20(1)]

A creditor that seeks to dispute a matter in this way must provide notice of the disagreement to the company's restructuring practitioner. If the creditor has received a copy of the restructuring plan—the creditor must notify the company's restructuring

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practitioner within five business days of receiving the plan. If the creditor has not received a copy of the restructuring plan but has otherwise become aware of it—the creditor must notify the company’s restructuring practitioner within five business days of becoming aware. *[Schedule 1, item 1, regulation 5.3B.20(2)]*

The Regulations prescribe what the creditor must include in the notice of the disagreement. If the relates to the creditor’s admissible debts or claims, the notice must include each of the following:

- detailed particulars of the debt or claim sought to be proved;
- if the disagreement relates to a debt—a statement of account and details of the vouchers (if any) by which the statement can be substantiated.

[Schedule 1, item 1, regulation 5.3B.20(3)]

If the disagreement relates to the creditor’s status as an excluded creditor, the notice must include detail sufficient to resolve the disagreement. *[Schedule 1, item 1, regulation 5.3B.20(3)]*

In order to properly assess the disagreement, the restructuring practitioner may seek further information. Specifically, after receiving a disagreement notice, the restructuring practitioner may request that the creditor or the directors of the company give the restructuring practitioner information about the company’s business, property, affairs and financial circumstances. The restructuring practitioner may also request that the information is verified by statutory declaration. *[Schedule 1, item 1, regulation 5.3B.20(4)]*

Following assessment of the disagreement, the restructuring practitioner must give a notice in writing to the company and the creditor. The notice must set out the restructuring practitioner’s recommendations for resolving the disagreement and their reasons for the recommendations. The restructuring practitioner must give the notice within five business days of receiving the disagreement notice. *[Schedule 1, item 1, regulation 5.3B.20(5)(a)]*

If the restructuring practitioner recommends that the schedule of debts and claims be varied and is of the opinion that the variation is significant—the restructuring practitioner must include further information in the notice. In these circumstances, the notice must state that the restructuring practitioner recommends that the schedule of debts and claims be varied and is of the opinion that the variation is significant. The notice must also outline the creditors’ rights under regulation 5.3B.21 (relating to creditors changing their vote if the proposal is varied – described below). The restructuring practitioner must give the notice in writing to the company and as many of the company’s creditors as is reasonably practicable. The restructuring practitioner must give the notice within five business days of receiving the disagreement notice. *[Schedule 1, item 1, regulation 5.3B.20(5)(b)]*

As soon as reasonably practicable after the restructuring practitioner recommends that the schedule of debts and claims be varied, the company must vary the schedule in accordance with the recommendation. *[Schedule 1, item 1, regulation 5.3B.20(6)]*

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Creditors' rights to change their vote if a proposal is varied

The Regulations allow for a creditor to change their vote on a proposal if the proposal is varied. This applies where:

- a company proposes to make a restructuring plan; and
- the restructuring practitioner for the company has given notice of a recommendation to vary the schedule of debts and claims included with the company's restructuring proposal (in accordance with regulation 5.3B.20(5)(a) - described above); and
- before the notice of the recommendation was given, the creditor who wishes to change their vote gave written statement setting out whether or not the restructuring plan should be accepted (in accordance with regulation 5.3B.19(1)(b) - described above).

[Schedule 1, item 1, regulation 5.3B.21(1)]

In these circumstances, the creditor may withdraw the statement and give a new statement in relation to the restructuring plan (in accordance with regulation 5.3B.19(1)(b) – described above). The creditor may do so within five business days after the day on which the creditor receives the notice regarding the recommendation to vary the schedule of debts and claims. *[Schedule 1, item 1, regulation 5.3B.21(2)]*

A creditor may also change their vote on a proposal if the Court makes an order to vary the schedule of debts and claims included with the company's restructuring proposal statement. The Court may do so under regulation 5.3B.51(2). Again, for the creditor to change their vote the company must have proposed to make a restructuring plan and the creditor who wishes to change their vote must have given written statement setting out whether or not the restructuring plan should be accepted (in accordance with regulation 5.3B.19(1)(b)). In these circumstances, the creditor may withdraw the statement and give a new statement in relation to the restructuring plan (in accordance with regulation 5.3B.19(1)(b) – described above). The creditor may do so within five business days after the day on which the creditor receives from the restructuring practitioner the notice that sets out the terms of the Court's order (this notice is given under regulation 5.3B.51(3)). *[Schedule 1, item 1, regulation 5.3B.21(1)]*

Court's power to settle a dispute regarding the proposed restructuring plan

Under section 458B of the Insolvency Reforms Bill, regulations may confer powers on the Court in relation to the restructuring of companies and restructuring plans. *[Schedule 1, item 1, regulation 5.3B.50]*

A creditor that disagrees with the company's assessment of the value of their debt or claim in the schedule of debts and claims or their status as an excluded creditor, may apply to the Court to vary the schedule of debts and claims (either adjusting the value of debt or claim, or the status of the creditor), or to extend the acceptance period for the proposed restructuring plan. This is premised on the creditor having first notified the small business restructuring practitioner for the company about the disagreement and the restructuring practitioner either making a recommendation to vary, or

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refusing to vary, the schedule of debts and claims. *[Schedule 1, item 1, regulation 5.3B.51(1) and (2)]*

Within five business days of the Court making an order, the small business restructuring practitioner must notify, in writing, as many of the company's creditors as is reasonably practicable of the terms of the order and provide an outline of the creditor's rights. The restructuring practitioner must also lodge a notice of the order with ASIC in the prescribed form. *[Schedule 1, item 1, regulation 5.3B.51(3)]*

Further powers of the Court in relation to debt restructuring plans (once made) are discussed below.

Accepting the proposed restructuring plan by creditors

The proposed restructuring plan is **accepted** if a majority in value of the affected creditors who reply within the acceptance period state that it should be accepted. *[Schedule 1, item 1, regulations 5.3B.01 and 5.3B.23(1) and (5)]*

In assessing whether a majority in value has been met, the value of admissible debts or claims for a creditor is worked out with reference to:

- the value of the creditor's claims known at the time that restructuring began; or
- if a debt has been purchased from another affected creditor—the value of the purchase price.

[Schedule 1, item 1, regulation 5.3B.23(2)(a)]

In the instance that there are mutual credits, debts or other mutual dealings between the company and the affected creditor, the value of the admissible debt or claim is the balance of the accounts. This is worked out by taking account of what is due from the one party to the other in respect of those mutual dealings and setting off the sum due from one party against any sum due from the other party. *[Schedule 1, item 1, regulation 5.3B.23(2)(b)]*

The value of debts or claims of excluded creditors is disregarded in assessing if a majority of affected creditors have provided statements in relation to the proposed restructuring plan. *[Schedule 1, item 1, regulation 5.3B.23(2)(c)]*

It is an offence for a person to give, or agree or offer to give, any valuable consideration to an affected creditor with the intention of affecting the acceptance or rejection of the proposed restructuring plan. This is a strict liability offence that carries a penalty of 50 penalty units. This offence has been made with regard to the Guide to Framing Commonwealth Offences. It is appropriate to ensure the integrity of the process and discourages misuse, by all parties, of the restructuring process. *[Schedule 1, item 1, regulation 5.3B.23(3) and (4)]*

Rejection by the affected creditors of the proposed restructuring plan

If a company's proposal to make a restructuring plan is not accepted by the majority in value of the company's affected creditors, the proposal will lapse and the

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company's restructuring process ends. *[Schedule 1, item 1, regulations 5.3B.02(1)(c) and 5.3B.18(1)(a)]*

Where a proposed restructuring plan has lapsed, the small business restructuring practitioner for the company must, within five business days:

- notify as many creditors as reasonably practicable, in writing, that the proposed restructuring plan has lapsed and the reasons why; and
- lodge with ASIC, a notice in the prescribed form of the lapsing of the proposed plan.

[Schedule 1, item 1, regulation 5.3B.46]

The effect of making a restructuring plan

The company's restructuring process ends when the restructuring plan is made. *[Schedule 1, item 1, regulation 5.3B.02(1)(f)]*

When a restructuring plan is made

A restructuring plan is made when the proposed restructuring plan is accepted by the majority in value of affected creditors who voted during the acceptance period.

[Schedule 1, item 1, regulation 5.3B.24(1)]

The parties to the restructuring plan are the company and the affected creditors.

[Schedule 1, item 1, regulation 5.3B.26]

The restructuring plan is taken to be made on the day after:

- the acceptance period ends, if a company's proposed restructuring plan is accepted by a majority in value of affected creditors who vote within that period;
- the specified period for the occurrence of a specified event if:
 - a company's proposed restructuring plan is accepted by a majority in value of eligible creditors who vote within the acceptance period; and
 - the proposed restructuring plan is subject to the occurrence of a specified event within a specified period after the plan is accepted and the event occurs within that specified period.

[Schedule 1, item 1, regulations 5.3B.24(2)]

Within five business days from the day a restructuring plan is made by the company, the small business restructuring practitioner for the plan must:

- notify each creditor in writing that a restructuring plan has been made and the date that the plan was made; and
- lodge with the ASIC, the following:
 - a notice in the prescribed form of the making of the plan;

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- information about the total value of the debts and claims of the company;
- details of the number of creditors to whom the proposal to make a restructuring plan was sent; and
- proportion in value of the company's affected creditors who stated before the end of the acceptance period that the plan should be accepted.

[Schedule 1, item 1, regulation 5.3B.47]

Creditors are bound by the restructuring plan

On and after the day on which a restructuring plan is made, the restructuring plan binds creditors with admissible debts or claims, the company, the company's officers and members and the small business restructuring practitioner for the plan. *[Schedule 1, item 1, regulation 5.3B.27(1) and (2)]*

Secured creditors are only bound by the plan to the extent that they agree to be so bound by the plan, and to the extent that their admissible debt or claim exceeds the value of their security interest. *[Schedule 1, item 1, regulation 5.3B.27(3)]*

A secured creditor is not prevented from realising or otherwise dealing with their security interest after the restructuring plan is made, unless the secured creditor has consented to be bound by the restructuring plan and the plan prevents them from realising or dealing in the security interest or because a Court so orders under proposed section 454F(2) of the Insolvency Reforms Bill. *[Schedule 1, item 1, regulations 5.3B.27(4) and 5.3B.55]*

Protections of the company and its property

While the restructuring plan is on foot, a person bound by the restructuring plan cannot make an application to wind up the company on the basis of an admissible debt or claim or proceed with such an application made before the plan became binding on the person. *[Schedule 1, item 1, regulation 5.3B.28(1) and (2)]*

In addition, a person bound by the plan must not begin or proceed with a proceeding, or an enforcement process, against the company in relation to any of its property to recover an admissible debt or claim, unless they have Court leave to do so and act within the terms of set by the Court. *[Schedule 1, item 1, regulation 5.3B.28(3)]*

Property under this regulation is intentionally broad to include *Personal Property Securities Act 2009* retention of title property of the company (see, section 51F of the Corporations Act for the definition) as well as any other property used or occupied by, or in the possession of the company (see, section 9 of the Corporations Act for the definition of 'property'). *[Schedule 1, item 1, Note to regulation 5.3B.28(4)]*

Rights of creditors not included in the restructuring plan

After a debt restructuring plan has been made, if an affected creditor of the company becomes aware that their admissible debts or claims are not included in the schedule of debts and claims included with the company's restructuring proposal statement,

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they must notify the small business restructuring practitioner for the plan as soon as reasonably practicable of the omission. This regulation does not apply to related creditors of the company. *[Schedule 1, item 1, regulation 5.3B.29(1) and (2)]*

A notice provided by the affected creditor to the company's small business restructuring practitioner for the plan must include detailed particulars of the debt or claim sought to be proved, in the case of a debt, include a statement of account, and specify any vouchers by which the statement may be substantiated. *[Schedule 1, item 1, regulations 5.3B.29(3)]*

The restructuring practitioner may request that the affected creditor or the directors of the company provide information about the company's business, property, affairs and financial circumstances, verified by statutory declaration *[Schedule 1, item 1, regulations 5.3B.29(4)]*

Within five business days of receiving the notice, the restructuring practitioner for the plan must give written notice to the company and the affected creditor setting out the outcome of their claim and the reasons for their decision. The restructuring practitioner for the plan must reject a debt or claim if satisfied the person is a related creditor of the company. *[Schedule 1, item 1, regulations 5.3B.29(5) and (6)]*

If the restructuring practitioner decides to admit the debt or claim, they must give notice to each of the parties to the plan of the decision, and deal with the debt or claim in accordance with the terms of the plan. *[Schedule 1, item 1, regulation 5.3B.29(7)(a)]*

The company is not ineligible to continue the restructuring merely because the eligibility criteria to enter the restructuring process would not have been met, had this debt or claim been known at the beginning of the restructuring process. *[Schedule 1, item 1, regulation 5.3B.29(7)(b)]*

Restructuring plan can only be varied by Court order

Once a restructuring plan is made, it cannot be varied other than by order of the Court. The Court may make such an order on its own initiative, or on the application of the company, an affected creditor, the small business restructuring practitioner or ASIC. *[Schedule 1, item 1, regulation 5.3B.52]*

Rights, obligations and liabilities in relation to the restructuring practitioner

Section 456G of the Insolvency Reforms Bill provides that the regulations may make provision for the rights, obligations and liabilities of a company, its directors and officers in relation to the small business restructuring practitioner for the company. *[Schedule 1, item 1, regulation 5.3B.41]*

The directors of a company that has made a restructuring plan that has not terminated must notify the small business restructuring practitioner for the plan within five business days if they become aware that:

- the company is not likely to be able to meet its obligations under the plan as and when they fall due;
- an administrator, liquidator or provisional liquidator of the company is appointed;

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- all of the obligations under the plan have been fulfilled and all creditors' admissible debts or claims under the plan have been dealt with in accordance with the plan.

[Schedule 1, item 1, regulation 5.3B.42]

Terminating a debt restructuring plan

Under proposed section 455B of the Insolvency Reforms Bill, the Corporations Regulations may prescribe circumstances in which a restructuring plan is terminated, contravened, or when all or part of a restructuring plan is void as well as the consequences of termination.

These circumstances are discussed in detail below.

Termination of a restructuring plan

The Regulations provide that a restructuring plan terminates on whichever happens first of:

- the day on which all of the 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 makes an order to terminate the plan (further discussion below), the day specified in the order;
- if the plan is expressed to be subject to the occurrence of a specified event within a specified period of no longer than 10 business days after the plan is made, and that event does not occur within that period, then the next business day after the end of that period;
- if there has been a contravention of the plan by a person bound by the plan, and this has not been rectified within 30 business days beginning on the date of the contravention, then the next business day after the end of that period; or
- the day an administrator, liquidator or provisional liquidator of the company is appointed and the company enters liquidation or a voluntary administration process.

[Schedule 1, item 1, regulation 5.3B.30(1)]

Where the restructuring plan terminates because all obligations under the plan have been fulfilled, and all admissible debts and claims have been dealt with in accordance with the plan, the company is entitled to retain any property that was subject to the restructuring plan but was not required to be distributed to creditors. The company is also released from all admissible debts and claims that arose due to circumstances before the beginning of the restructuring process. *[Schedule 1, item 1, regulation 5.3B.30(2)]*

Where the restructuring plan terminates for any reason other than the obligations under the plan being fulfilled, the company must notify the small business

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restructuring practitioner for the plan of the termination within one business day of the event. Any outstanding debts or claims under the plan are taken to be due and payable on the day on which the plan's termination occurs. *[Schedule 1, item 1, regulation 5.3B.30(3)]*

The small business restructuring practitioner for the plan is to give written notice of the termination of the plan to the company and as many of the company's creditors as reasonably practical, and lodge a notice of the termination with ASIC in the prescribed form within five business days of the plan terminating. Failure to give notice within the required timeframe is an offence under section 1311(1) of the Corporations Act. *[Schedule 1, item 1, regulation 5.3B.49]*

Notice provisions are discussed further below.

Effect of termination of a plan

The termination or avoidance of a restructuring plan in the whole or part, does not affect the validity of anything done in good faith under the plan by a person prior to the person having notice of the termination or avoidance. *[Schedule 1, item 1, regulation 5.3B.31]*

Powers of the Court to vary, void and terminate a debt restructuring plan

Section 458A of the Insolvency Reforms Bill gives the Court a broad power to make orders as it thinks appropriate about how the new formal debt restructuring process in Part 3B of that Bill should operate in relation to a particular company. Section 458B of the Insolvency Reforms Bill also provides that regulations may confer other powers on the Court, including specific powers for the Court to vary, void, validate or terminate a restructuring plan. *[Schedule 1, item 1, regulation 5.3B.50]*

Where a restructuring plan has already been made, an affected creditor, the company, the small business restructuring practitioner for the plan or ASIC may apply to the Court to vary the plan, declare that part or all of the plan is either void or valid, or terminate the plan. *[Schedule 1, item 1, regulations 5.3B.52(2), 5.3B.53(4) and 5.3B.54(2)]*

The Court may also vary or terminate a restructuring plan on its own initiative. *[Schedule 1, item 1, regulations 5.3B.52(2) and 5.3B.54(2)]*

The Court may also make any other order in relation to the voiding or validating of a plan that it thinks is appropriate. *[Schedule 1, item 1, regulation 53(2)]*

In this instance, the Court refers to a superior court, such as a State or Territory Supreme Court, the Family Court of Australia or the Federal Court (unless jurisdiction has been provided to a lower court). This is consistent with section 58AA of the Corporations Act.

The Court may void or validate a restructuring plan

A Court may make an order to void part or all of a restructuring plan if it is satisfied that:

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- there are reasonable grounds to believe that the whole, or part, of the plan was not made in accordance with, or does not comply, with the Corporations Act or the Regulations;
- the small business restructuring practitioner for the plan commits a breach of duty in relation to the restructuring plan;
- the small business restructuring practitioner for the plan has breached a condition of their registration as a liquidator;
- the small business restructuring practitioner for the plan breaches a condition imposed on their registration as a registered liquidator, to the extent the condition relates to the restructuring plan.

[Schedule 1, item 1, regulation 5.3B.53(1)]

The Court may make an order declaring the whole, or part of, the restructuring plan is valid despite a contravention of a provision of the Corporations Act or the Corporations Regulations, if satisfied that the provision was substantially complied with and no injustice will result for anyone bound by the plan if the contravention is disregarded. *[Schedule 1, item 1, regulation 5.3B.53(3)]*

The Court must not make an order to vary or void a plan that has already been terminated for any other reason. *[Schedule 1, item 1, regulation 5.3B.53(5)]*

The Court may terminate a restructuring plan

The Court may order the restructuring plan be terminated if satisfied that:

- information about the company's business, property, affairs or financial circumstances contained in the proposed restructuring plan or restructuring proposal statement was false or misleading; and
- this information could reasonably be expected to have affected the decision of affected creditors to accept the proposed restructuring plan; or
- if there are material omissions from the proposed restructuring plan or restructuring proposal statement that would reasonably be expected to have been material in the decision to accept the proposed restructuring plan; or
- there has been a material contravention by a person bound by the restructuring plan, so that it cannot be given effect without injustice or undue delay;
- the plan cannot be given effect without injustice or undue delay;
- an act or omission done or proposed under the plan would be contrary to the interests of creditors of the company as a whole; or
- the plan should be terminated for some other reason.

[Schedule 1, item 1, regulation 5.3B.54(1)]

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Small business restructuring practitioner for a restructuring plan

Section 455B(7) of the Insolvency Reforms Bill provides that the Corporations Regulations may provide for matters relevant to the appointing a small business restructuring practitioner for a restructuring plan. This includes their functions, duties and powers in relation to the restructuring plan, and the rights, obligations and liabilities of the small business restructuring practitioner arising out of the performance of their functions and duties and the exercise of their powers.

Appointing a small business restructuring practitioner for a restructuring plan

When a restructuring plan is made, the person appointed as the small business restructuring practitioner for the company is automatically appointed as the small business restructuring practitioner for the plan. *[Schedule 1, item 1, regulation 5.3B.32]*

However, the company may choose to appoint a different small business restructuring practitioner for the plan. The appointment of the replacement practitioner is to be made by resolution of the company's board. *[Schedule 1, item xx, regulation 5.3B.32]*

Under sections 456A and 456B of the Insolvency Reforms Bill, a person cannot be appointed as a small business restructuring practitioner for a restructuring plan unless the person has consented in writing to the appointment, and as of the time of their appointment, the person has not withdrawn their consent. Only a registered liquidator can consent to be a small business restructuring practitioner.

Functions of the restructuring practitioner for a restructuring plan

The Regulations outline the functions of the restructuring practitioner for a restructuring plan.

While the restructuring practitioner appointed for the company during the restructuring process has a largely supportive role in advising and assisting the company directors, the restructuring practitioner appointed for the plan has additional functions necessary for administering the plan. The Regulations prescribe these functions as follows:

- receiving money from, and holding money on trust for, the company;
- paying money to creditors in accordance with the plan;
- if requested by the company's directors:
 - realising any property available to pay creditors in accordance with the plan; and
 - distributing the proceeds of any realisation of property among creditors in accordance with the plan;
- answering questions about the performance or exercise of their functions and powers as the small business restructuring practitioner for the plan; and

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- anything else that is incidental, necessary or convenient for the purpose of administering the plan.

[Schedule 1, item 1, regulation 5.3B.33]

Disposal of company property

In the course of undertaking their functions, the small business restructuring practitioner for a plan may sell company property in order to make payments to creditors in accordance with the plan.

However, a practitioner must not dispose of property that is subject to a security interest, or where the property may be used by, occupied by, or in possession of the company but someone else is the owner or lessor. *[Schedule 1, item 1, regulation 5.3B.34(1)]*

This includes where the property is subject to a security interest under the *Personal Property Securities Act 2009* (see definition of **PPSA retention of title property** in section 51F of the Corporations Act). *[Schedule 1, item 1, Note to regulation 5.3B.34(1)]*

The prohibition on disposing of property that is subject to a security interest does not apply if the disposal occurs:

- in the ordinary course of business for that company;
- with the written consent of the secured party, owner or lessor; or
- with the leave of the Court.

[Schedule 1, item 1, regulation 5.3B.34(2)]

Where a restructuring practitioner disposes of property that is subject to a security interest, the disposal extinguishes the security interest. *[Schedule 1, item 1, regulation 5.3B.34(7)]*

Where the owner of secured property demands the return of that property, this does not prevent the restructuring practitioner from disposing of the property within the ordinary course of business. For the avoidance of doubt, a disposal of the property that occurs after the demand is made does not mean that the disposal is not in the ordinary course of the company's business. *[Schedule 1, item 1, regulation 5.3B.34(8)]*

In making an order to grant leave for the sale of prohibited property, the Court must be satisfied that adequate arrangements have been made to protect the interests of the secured creditors, owners or lessors. *[Schedule 1, item 1, regulation 5.3B.34(3)]*

The Court may only make an order on application by:

- where it relates to a disposal within the ordinary course of business—the secured party; or
- where it relates to a disposal within the ordinary course of business and the practitioner has written consent from the secured party, owner or lessor (as the case may be)—the relevant owner or lessor.

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[Schedule 1, item 1, regulation 5.3B.34(5)]

The Court may prohibit the sale of property, despite it being in the ordinary course of the company's business. The Court must only do so if it is not satisfied that arrangements have been made to adequately protect the interests of applicant for the order. This may be either the secured party, owner or lessor of the property. *[Schedule 1, item 1, regulation 5.3B.34(4) and (6)]*

Restructuring practitioner acts as a company's agent

When performing a function or duty, or exercising a power, as restructuring practitioner for a company's restructuring plan, the restructuring practitioner is taken to be acting as the company's agent. *[Schedule 1, item 1, regulation 5.3B.35]*

Qualified privilege

The Regulations specify that a person who is or has been a small business restructuring practitioner for a plan has qualified privilege in respect of a statement made, orally or in writing, in the course of performing or exercising any of their functions and powers as a small business restructuring practitioner for the plan. *[Schedule 1, item 1, regulation 5.3B.36]*

The Regulations also specify that a small business restructuring practitioner appointed for the plan is not liable to an action or other proceeding for damages in respect of anything done by that person, in good faith and without negligence, in the performance or exercise, or purported performance or exercise, of any of the small business restructuring practitioner's functions, powers or duties as small business restructuring practitioner for the plan. *[Schedule 1, item 1, regulation 5.3B.37]*

These are important safeguards to ensure that practitioners are able to undertake their functions, including investigating and reporting on the affairs of the company, without risk of legal proceedings. This is consistent with qualified privilege afforded to liquidators during winding up and administrators during voluntary administration.

Right of Indemnity

The small business restructuring practitioner has a right to be indemnified out of the company's property for any debts or liabilities incurred or damages or losses sustained in the performance of their functions or duties or in the exercise of their power. They are also indemnified in relation to remuneration they are entitled to under Subdivision DA of Division 60 of Schedule 2 to the Corporations Act. Indemnity does not cover acts that are not performed in good faith or that are negligent. *[Schedule 1, item 1, regulation 5.3B.38]*

The small business restructuring practitioner's right of indemnity has priority, subject to section 556 of the Corporations Act, over all unsecured debts of the company, debts secured by a *Personal Property Securities Act 2009* security interest in property of the company, and debts secured by circulating interest in property of the company. *[Schedule 1, item 1, regulation 5.3B.39(1)]*

Where a debt is secured by a circulating security interest in the company's property and the secured party has taken possession or appointed a person, including a

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receiver to deal with the property prior to restructuring having begun, indemnity of the restructuring practitioner only has priority to the extent agreed to by the secured party. *[Schedule 1, item 1, regulation 5.3B.39(2)]*

Where the circulating security interest arose after the restructuring plan has been made and the secured party appoints a receiver or person to deal with the property, indemnity of the small business restructuring practitioner has priority. *[Schedule 1, item 1, regulation 5.3B.39(3) and (4)]*

The right of indemnity of the restructuring practitioner does not have priority where the circulating security over the company property, except to extent secured party consents in writing, in so far as the debt was incurred for the repayment of money borrowed, interest in respect to money borrowed or borrowing costs. *[Schedule 1, item 1, regulation 5.3B.39(5)]*

To secure the right of indemnity the restructuring practitioner has a lien on the company's property. *[Schedule 1, item 1, regulation 5.3B.40]*

Protection of persons dealing with restructuring practitioner

Any person that is dealing with the small business restructuring practitioner will have the benefit of the existing protections under section 128 and 129 of the Corporations Act. These are statutory provisions that mirror the common law 'indoor management rule.'

The intention of these rules is to protect people who are outside of the company in their dealings of the company. External persons are entitled to make assumptions about the company without having to investigate whether the internal procedures of the company they are dealing with have been followed, and whether the person they are dealing with – such as a small business restructuring practitioner – was properly appointed and is compliant under the relevant legislation.

Notice requirements

There are a number of notice requirements in relation to the restructuring plan. These notice requirements keep creditors and ASIC informed when a proposed restructuring plan is lapsed, and when a restructuring plan is made, varied and terminated.

Under section 600G of the Corporations Act, notifications to ASIC and the creditors may be provided electronically.

The directors of a company that has made a restructuring plan that has not terminated must notify the small business restructuring practitioner for the plan within five business days if they become aware that:

- the company is not likely to be able to meet its obligations under the plan as and when they fall due;
- an administrator, liquidator or provisional liquidator of the company is appointed;

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- all of the obligations under the plan have been fulfilled and all creditors' admissible debts or claims under the plan have been dealt with in accordance with the plan.

[Schedule 1, item 1, regulation 5.3B.42]

Where a proposed restructuring plan has lapsed, the small business restructuring practitioner for the company must, within five business days:

- notify as many creditors as reasonably practicable, in writing, that the proposed restructuring plan has lapsed and the reasons why; and
- lodge with ASIC, a notice in the prescribed form of the lapsing of the proposed plan.

[Schedule 1, item 1, regulation 5.3B.46]

Where a restructuring plan has been made by the company, the small business restructuring practitioner for the plan must, within five business days:

- notify each creditor in writing that a restructuring plan has been made and the date that the plan was made; and
- lodge with ASIC, the following:
 - a notice in the prescribed form of the making of the plan;
 - information about the total value of the debts and claims of the company;
 - details of the number of creditors to whom the proposal to make a restructuring plan was sent; and
 - proportion in value of the company's affected creditors who stated before the end of the acceptance period that the plan should be accepted.

[Schedule 1, item 1, regulation 5.3B.47]

Where there has been a variation to the restructuring plan by a court order, the small business restructuring practitioner for the plan must, within five business days:

- notify as many creditors as reasonably practicable, in writing, setting out the terms of the court order and outlining the creditors' rights; and
- lodge with ASIC, a notice in the prescribed form about variations to the restructuring plan.

[Schedule 1, item 1, regulation 5.3B.51(3)]

Where the directors of the company become aware that there has been, or is likely to be, a contravention of the restructuring plan, they must, as soon as practicable after becoming so aware, notify the small business restructuring practitioner for the plan.

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Where the small business restructuring practitioner for the plan becomes aware that there has been, or is likely to be, a contravention of the restructuring plan, they must, as soon as practicable after becoming so aware:

- notify as many creditors as reasonably practicable of the contravention or likely contravention; and
- lodge with ASIC, a notice in the prescribed form of the contravention or likely contravention of the plan.

[Schedule 1, item 1, regulation 5.3B.48]

When a restructuring plan terminates, the small business restructuring practitioner for the plan must, within five business days:

- notify the company and as many creditors as reasonably practicable, in writing, of:
 - the termination; and
 - if the plan terminates for any reason other than because the obligations under the plan have been fulfilled—the reasons for the termination; and
- lodge with ASIC, a notice in the prescribed form of the termination of the plan.

[Schedule 1, item 1, regulation 5.3B.49]

Failure to comply with each of the notice requirements outlined above is an offence under section 1311(1) of the Corporations Act.

Consequential amendment – Item 2, paragraph 5.6.75(1)(a)

Regulation 5.6.75 of the Corporations Regulations provides a framework enabling ASIC to maintain a *publication website* on which it publishes notices that are required to be published in the prescribed manner under various Parts of the Corporations Act, including Parts in Chapter 5—External administration.

This item amends regulation 5.6.75 to allow notices that are required to be published under new Part 5.3B to be included in ASIC's existing publication website framework.

Schedule 2 – Amendments relating to temporary restructuring relief

Schedule 2 to the Insolvency Reforms Bill would establish temporary relief for an eligible company seeking to enter the new debt restructuring process. Schedule 2 to the Regulations makes amendments to the Corporations Regulations to prescribe matters relevant to the operation of the temporary restructuring relief.

Temporary increase to the statutory minimum and statutory period

For a company that is eligible for temporary restructuring relief, the Regulations prescribe a statutory minimum and a statutory period for the purposes of section 9 of the Corporations Act.

The statutory minimum prescribed is \$20,000 and the statutory period prescribed is six months. The higher amount and the longer period reflect the intention that a company seeking to enter the restructuring process receives appropriate relief against a creditor's statutory demand for the payment of a debt. The regulation prescribing the higher statutory minimum and the longer statutory period is repealed on 31 July 2021 – no company is able to be eligible for temporary restructuring relief beyond this date (see section 458E of the Insolvency Reforms Bill). *[Schedule 2, item 1, regulation 5.4.01AAA of the Corporations Regulations 2001]*

The Regulations also amend the notes in Form 509H (Creditor's statutory demand for payment of debt) in Schedule 2 to the Corporations Regulations to provide that, for a period in 2021 and where the debtor company is eligible for temporary restructuring relief, the statutory minimum is \$20,000 and the statutory period is six months. *[Schedule 2, items 2 and 3, notes 2 and 5 in Form 509H in Schedule 2 to the Corporations Regulations 2001]*

Schedule 3 – Amendments relating to the simplified liquidation process

Schedule 3 to the Insolvency Reforms Bill would establish the new simplified liquidation process. Schedule 3 to the Regulations makes amendments to the Corporations Regulations to prescribe matters relevant to the operation of the simplified liquidation process. All legislative references in this Schedule are to the Corporations Regulations unless otherwise specified.

Declaration that the company is eligible and other matters for the simplified liquidation process

Section 498 of the Insolvency Reforms Bill provides that the directors of a company must give the liquidator a declaration stating that the directors believe on reasonable grounds that the eligibility criteria for the simplified liquidation process will be met in relation to the company. The Insolvency Reforms Bill also provides that the declaration must include any information prescribed in the Corporations Regulations (see sections 498(2)(c) and 498(3) of the Insolvency Reforms Bill). The Regulations prescribe the following information as information that must be included in the director's declaration:

- whether the company has, at any time, entered into a transaction that is a voidable transaction of a kind that is an uncommercial transaction, an unfair loan to a company, an unreasonable director-related transaction or a creditor-defeating disposition (see sections 588FB, 588FD, 588FDA and 588FDB of the Corporations Act); and
- whether, in the directors' opinion, there are reasonable grounds to believe that, on the declaration being given, the eligibility criteria for the simplified liquidation process will be met in relation to the company, and the reasons for that opinion.

[Schedule 3, item 2, regulation 5.5.02]

The requirement, described above, that directors declare that they have not entered into the transactions and believe on reasonable grounds that the eligibility criteria will be met is intended to provide the liquidator with information to inform their assessment of whether the eligibility criteria for the simplified liquidation process are met and whether the company has engaged in conduct of the sort that would make the adoption of the simplified liquidation process unsuitable or inappropriate.

Eligibility criteria for the simplified liquidation process

The Regulations prescribe a number of matters relevant to the eligibility for the simplified liquidation process.

Liabilities test of the company

Section 500AA of the Insolvency Reform Bill empowers the Regulations to prescribe a test for eligibility for the simplified liquidation process based on the liabilities of the company.

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The Regulations prescribe that the test based on liabilities is that the total liabilities of the company on the day on which the triggering event occurred must not exceed \$1 million (for triggering events – see section 489F of the Insolvency Reforms Bill). The meaning of liabilities includes any liability or obligation that is not contingent. *[Schedule 3, item 2, regulations 5.5.03(1) and (6)]*

Circumstances in which the previous use rule does not apply

The eligibility criteria for the simplified liquidation process in section 500AA of the Insolvency Reforms Bill requires that, subject to exceptions prescribed in the Regulations, the simplified liquidation process cannot be used in either of the following scenarios:

- where a director of the company has been a director of a company that has undergone restructuring or been the subject of a simplified liquidation process;
- where the company itself has undergone restructuring or been the subject of a simplified liquidation process.

Previous use more than seven years ago

Section 500AA empowers the Regulations to prescribe the period in which the previous use must not have occurred (hereafter referred to as the ‘previous use rule’).

The Regulations prescribe a period of seven years as the period in which the previous use rule applies. This provides that a director or company is not prohibited from being eligible for the simplified liquidation process where the director or company previously used the restructuring process or the simplified liquidation process more than seven years prior to the current company seeking to satisfy the eligibility criteria for the simplified liquidation process. *[Schedule 3, item 2, regulations 5.5.03(2) and (3)]*

Previous use by a related body corporate

Section 500AA also empowers the Regulations to prescribe circumstances in which a director or a company is exempt from the previous use rule.

In relation to previous use by a director, the Regulations prescribe the circumstance where:

- the other company of which the person was or is a director is a related body corporate of the current company seeking to satisfy the eligibility criteria for the simplified liquidation process;
- if the other company is or has been undergoing restructuring—the restructuring practitioner was appointed no more than 20 business days before the day on which the current company adopted the simplified liquidation process. The restructuring of a company begins when a restructuring practitioner for the company is appointed under section 453B of the Insolvency Reforms Bill;

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- if the other company is or has been the subject of the simplified liquidation process—there is no more than 20 business days between the day on which both companies adopted the simplified liquidation process.

[Schedule 3, item 2, regulation 5.5.03(4)]

In this circumstance, the intention is to allow companies that are related to each other, (for example, in the same corporate group) to restructure or use the simplified liquidation process at the same or roughly the same time. This reflects the likelihood that if a company within a corporate group is insolvent or likely to become insolvent, other companies within the group may need to restructure or liquidate at the same or roughly the same time. In many instances, these related companies will have common directors. The term ‘related body corporate’ includes a company that is a holding company or subsidiary of the other (see sections 9 and 50 of the Corporations Act).

In relation to previous use by a company, the Regulations prescribe the following circumstance:

- the company has been undergoing restructuring; and
- the restructuring terminated no more than 20 business days before the day on which the current company adopted the simplified liquidation process (for when restructuring ends – see regulation 5.3B.02).

[Schedule 3, item 2, regulation 5.5.02(5)]

In this circumstance, the intention is to allow a company that has recently terminated a restructuring to enter into the simplified liquidation process, provided that the movement into liquidation happens soon after the termination of the restructuring process.

The 25 per cent in value of creditors test

A liquidator must not adopt the simplified liquidation process if at least 25 per cent in value of creditors request the liquidator not to follow the simplified liquidation process in relation to the company (see sections 500A(2)(c) and 500AD of the Insolvency Reforms Bill). Section 500AD(b) of the Insolvency Reforms Bill empowers the Regulations to prescribe creditors that are, or are not, to be taken into account for the purposes of the test.

The Regulations prescribe a person who is a related entity, and a creditor, of the company is not to be taken into account for the purposes of the 25 per cent in value test. The term ‘related entity’ in relation to a body corporate is defined in section 9 of the Corporations Act. The term captures a wide group of people and entities, including people involved with the formation and management of the company, and people in a family relationship with such people. The exclusion of a creditor who is a related entity of the company reflects the intention that the necessary 25 per cent in value should be properly representative of the views of creditors generally, and not inappropriately influenced by creditors who may have a less than arms-length relationship with the company. *[Schedule 3, item 2, regulation 5.5.09]*

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Voidable transactions

Where a company which is unable to pay its debts as they fall due enters into a transaction with a creditor which has the effect of providing that creditor with an advantage in repayment over that which it would receive if the transaction were set aside and the creditor were to prove for the debt in the winding-up, and where the transaction was entered into within six months before the relation-back day—then the transaction is an unfair preference and may be voidable. For a creditors' voluntary winding up, the relation-back day is generally the day on which the resolution to wind up the company was passed (see sections 9, 91 and 513B of the Corporations Act). The rationale underpinning unfair preferences is to enforce equal treatment among creditors by invalidating transactions between an insolvent debtor corporation and a creditor that have been made prior to liquidation, and that have the effect of preferring that creditor over creditors in general. See section 588FA of the Corporations Act.

Where a company is being wound up, a transaction of the company that was entered into on or after the relation-back day may be voidable. If it appears to a liquidator that a company which is being wound up has entered into a voidable transaction, the liquidator may seek an order of the Court to have the transaction set aside. If the Court is satisfied that the transaction is voidable it has the power to make any of the orders under section 588FF of the Corporations Act. These orders are designed to restore the company to the position it would have been in if it had not entered into the voidable transaction. See section 588FE of the Corporations Act.

In relation to a liquidation that has adopted the simplified liquidation process, section 500AE(3)(b) of the Insolvency Reforms Bill enables the Corporations Regulations to prescribe circumstances in which a transaction is not voidable despite section 588FE of the Corporations Act.

The Regulations insert regulation 5.5.04 to provide that, in a simplified liquidation process, a transaction is not voidable under section 588FE(2) of the Corporations Act where:

- the transaction is an unfair preference;
- the transaction was not entered into, and no act was done for the purpose of giving effect to it during the three months ending on the relation-back day and after that day but on or before the day when the winding up began;
- no creditor under the transaction is a related entity of the company;
- either:
 - the transaction results in the creditor receiving from the company no more than \$30,000 in value; or
 - if the transaction forms part of a series of related transactions, all of the related transactions result in the creditor receiving from the company no more than \$30,000 in value; and

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- the company is subject to the simplified liquidation process.

[Schedule 3, item 2, regulation 5.5.04]

The term ‘related entity’ in relation to a body corporate is defined in section 9 of the Corporations Act. The term captures a wide group of people and entities and is intended to facilitate the recovery of assets transferred to such entities under the voidable transaction provisions.

Provision for a series of transactions is intended to avoid misuse of the exemption where a transaction valued at more than \$30,000 is spread over a series of smaller payments. Such a series of related transactions does not fall within the exemption in regulation 5.5.04.

A transaction that does not meet the criteria described above may remain a voidable transaction and the liquidator may seek an order of the Court to have the transaction set aside. Also, where a liquidation ceases to follow the simplified liquidation process, a transaction that was not voidable because of the exemption in regulation 5.5.04 is no longer exempt, and the liquidator may seek an order of the Court to have the transaction set aside.

Reporting to ASIC

Reporting offences or other breaches

Under a general liquidation process, a liquidator is required to lodge a report to ASIC if it appears to the liquidator that a past or present officer or employee of the company is guilty of an offence, or if a person involved with the company may have appropriated company property or breached a duty, or if the company may be unable to pay its unsecured creditors more than 50 cents in the dollar. The purpose of this requirement is to ensure that ASIC is informed of potential misconduct of the company or its officers and to allow ASIC or the liquidator to take appropriate action. See section 533 of the Corporations Act.

Under the simplified liquidation process, the liquidator is not required to lodge a report with ASIC under section 533 of the Corporations Act (see section 500AE(2)(a) of the Insolvency Reforms Bill).

Instead, section 500AE(3)(f) of the Insolvency Reforms Bill enables the Corporations Regulations to prescribe information, reports and documents that are to be provided to ASIC in relation to a company under simplified liquidation.

Accordingly, the Regulations insert regulation 5.5.05 to require that a liquidator must lodge a report where, in their opinion, there are reasonable grounds to believe that a person may have engaged in conduct constituting an offence under a law of the Commonwealth or a State or Territory in relation to the company that has had, or is likely to have, a material adverse effect on the interests of the creditors as a whole or of a class of creditors as a whole. A relevant person for the purposes of this test is a person who is a past or present officer or employee, or a member or contributory, of the company or a person who has taken part in the formation, promotion, administration, management or winding up of the company. What amounts to a

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material detriment to the creditor depends on the nature and circumstances of the conduct, the company and the creditor involved. *[Schedule 3, item 2, regulation 5.5.05(2)]*

The liquidator must lodge this report with ASIC as soon as practicable, or in any event, within six months after first forming the belief. *[Schedule 3, item 2, regulation 5.5.05(2)(c)]*

The report must:

- state whether the liquidator proposes to make an application for an examination or order under section 597 of the Corporations Act; and
- give ASIC such information, or give ASIC access to and facilities for inspecting and taking copies of any documents as ASIC requires.

[Schedule 3, item 2, regulations 5.5.05(2)(c) and (d)]

The liquidator may also lodge reports specifying any other matter that, in their opinion, it is desirable to bring to the notice of ASIC. *[Schedule 3, item 2, regulation 5.5.05(3)]*

Regulation 5.5.05 also prescribes a power for the Court to direct the liquidator to lodge a report (if the liquidator has not done so already) where it appears to the Court that:

- that a past or present officer or employee, or a contributory or member, of the company has been guilty of an offence under a law of the Commonwealth or a State or Territory in relation to the company; or
- that a person who has taken part in the formation, promotion, administration, management or winding up of the company may have misapplied or retained, or may have become liable or accountable for, any money or property of the company or may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company.

The Court's power to direct the liquidator in this way may be done on the application of a person interested in the winding up. This may include, for example, a creditor or member of the company subject to the simplified liquidation. *[Schedule 3, item 2, regulation 5.5.05(04)]*

Reporting entry into and exit from the simplified liquidation process

A liquidator is required to notify ASIC when the liquidator:

- adopts the simplified liquidation process (under section 500A(1) of the Insolvency Reforms Bill); and
- ceases to use the simplified liquidation process (under section 500AC(1) of the Insolvency Reforms Bill).

[Schedule 3, item 2, regulations 5.5.06 and 5.5.08(2)]

The liquidator must notify ASIC within five business days of the adoption or cessation of the simplified liquidation process. A liquidator's failure to comply with

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this requirement to notify ASIC is an offence. *[Schedule 3 item 2, regulations 5.5.06 and 5.5.08(2), and section 1311 of the Corporations Act]*

The imposition of an offence is necessary to ensure that liquidators report information to ASIC about the use of the simplified liquidation process, including when use of the simplified process has ceased. This information is necessary to enable ASIC to have a role in overseeing the liquidation of companies using the simplified process. In this way, the imposition of an offence is intended to reduce the incidence of behaviour that would otherwise be prohibited by the Corporations Act.

Because no penalty is specified for the offence, the offence is an offence of strict liability and a registered liquidator who commits the offence may be punished on conviction with a penalty not exceeding 20 penalty units (see sections 1311A and 1311F of the Corporations Act). As a strict liability offence, no fault element applies to a liquidator's failure to give ASIC notice but the defence of mistake of fact is available. This is consistent with established principles in the Criminal Code as well as the existing legislative scheme for offences set out in Part 9.4 of the Corporations Act.

In considering the imposition of this offence, regard has been had to the Guide to Framing Commonwealth Offences.

Dividend process

Under a liquidation process, the liquidator is responsible for distributing any available funds to creditors in accordance with the priorities set out in the Corporations Act. This occurs when the liquidator has gathered enough funds to provide dividends to all creditors that prove their debt. To receive distributions, a creditor who has debts due against a company, or claims to a debt against a company must provide this information to the liquidator. This may be done either formally or informally as required by the liquidator in accordance with section 553D of the Corporations Act.

Proofs of debt and claims

Section 500AE(3)(c) of the Insolvency Reforms Bill empowers the Regulations to prescribe the process for proofs of debt and claims in relation to a company that is subject to the simplified liquidation process. Under the simplified liquidation process, the process for a creditor proving their debts and claims is generally the same as the regular liquidation process with some minor changes.

The Regulations provide that where a liquidator requires a debt with formal proof, the liquidator must provide the creditor with 14 days to submit their proofs of debt and claims, along with any particulars that substantiate the claim. The period of 14 days begins from when the notice to submit the particulars of a debt or claim are lodged with ASIC in accordance with regulation 5.6.39(2) of the Regulations. This includes any detailed particulars of the claims or debts and, in the case of a debt, a statement of account and specifications of vouchers (if any) by which the statement can be substantiated (see regulation 5.6.50). *[Schedule 3, item 5, regulation 5.6.39]*

The Regulations provide that the liquidator of a company may only call once for creditors to submit the particulars of their debts and claims. This differs from the regular process which allows the liquidator to call for creditors as many times as is

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necessary throughout the liquidation process. The intention is that the simplified liquidation process will be used by small companies with non-complex debt requirements. Given the threshold relating to the liabilities, it is unlikely that these companies will have large amounts of creditors that will be unknown to the company. Where the liabilities exceed the threshold and the liquidator becomes aware of more complex debt arrangements, the liquidator will cease to use the simplified liquidation process and move into the regular liquidation process (further discussion below). *[Schedule 3, item 5, regulation 5.6.39]*

The liquidator also maintains the discretion to accept a debt without formal proof. If the liquidator does accept informal proof, the notification for submission of the claims by the liquidator as well as creditors rights are the same as the regular liquidation process. *[Schedule 3, item 9, regulation 5.6.39(4)]*

Once received, the liquidator must either choose to accept or reject the creditor's particulars. Similar to the regular liquidation process, the liquidator has 28 days to inform the creditor of the outcome of their debt or claim. The liquidator may admit all or part of the formal proof of debt or claim, reject all or part of it, or require further evidence in support of it (see, regulation 5.6.53). The simplified liquidation process retains all of the creditor's rights in relation to the proofs of debt and claims process. This includes the ability to amend a statement of claim where further information comes to light about the companies liabilities owed to the particular creditor. For example this may occur where there are other outstanding tax liabilities that come to light once the company enters the simplified liquidation process.

Declaring and distributing a dividend

Section 500AE(3)(e) of the Insolvency Reforms Bill provides that the Regulations may also provide for circumstances when a liquidator may declare and distribute a dividend. Under the simplified liquidation process, a liquidator of a company may declare a dividend by lodging a notice with ASIC and notifying creditors that are known to the liquidator. A liquidator may only declare and distribute a dividend once among creditors whose debts or claims have been admitted. An expedited dividend process allows creditors to get paid quickly. This reflects the intention that the simplified liquidation process is efficient and is consistent with the recommendations from the Productivity Commission in its 2015 inquiry into *Business Set-up, Transfer and Closure*. *[Schedule 3, item 19, regulation 5.6.67A]*

Unlike under the regular liquidation process, a creditor who has not had their debt or claim admitted before the declaration of a dividend does not have a right to the distribution of a dividend. Although this impacts on a potential creditor's rights, this requirement ensures that the liquidation process remains cost and time efficient by encouraging all potential creditors to respond within the timeframes required by the liquidator. *[Schedule 3, item 20, regulation 5.6.68(3)]*

Circumstances in which a liquidator must cease to follow the simplified process

Section 500AC(1)(b) of the Insolvency Reforms Bill empowers the Regulations to prescribe circumstances in which the liquidator of a company must cease to follow the simplified liquidation process.

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The Regulations provide that the liquidator must cease to follow the process where the liquidator has reasonable grounds to believe that the company or a director of the company has engaged in conduct that has had or is likely to have, a material adverse effect on the interests of the creditors as a whole or of a class of creditors as a whole. What amounts to a material adverse effect depends on the nature and circumstances of the conduct, the company and the creditor involved. *[Schedule 3, item 2, regulation 5.5.07(1)]*

Further, the liquidator must have reasonable grounds to believe that the conduct was fraudulent or dishonest. This reflects the intention that only conduct that indicates to a liquidator that genuine misconduct or wrongdoing has occurred is intended to require the liquidator to cease to follow the simplified liquidation process. Conduct of the nature in described by regulation 5.5.07 of the Regulations may indicate conduct, or the existence of further conduct, that should be subject to the comprehensive investigatory requirements of the regular liquidation process *[Schedule 3, item 2, regulation 5.5.07(1)]*

The Regulations provide that the liquidator is taken to have ceased to follow the simplified liquidation process on the day on which the liquidator first held the belief that the conduct has been engaged in. *[Schedule 3, item 2, regulation 5.5.07(2)]*

Transition from the simplified liquidation process

Section 500AC(2) of the Insolvency Reforms Bill empowers the Regulations to deal with the transition from a simplified liquidation process to another form of external administration.

The Regulations provide that the cessation of the simplified liquidation process in relation to a company does not affect the validity of anything that was done in good faith in relation to the company before the cessation. *[Schedule 3, item 2, regulation 5.5.08(3)]*

Further, where a liquidation moves from the simplified to the regular liquidation process, a liquidator may need to provide a report to ASIC under section 533 of the Corporations Act regarding a circumstance that was not required to be provided reported under the simplified liquidation process. In this circumstances, the liquidator must provide the report within six months of the day on which the simplified liquidation process in relation to the company ended. *[Schedule 3, item 2, regulation 5.5.08(4)]*

Application of amendments

The amendments made by the Regulations for the simplified liquidation process apply in relation to the winding up of a company because of a triggering event that occurs on or after the commencement of the Insolvency Reforms Bill that creates the simplified process. *[Schedule 3, item 21, regulation 10.43.01]*

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ATTACHMENT B

Amendments not included in this Exposure Draft

A number of elements of the reforms to the corporate insolvency framework established by the proposed Insolvency Reforms Bill will be implemented through amendments to the Corporations Regulations. This Exposure Draft includes some, but not all, of the proposed amendments to the Corporations Regulations.

Debt restructuring— exceptions from the stay on ‘ipso facto’ clauses

In relation to the proposed debt restructuring process, this Exposure Draft does not include proposed amendments to the Corporations Regulations regarding:

- stays on enforcing rights—the prescribed reasons in which a right cannot be enforced against a company due to the company coming or possibly coming under restructuring, or its financial position; and a prescribed kind of right, or a right in a prescribed kind of contract, agreement or arrangement, to which a stay will not apply.

Temporary fee waiver

This Exposure Draft does not include proposed amendments to the *Corporations (Fees) Regulations 2001* to temporarily waive fees, until 30 June 2022, associated with registration as a registered liquidator to encourage more practitioners to enter the market.

Industry funding model

This Exposure Draft does not include amendments to the *ASIC Supervisory Cost Recovery Levy Regulations 2017* that are needed to factor the new restructuring process into a leviable entity’s entity metric for the purposes of calculating the entity’s ASIC Supervisory Cost Recovery Levy, imposed by the *ASIC Supervisory Cost Recovery Levy Act 2017*.