

Small Business Restructuring Revised legislation – ARITA proposal

Summary of significant changes

Changes to structure of legislation

- Move majority of legislation to Act rather than in Regulations.
- Problem it solves: cut down in complexity of the legislation.

Threshold for eligibility

- Remains at \$1 million, but is calculated excluding:
 - Employee entitlements
 - Secured creditor deficiency
 - Lease future debts (unless the lease was terminated prior to the appointment of the RP)
 - Related party debts.
- Problem it solves: increases the effective amount of the threshold without significantly increasing the possible exposure of arms-length creditors to what is a lower information restructuring process. The idea of SBRs is to keep the process simple so that costs of the process are kept down. If the dollar value of debt is increased too much, the complexity of businesses eligible for the process is likely to be higher, which then can create conflict with the use of a simplified process and increase the risk of misuse of the process.

Whilst it is not possible to accurately determine the likely increase in companies eligible for the process, we can say that a large number of SME companies have related party debt and the removal of this debt from the threshold amount will increase eligibility.

How secured creditors and owners/lessors dealt with under SBR

- Definition of admissible debt or claim to exclude:
 - Secured creditors
 - Lessors for amounts relating to periods after the date of appointment of the RP (unless the lease was terminated prior to the appointment of the RP).
- Secured creditors, owners/lessors should be unable to enforce their security solely due to the appointment of a restructuring practitioner (commonly referred to as an “ipso facto” moratorium similar to that contained in ss 415D, 434J, 451E and 454N of the *Corporations Act*). This would not prevent enforcement due to non-payment.
- Problems it solves:
 - difficulty in determining deficiency in secured creditor debt and what to do with forward lease payments where company wants to continue with leased assets.
 - Gives the restructuring an opportunity to succeed.

Impact of the appointment of a receiver

- If a secured creditor with security over all or substantially all of the company's assets has appointed a receiver or receiver and manager, the company is not eligible to appoint an RP.
- Appointment of a receiver over all or substantially all of the company's assets should also terminate the restructuring.
- Problem it solves:
 - The appointment of a receiver over all, or substantially all of the company's assets, means that there will be nothing of substance left to restructure within the business and an alternate external administration would be more appropriate.

Clarifying amount of creditor claims

- To ensure the accuracy of the schedule of debts and claims and the return under the plan, a simple debt confirmation process should be undertaken during the proposal period
- The debt confirmation process should be similar to a proof of debt process, whereby creditors confirm the amount of their debt that is to appear in the schedule of debts and claims and participate in the plan
- Failure to confirm the amount of debt by the designated date (say 15 business days after notice is given) will mean that the creditor is bound by the plan but does not participate in the payments under the plan
- Will need to be situations where the creditor can apply to court for the schedule of debts and claims to be varied.
- Problem it solves: Members have advised that some creditors are not engaging with the process and either not providing account details for plan payments or advising where debt is overstated. This creates issues and increases costs for the restructuring as the creditor is being paid more than they are entitled to due to overstated debt or the RP does not have confirmation of where to pay money. A debt confirmation process will also remove challenges to the schedule of debts and claims and extensions of the acceptance period, reducing costs and streamlining the process.

Process for varying a plan

- Creditors have the power to vary a plan once it has been made:
 - Company proposes variation to RP
 - Cost of variation to be agreed with RP as a fixed fee (regardless of outcome) and approved by the directors by resolution. Separate fee to the administration of the plan.
 - RP to write an explanation of the variation for creditors.
 - RP sends variation information to creditors and asks creditors whether variation should be accepted – min of 15 business days to "vote".
 - Variation accepted if majority of creditors who reply by the deadline state that the proposed variation should be accepted.

- Stay on default period while variation considered (as long as variation proposed prior to default period)
- If variation not accepted and default period exceeded, default period consequence applies at end of deadline.
- If variation not accepted but default period not exceeded, company can continue with plan in current form, propose a new variation (for additional fee) or terminate the plan.
- Creditors who are entitled to vote on original proposal can vote on the variation.
- No limit on the number of variations but total period of plan cannot exceed maximum period set under the Act (currently 3 years)
- Problem it solves: Currently have to go to court for variation of a plan which is very expensive

How winding up applications are dealt with

- Automatic stay of any winding up application until the end of the acceptance period.
- If plan is made, winding up application lapses (but creditors have right to apply to court for termination of plan - existing reg 5.3A.62).
- If plan is not made, application returns to court for hearing.
- If plan is made and then fails, and company goes into liquidation, relation back date is based on winding up application on foot at the time of the appointment of the RP. The relation back date is important for determining recoverable transactions in the liquidation.
- Problem it solves: Currently have to go to court to deal with the winding up application – can take numerous appearances which is very expensive. Debt levels are low and time frame is short so creditors should be given the opportunity to vote on proposed plan.

Who acts as RP

- RP is a registered liquidator and it is not clear whether the independence requirements that apply to other types of external administrations (eg liquidations and voluntary administrations) apply to SBRs.
- The Act needs to specifically recognise that the RP acts an adviser to the company and its directors, and that the proposed restructuring practitioner needs to be able to work with the company prior to the appointment being made without affecting their ability to accept the RP appointment (ie impact independence)
- This is very different to other external administrations where the appointee works for the creditors and remains independent from the directors.
- RP of a company should specifically not be able to transition to another type of external administration appointment (eg liquidator or voluntary administrator) due to the nature of the role of the RP (ie relationship working with the directors would prevent the RP from being independent in a subsequent appointment)
- Problem it solves: makes it clear that a relationship with the company prior to the appointment as an RP is not an issue for that appointment, as the RP works with the company. The independence issue to manage is the transition from SBR to another external administration.

Related party creditors

- Allow plans to treat related party creditors differently to arm's length creditors.
- The plan can effectively create a debt for equity swap for related party creditors.
- Regardless of their treatment under the plan, related party creditor claims should be extinguished by the plan consistent with other creditor claims.
- Problem it solves: Currently, related party creditors (such as the owners and their families) are unable to elect to receive, say, lower or no payment, to enhance the offer to other creditors and thereby increase the likelihood of the business continuing.

Assets under the plan

- Limit plans to the payment of cash by the restructuring practitioner so the restructuring practitioner simply distributes funds as agreed under the plan.
- Problem it solves: The current legislation allows for inclusion of non-cash assets in the plan and for the sale of those assets by the RP. The inclusion of non-cash assets is an unnecessary and potentially costly complication for an SBR process – where these are an issue, other processes are available (voluntary administration).

Creditor requests for information

- Remove creditors' rights to request information under the strict statutory process in exchange for enhanced specific reporting. Creditors will still be able to request information and this is likely to be provided, otherwise the creditor has the power to vote against the proposed plan.
- Problem it solves: Uncertainty about the level of information requests that may be received and the red tape around the request for information process results in possible increased costs that need to be built into the fixed fee set for the SBR process

Reporting to creditors

- Currently not required under the Act, but the ATO requires a report including certain specific information before it will consider voting in favour of a proposal. Due to the fact that the ATO is usually a substantial creditor in most SBRs, for the plan to be accepted, the ATO needs to approve the plan. Therefore, reporting is being provided to all creditors.
- The Act should set specific reporting requirements and a need for the RP to provide an opinion on whether the company is likely to be able to meet the obligations under the plan.
- Problem it solves:
 - If the Act prescribes a level of reporting, it will provide certainty over what creditors should expect and remove the risk of “regulatory creep” by the ATO. It can also remove the need for creditors to be able to request information (refer above).

- Many creditors are also small businesses with a lack of understanding of the SBR process. There is also no meeting at which creditors can ask questions. Therefore, an opinion from the RP may assist these creditors with making their decision.

Outcome if plan not accepted

- Currently if a plan is not accepted, the company returns to the control of the directors notwithstanding that the company is insolvent. Company is deemed insolvent once the plan is sent to creditors.
- Creditors need to either incur additional cost to apply to the Court for the appointment of a liquidator or rely on the company to take action to appoint a liquidator.
- The RP cannot become the liquidator due to independence issues as a result of the nature of the role of the RP and the relationship with the directors.
- If the directors appoint a liquidator it is likely they will ask the RP for guidance on who to appoint.
- The company should automatically proceed to liquidation where the plan is not accepted by creditors. The RP should appoint the liquidator – cannot be the RP or a member of the RPs firm. This is in reality no different to the current situation where the directors appoint a liquidator recommended by the RP. CVL process is followed so creditors have the option of requesting a meeting and changing the liquidator.
- Problem it solves: Control of the company does not go back to the directors – it is not appropriate to return control of an insolvent company to the directors. Creditors do not have to either rely on the directors to take action or incur additional costs to get a liquidator appointed. Creditors still have the ability to seek a change of liquidator (as with the current CVL process where the liquidator is appointed by the directors). The liquidator could appoint a voluntary administrator if that is the right course of action for the company.

Appendix A: Flowchart – How SBRs should work

	Proposed process	Additional comments	Change	Cost & time savings
Pre-appointment	Directors identify that the company is having financial difficulties and seek assistance from a registered liquidator			
	Liquidator reviews company's financial position and future prospects, assesses eligibility for a small business restructuring (SBR)	Company pays for this work separately to the SBR process. Debt threshold for eligibility remains at \$1M, but excludes any secured creditor deficiency, owner/lessor future debts and any related entity claims.	Threshold currently includes secured creditor deficiency and related party claims	
	The liquidator works as an adviser to the company and assists the directors to liaise with secured creditors to ensure their support (as secured creditors are outside the SBR), establish a list of creditors and amounts outstanding, start the process to get tax lodgements up to date and determine any outstanding employee entitlements and payment of those entitlements.	Ipso facto on all secured creditors, owners and lessors due to the appointment of an RP - does not prevent enforcement due to other breaches, such as non-payment.	Secured creditors are currently bound for any amount that their debt exceeds the value of the security, which sounds great, but the problem is that the value of the security is an estimate that would be difficult to determine and agree with the secured creditor. Without support of secured creditors, company would not be able to restructure. If secured debt needs to be compromised, VA may be a better option.	The RP is able to do more work in the pre-appointment period to assist the company to ensure eligibility and obtain support of creditors. This ensures that the process runs smoothly once the appointment is made.
	Act specifically recognises that the RP can work with the company prior to appointment.	Act should specifically recognise that the RP is able to assist the company prior to appointment as RP without impacting independence, as the RP's role is to assist the directors through the SBR process.	Currently independence requirements would prevent the prospective RP from working with the company extensively prior to appointment.	Timeframe: This period should take as much time is necessary (considering other issues that may force the company to act quickly).
	The directors appoint the liquidator in writing (liquidator must consent prior to appointment) that has been assisting the company as Restructuring Practitioner (RP) - after declaring company is insolvent or likely to become insolvent, that the company is eligible to do an SBR and approving the RPs remuneration for the RP (proposal and acceptance period)		Eligibility is currently done within 5 BD of appointment as is a extra step which is not necessary if RP is assisting company prior to appointment and can assist with directors making this determination at the time of appointment.	

Proposed process

Automatic stay of any winding up applications
Secured creditors unable to enforce security solely due to the appointment of an RP
Company trades in the ordinary course of business with RP to approve any transactions outside the ordinary course of business, has to disclose "restructuring practitioner appointed"
<p>RP by first BD after appointment:</p> <ul style="list-style-type: none"> - lodgement with ASIC of appointment and company eligibility - PNW advertisement of appointment - notice of appointment, DIRRI and call for confirmation of claim to creditors - PNW advertisement calling for creditor claims
<p>Company should assist creditors with reasonable request for information. RP not required to provide information that will be sent to all creditors with the plan proposal.</p>

Additional comments

<p>Restructuring ends if RP terminates it, liquidator or VA appointed, Court Orders or directors terminate.</p>
<p>Confirming creditor claims at this point in the process means that once the plan is developed, the return to creditors will be more certain (there will not be changes to the amount of debt), the voting process will not be delayed if there are disputes about claims. A date should be set for claims to be lodged (in the same way that they are for dividends in liquidations - suggest 15 business days). If claims are not made by this date then the creditor is bound by the plan (if accepted) but will not participate in any payments under the plan - this will encourage creditors to confirm their debt. Creditor can dispute in Court if they want to participate but had not proved their claim. If creditor does go to Court, proposal period will need to extend - but this should be the exception. If the final list of creditor claims is greater than the threshold, the restructuring should terminate.</p>
<p>Creditors' rights to request information should be limited in an SBR in view of the fact that this is meant to be a short and cost effective process, there are already many reporting points to keep creditors informed and it is proposed that better information is provided to creditors with the plan proposal.</p>

Change

<p>Not currently an automatic stay - company has to go to Court which is a big expense</p>
<p>Creditor claims are currently dealt with in the acceptance period which can result in multiple variations being sent to creditors, which also necessitates creditors being able to change their vote during the acceptance period multiple times. Currently changes to creditor claims which result in the debt threshold being exceeded do not result in termination of the restructuring, which is an incentive for under estimating creditor claims.</p>
<p>Currently RPs are required to comply with all reasonable requests for information in the same way as a liquidator or voluntary administrator. Requests should be made to the company rather than RP. RP's limited to how a SBR works, how this SBR will work, what creditors will get, alternatives, other creditors, timing of payments - all provided in report, therefore RP should not be required to provide separately.</p>

Cost & time savings

<p>Significant cost saving as company will no longer have to apply to Court for a stay of the winding up application and RP will not have to assist company. Will not distract company and RP from the SBR process.</p>
<p>This change will reduce costs as there will be less uncertainty regarding creditor claims and there will no longer be a need for RPs to include allowance in their fixed fee for variations of the proposal and extensions of the Acceptance Period.</p>
<p>Current requirements result in uncertain costs as RP doesn't know how many queries will be received. RP has to include an allowance in the fixed fee even if there ends up being no queries. Creditors are still protected as they can ask queries - if they are not happy with response from company (or RP) then they will vote no.</p>

Proposed process

With assistance of RP, the company prepares a restructuring plan. Plan can create a second class of creditors for related party creditors and that class can be treated differently. All arms length creditors have to be treated the same under the plan. Secured creditors, owners and lessors are not bound by the plan but the ipso facto on enforcement solely due to the appointment of the RP will continue to apply. Plan cannot be conditional, cannot involve the transfer of any assets other than cash and cannot give the RP for the plan the power to realise assets. Plan specifies the percentage of funds received from the company that are paid to the RP for remuneration.

RP prepares a statement about the plan setting out a minimum amount of information:

- company assets
- company secured debt
- company creditors
- contingent employee entitlements
- related party debt/loans
- potential return in liquidation excluding costs and recoverable property
- a statement as to whether they have seen any evidence of transactions which may be recoverable in a liquidation (but no positive obligation to investigate)
- a statement on their opinion as to whether the company is likely to be able to meet the obligations under the plan and any conditions on that opinion
- a declaration that the information is correct to the best of their knowledge

Additional comments

For small closely held companies, directors often want to exclude related entities from participating in the plan in order to be able to improve the offer to unrelated creditors but this cannot currently be done. Conditions, transferring assets and sale of assets can result in increased costs - plans under SBRs should be straight forward simply involving the collection and distribution of cash. Any complex arrangements should be dealt with via a VA.

The Act should be clearer about what the RP is required to do. Although current information requirements look to be low, the Act states that the RP commits a strict liability offence if the RP does not make reasonable inquiries into, and take reasonable steps to verify, the company's business, property, affairs and financial circumstances. It is not clear what this obligation is and as a result, extra costs will be incurred so the RP can undertake work which may not be necessary in order to protect themselves from a strict liability offence. However, it is important to get the balance of information right - onerous investigation and reporting obligations are costly. If the company's affairs are complex, a VA may be more appropriate as there are detailed reporting requirements for VAs.

Change

Creditors (including related party creditors) all have to be treated the same - related party creditors cannot be excluded from a payment under the plan. Conditions, making property (other than cash) available under the plan and giving the RP the power to sell assets on the company's behalf are currently allowed. Currently remuneration is a percentage of funds paid to creditors (assumable as assets other than cash can be made available as part of the plan). As it is proposed that only cash can be paid into the plan - remuneration should be expressed as a percentage of receipts.

Current reporting requirements are very limited - largely a declaration that the company is eligible, the company is likely to be able to discharge obligations under the plan, reasonable grounds that the company has set out information required. The limited information required to be provided does not enable creditors to make an informed decision about how to vote. The ATO (a common creditor) requests additional information before it will make a decision on how to vote.

Cost & time savings

Flexibility to exclude related creditors will result in better returns for creditors.

This may cost a little more, however should prevent creditors needing to request more information in order to make an informed decision. It is important however that reporting is not complex and detailed - as if that level of reporting is necessary, a VA is a better option.

Proposed process

Company must have paid all employee entitlements that are payable and have made all tax returns before the RP can send the plan to creditors.

All creditor claims settled by this date.

RP to send to creditors and lodge with ASIC the restructuring plan, proposal, standard terms, declaration and statement. RP to ask creditors to vote (not related party creditors).

Once the plan is sent, the company is insolvent. If the plan is cancelled, not made or terminated, control cannot be returned to the directors (company is insolvent). The company either has to go into VA or liquidation. RP cannot be appointed as administrator or liquidator.

Additional comments

As the company is insolvent, control cannot be returned to the directors. The company needs to progress to another form of external administration.

Change

Currently there is a confirmation of claim and dispute process here too - we have recommended this be moved to the proposal period rather than the acceptance period.

Currently if the plan is cancelled, not made or terminated (unless it is because of liquidation or VA) the control of the company is returned to the directors. This is not appropriate as the company is insolvent under law.

Cost & time savings

Timeframe: Currently 20 business days, with ability to extend by a further 10 business days.

Period will be dependent on how much time is given to creditors for the confirmation of claim process - will need to be either 10 or 15 business days, could be 10 business days since communication is via email. Could express the period as up to 20 business days so proposal could be sent before the end of the 20 business days (ie as soon as creditors confirmation period ends). RP should still be able to extend for 10 business days if necessary, but this should be the exception due to the pre-appointment work.

Acceptance period	Proposed process	Additional comments	Change	Cost & time savings
	Creditors vote	Directors would appoint liquidator recommended by RP - therefore no difference to the RP making the appointment. Retain CVL process after appointment of liquidator so creditors can replace liquidator.	Creditors can currently change their vote as many times as they want during the acceptance period due to the dispute process. No longer necessary.	Reduced costs as there is only one voting process - no variations and no "revoting" by creditors.
	RP assesses creditor votes and determines if the plan has been made (majority in value of arms length creditors - not secured creditors, lessor future debts)		Secured creditors currently count for the amount of any deficiency	Cost effective transition to liquidation so that creditors do not have the added cost of applications to Court if directors do not act.
	If plan not accepted, company is insolvent (due to plan being proposed) and RP has to appoint a liquidator. Liquidator can then appoint a VA if a VA is a better option.			Timeframe: Currently up to 20 business days - proposed changes will be 15 business days

Plan period	Proposed process	Additional comments	Change	Cost & time savings
	Plan made - RP for company becomes RP for plan unless company resolves to appoint someone else			
	RP within 2 BD of plan being made: - lodges notice of appointment with ASIC - lodges voting outcome with ASIC - advertises that plan made on the PNW - gives notice to creditors		At the moment there is a double up on lodgements with ASIC which can be streamlined (plan lodged again, details of debts and claims lodged again. Lodgement timing and what is lodged can be streamlined	
	Company can propose a variation of the plan which is voted on by creditors in the same way as the initial proposal. Company needs to pay RP extra to send variation information and determine voting outcome.	SBRs are corporate debt agreements. In debt agreements creditors can approve a variation.	At the moment it is only the Court that can approve a variation which is very expensive.	Process streamlined and more cost effective with company being able to offer a variation rather than having to go to Court and a more reasonable time period to rectify defaults. Cost of plan will not need to be made higher for variation as this will be an extra cost to the company and only if necessary.
	Where the company fails to comply with the plan, it has 30 days to either comply with the plan or propose a variation. If either of these do not occur, the RP terminates the plan and notifies creditors and ASIC. The company must then be placed into liquidation or voluntary administration - it cannot be returned to the control of the directors.		At the moment the directors must notify the RP of contravention or likely contravention. RP then must notify ASIC and creditors of non-compliance within 2 BD. The RP is best placed to determine non-compliance. 2BD is too short for a small business. The business must be given a reasonable timeframe to try and comply or else vary the plan.	Appointment of a liquidator is quicker and cost effective and ensures that creditors are not left having to incur further costs to get a liquidator appointed if directors fail to act.
	RP to appoint liquidator once company is non-compliant. Liquidator can then appoint a VA if a VA is a better option. Liquidator to follow CVL process, including the option for creditors to request a meeting of creditors to replace the liquidator.	Directors would appoint liquidator recommended by RP - therefore no difference to the RP making the appointment. Ensures that liquidator can be appointed immediately on failure of the plan. Retain CVL process after appointment of liquidator so creditors can replace liquidator.	At the moment there is no automatic appointment of a liquidator, so if directors don't appoint, creditors have to incur further costs to apply to Court.	Timeframe: Depends on the length of the plan - this will not change.
	RP collects payments under the plan and distributes funds to creditors.	Creditors do not have right to ask questions of the RP - RPs will deal with straightforward questions about the plan in the ordinary course without legislation. If creditors are unhappy with RP performance and/or payments not being made they can complain to ASIC.	At the moment the RP has the power to realise property but we propose that only cash can be dealt with under the plan, so this power is not required.	
	RP to lodge notice with ASIC, company and creditors when plan is complete (final payment made to creditors)	Directors do not notify RP of completion - RP knows when final payment to creditors is made.		

Appendix B: Structure of Legislation

Key to change column

M = Move to Act
L = Leave in Regulations
D = Delete
C = Change
N = New

Corporations Act

Current provision	Change	Edit
<i>Division 1 – Preliminary</i>		
452A Object of this Part		
452B Meaning of <i>property</i>		
DEFINITIONS	N, C	Definitions moved from regulations (may be moved to s9) Consider amending related entity to cover entities controlled/owned by spouse
<i>Division 2 – Restructuring</i>		
<i>Subdivision A – When restructuring begins and ends</i>		
453A Meaning of <i>restructuring</i>		
WHEN RESTRUCTURING ENDS	N	From regulation 5.3B.02 Most points are appropriate. However, directors can only terminate restructuring and take back control of company until the plan is sent (sending plan deems the company insolvent). Once plan is sent, coy either has to be placed into liq or VA to terminate. The appointment of a receiver over all or substantially all of the assets of the company should terminate the restructuring. Secured creditors to now stand outside the restructuring. Ipso facto to apply. If company cannot get the support of the secured creditor and secured creditor appoints a receiver over all or substantially all of the company's assets, there is no purpose to the restructuring. Restructuring must terminate if creditors exceed threshold – should it go in this section rather than the amended s 453J?
NOTICE OF END OF RESTRUCTURING	N	Reg 5.3B.53 Could incorporate into previous new section "When restructuring ends"
453J Restructuring practitioner may terminate restructuring	M, C	All termination provisions should be moved together.

Current provision	Change	Edit
TERMINATION OF RESTRUCTURING	N	Must terminate if debts exceed \$1M after creditors claims are verified From reg 5.3B.06. Consider combining reporting requirements into current s453J
<i>Subdivision B – Appointment of restructuring practitioner</i>		
453B Appointing a restructuring practitioner	C	Directors need to make and sign declaration of eligibility at the time of making the appointment (incorporate reg 5.3B.49). Remove obligation for directors to make a statement about voidable transactions as directors do not have the knowledge to make this assessment without significant assistance from the RP. Company should not be able to appoint an RP if in receivership – this should be incorporated into the list of when an RP cannot be appointed.
453C Eligibility criteria for restructuring	C	Incorporate Reg 5.3B.24 into this section Having two levels of eligibility is confusing (ie some in s453C and some in reg 5.3B.24). It would be better to have it all together with the debt threshold amount in the regulations so it is easier to change if required. Maybe the requirements in s453C could be expressed as, "before the plan is sent the creditors by the RP, the company must have ..."
453D Declaration by restructuring practitioner—relevant relationships		Relationship with directors and company does not prevent appointment – but must be disclosed (refer new provision after s456C)
NOTICE OF APPOINTMENT OF RESTRUCTURING PRACTITIONER FOR COMPANY	N	Reg 5.3B.50
NOTICE OF TERMINATION OF APPOINTMENT OF RESTRUCTURING PRACTITIONER FOR COMPANY	N	Reg 5.3B.51 – could combine notice requirements (former regs 5.3B.50 and 5.3B.51)
<i>Subdivision C – Role of the restructuring practitioner during restructuring</i>		
453E Functions, duties and powers of the restructuring practitioner		
453F Directors to help restructuring practitioner		
453G Restructuring practitioner's right to inspect books held by other persons		
453H Restructuring practitioner acts as company's agent		
453J Restructuring practitioner may terminate restructuring	M	Div 2, subdiv A
<i>Subdivision D – Conduct of company during restructuring</i>		
453K Control of company under restructuring		Edit subsection (2) for changes to position of secured creditors and the appointment of a receivership over all or substantially all assets terminates restructuring
453L Conducting the business of the company during restructuring		
453M Order for compensation where director involved in void transaction		
453N Effect of things done during restructuring of company	C	Transaction in good faith with the consent of the RP are not able to be set aside in a winding up (RP does not do transaction)
453P Effect of restructuring on company's members		
TRANSACTIONS OR DEALINGS IN THE ORDINARY COURSE OF BUSINESS	N	Reg 5.3B.04
CONSENT TO TRANSACTIONS OR DEALINGS OUTSIDE THE ORDINARY COURSE OF BUSINESS	N	Reg 5.3B.05

10. ARITA SMALL BUSINESS RESTRUCTURING

Current provision	Change	Edit
<i>Subdivision E – Effect on company etc. during restructuring</i>		
453Q Winding up company	C	Automatic stay of winding up application on the appointment of an RP. If plan accepted winding up application lapses. If plan is not accepted, winding up application heard. If plan fails, relation back date goes back to winding up application on foot on appointment of RP.
453R Restrictions on exercise of third party property rights		Secured creditors, owners and lessors (for future debts) to stand outside the SBR process. Cannot take enforcement action only due to the appointment of an RP.
453S Stay of proceedings	C	Only court should be able to consent to continuation of proceedings during the proposal and acceptance periods. RP is not in control of the company, it should not be the RP making these decisions.
453T Suspension of enforcement process		
453U Duties of court officer in relation to property of company	CS	Property should not be returned to the RP - property should be returned to the company. The company cannot deal with the property outside the ordinary course of business without RPs consent, so there is a level of protection around how property or money might be used
453V Lis pendens taken to exist		
453W Restructuring not to trigger liability of director or relative under guarantee of company's liability		
453X Property subject to a banker's lien—exemption from this Subdivision		
<i>Subdivision F – Rights of secured party, owner or lessor during restructuring</i>		
454A Application of Subdivision	D	Secured creditors, owners and lessors (for future debts) to stand outside the SBR process.
454B Application of sections 454C to 454H—PPSA security interests	D	
454C Secured party acts before or during decision period	D	Cannot take enforcement action due to the appointment of an RP.
454D Where enforcement of security interest begins before restructuring	D	
454E Security interest in perishable property	D	
454F Court may limit powers of secured party etc. in relation to secured property	C, M	Court to retain powers to limit powers of secured party etc in relation to secured property (edits will be required due to removal of other provisions). Incorporate reg 5.3B.64 into new provisions. As this needs to cover restructuring and plan, consider moving to Division 6 Powers of the Court.
454G Giving a notice under a security agreement etc.	D	
454H Sale of property subject to a possessory security interest	D	
454J Scope of sections 454K to 454M	D	
454K Where recovery of property begins before restructuring	D	
454L Recovering perishable property	D	
454M Court may limit powers of receiver etc. in relation to property used by company	C, M	
<i>Subdivision G – Enforcement rights triggered by restructuring</i>		
454N Stay on enforcing rights merely because the company is under restructuring etc.		
454P Lifting the stay on enforcing rights		
454Q Order for rights to be enforceable only with leave of the Court		
454R Self-executing provisions		
454S When other laws prevail—certain other Commonwealth Acts		

10. ARITA SMALL BUSINESS RESTRUCTURING

Current provision	Change	Edit
<i>SUBDIVISION XX</i> CREDITOR VERIFICATION OF DEBTS AND CLAIMS	N	NEW SUBDIVISION AND PROVISIONS Process for creditors to verify their debts during the proposal period. Notice of requirement to verify claim sent with notice of appointment. 15 business days to verify claim. If claim not verified then creditor is bound by the plan but does not participate in payments from the plan. Creditor has right to appeal to Court.
<i>Division 3 – Restructuring plan</i>		
455A Proposing a restructuring plan	C	Once a plan is proposed and the company is insolvent, then control of the company should not be able to return to directors. If directors terminate the restructuring, they either have a appoint a VA (not RP) or company goes into liquidation (RP not liquidator). RP appoints liquidator and liquidator must follow CVL process so creditors can replace the liquidator
455B Restructuring plan	C	Regulations on the plan moved into the Act – only limited matters should be retained in the regulations (refer new subdivision B and C below)
<i>SUBDIVISION B – PROPOSING A RESTRUCTURING PLAN</i>	N	
HOW A RESTRUCTURING PLAN IS PROPOSED	N	Reg 5.3B.14
CONTENTS OF RESTRUCTURING PLAN	N	Reg 5.3B.15, 5.3B.16 A set template does not work - should be a list of content to include but not a set format. Further basic financial information needs to be provided that is currently not prescribed - assets, secured debt, redundancy entitlements for example. The plan should only provide for payments of cash - giving property to the RP to deal with is too expensive and time consuming. If property needs to be sold the company should do it. Restructuring proposal statement should not be a separate document – form part of the plan (reg 5.3B.16)
STANDARD TERMS FOR RESTRUCTURING PLANS		Reg 5.3B.27 This provision should set the standard terms to be part of the plan. Could be included as part of the previous provision “Content of restructuring plan” Related party creditors should be able to be excluded from the plan payment process in order to be able to improve the return to unrelated creditors. Q - Related parties can't vote - so does there need to be some way of binding them?
MEANING OF PROPOSAL PERIOD	N	Reg 5.3B.17 – will need amendment due to moving creditor verification process to proposal period. Creditor to be able to apply to court if did not participate in verification process and thus excluded from plan payments.
RESTRUCTURING PRACTITIONER MUST MAKE DECLARATION IN RELATION TO RESTRUCTURING PLAN	N	Reg 5.3B.18 Obligations of the RP in (4) need to be clarified. Would be better to have a list of matters that the RP needs to report on and make a declaration about. A wide ranging declaration not pinned to particular obligations/information, results in increased costs for the restructuring as more work needs to be done to verify information beyond that reported.

10. ARITA SMALL BUSINESS RESTRUCTURING

Current provision	Change	Edit
RESTRUCTURING PRACTITIONER MUST NOTIFY COMPANY OF DEFECT IN RESTRUCTURING PLAN	N	Reg 5.3B.19
PROPOSAL TO MAKE RESTRUCTURING PLAN LAPSES	N	Reg 5.3B.20 Control should not return to the directors – company should immediately go into liquidation and have been deemed to have met the requirements for a CVL. RP cannot be liquidator. RP appoints liquidator and liquidator must follow CVL process so creditors can replace the liquidator.
PROPOSING A RESTRUCTURING PLAN TO CREDITORS	N	Reg 5.3B.21 and 5.3B.52 Amend the verification process as this is now done in the proposal period Incorporate notice requirement from reg 5.3B.52
<i>SUBDIVISION C – ACCEPTING A PROPOSAL FOR A RESTRUCTURING PLAN</i>		
ACCEPTANCE OF RESTRUCTURING PLAN	N	Reg 5.3B.25
HOW A RESTRUCTURING PLAN IS MADE	N	Reg 5.3B.26
PARTIES TO RESTRUCTURING PLAN	N	Reg 5.3B.28
EFFECT OF RESTRUCTURING PLAN	N, C	Reg 5.3B.29 Needs editing for changes to secured creditors, owners and lessors
PROTECTION OF COMPANY'S PROPERTY FROM PERSONS BOUND BY RESTRUCTURING PLAN	N	Reg 5.3B.30
NOTICE OF APPOINTMENT OF RESTRUCTURING PRACTITIONER FOR RESTRUCTURING PLAN	N	Reg 5.3B.54
NOTICE OF MAKING OF RESTRUCTURING PLAN	N	Reg 5.3B.55
<i>SUBDIVISION XX – CONTRAVENTION OF RESTRUCTURING PLAN</i>		
NOTICE OF CONTRAVENTION OF RESTRUCTURING PLAN	N	Reg 5.3B.56 2 days is a very short period - suggest extending this to give company time to try and rectify the non-compliance or offer a variation to the plan.
<i>Subdivision XX – VARIATION OR TERMINATION OF THE RESTRUCTURING PLAN</i>		
CREDITOR POWER TO VARY OR TERMINATE A PLAN	N	NEW PROVISIONS Creditors have the power to vary or terminate a plan once the plan is made.
WHEN COURT MAY VARY RESTRUCTURING PLAN	N	Reg 5.3B.61
WHEN COURT MAY VOID OR VALIDATE RESTRUCTURING PLAN	N	Reg 5.3B.62
WHEN COURT MAY TERMINATE RESTRUCTURING PLAN	N	Reg 5.3B.63
WHEN RESTRUCTURING PLAN TERMINATES	N	Reg 5.3B.31 Add in as a grounds for termination of the plan - Receiver is appointed over all or substantially all of the company's assets. Company should have power to terminate plan, offer a variation of the plan and there should be a longer period than 30 BD for termination on contravention of the plan
EFFECT OF TERMINATION OR AVOIDANCE	N	Reg 5.3B.32

10. ARITA SMALL BUSINESS RESTRUCTURING

Current provision	Change	Edit
NOTICE OF TERMINATION OF RESTRUCTURING PLAN	N	Reg 5.3B.57 – consider incorporating with “When restructuring plan terminates” (former reg 5.3B.31). It is the RP not the directors who will know when all obligations under the plan have been completed (last payment made to creditors) - so directors should not be providing notice under (a). The RP may know about an event before being notified by the directors, so (2) should be amended.
<i>Division 4 – The restructuring practitioner</i>		
<i>Subdivision A – Qualifications of restructuring practitioners</i>		
456A Appointee must consent		
456B Restructuring practitioner must be registered liquidator		
456C Disqualification of person connected with company		
RP RIGHT TO WORK WITH COMPANY PRIOR TO APPOINTMENT	N	NEW PROVISION Proposed RP able to work with the company prior to appointment without affecting ability to accept appointment – usual independence rules regarding relationship with directors and the company does not apply.
<i>Subdivision B – Removal and replacement of restructuring practitioner</i>		
456D Appointment of restructuring practitioner cannot be revoked		
456E Vacancy in office of restructuring practitioner for company		
456F Declarations by replacement restructuring practitioner—relevant relationships		
<i>Subdivision C – Rights, obligations and liabilities in relation to the restructuring practitioner</i>		
456G Rights, obligations and liabilities of a company and its officers in relation to the restructuring practitioner	D	Regulations to be moved to form part of the Act. This provision can be deleted as it is a section referring power to the regulations.
456H No liability for consent etc.		
456J Right of indemnity	D	RP incurs no debts so right of indemnity not required. Adds complexity to the SBR process – process should be simple.
456K Right of indemnity has priority over other debts	D	
456L Lien to secure indemnity	D	
456LA Restructuring practitioner has qualified privilege		
456LB Protection of persons dealing with restructuring practitioner		
<i>Subdivision D – Appointment of 2 or more restructuring practitioners</i>		
456M Appointment of 2 or more restructuring practitioners of company		
456N Appointment of 2 or more restructuring practitioners of restructuring plan		
<i>SUBDIVISION E – RESTRUCTURING PRACTITIONER FOR A RESTRUCTURING PLAN</i>	N	
APPOINTMENT OF RESTRUCTURING PRACTITIONER FOR RESTRUCTURING PLAN	N	Reg 5.3B.33
VACANCY IN OFFICE OF RESTRUCTURING PRACTITIONER FOR RESTRUCTURING PLAN	N	Reg 5.3B.34

10. ARITA SMALL BUSINESS RESTRUCTURING

Current provision	Change	Edit
NOTICE OF TERMINATION OF APPOINTMENT OF RESTRUCTURING PRACTITIONER FOR RESTRUCTURING PLAN	N	Reg 5.3B.58
DECLARATION BY NEW AND REPLACEMENT RESTRUCTURING PRACTITIONERS – RELEVANT RELATIONSHIPS	N	Reg 5.3B.35
REPLACEMENT DECLARATIONS—RELEVANT RELATIONSHIPS	N	Reg 5.3B.36
FUNCTIONS OF RESTRUCTURING PRACTITIONER FOR RESTRUCTURING PLAN	N	Reg 5.3B.37 RP does not need the power to realise assets as plan should be limited to the collection and distribution of cash. Remove this function.
REPLACEMENT RESTRUCTURING PRACTITIONER MUST LODGE OUTSTANDING NOTICES ETC	N	Reg 5.3B.38
PROTECTION FROM LIABILITY	N	Reg 5.3B.42
<i>Division 5 – Information, reports, documents etc.</i>		
457A Regulations may deal with information etc.		
457B Notice in public documents of company		
457C Effect of contravention of this Division		
<i>Division 6 – Powers of Court</i>		
458A General power to make orders		
458B Other powers of the Court		
<i>Division 7 – Other matters</i>		
458C Time for doing act does not run while act prevented by this Part	D	No longer required
458D Meaning of <i>restructuring relief period</i>		
458E Meaning of <i>eligible for temporary restructuring relief</i>		
458F Directors declare company not eligible for temporary restructuring relief		
458G Court order that company not eligible for temporary restructuring relief		
458H Obligation on registered liquidator to report		

Corporations Regulations

Current provision		Edits
<i>Division 1 – Preliminary</i>		
5.3B.01 Definitions	M	Div 1
<i>Division 2 – Restructuring</i>		
<i>Subdivision A – Restructuring generally</i>		
5.3B.02 When restructuring ends	M	Move to Div 2, Subdiv A
5.3B.03 Eligibility criteria for restructuring	L, C	Change eligibility criteria to \$1M debt excluding: <ul style="list-style-type: none"> ○ Employee entitlements ○ Secured creditors ○ Future lease payments (unless lease terminated prior to appointment of RP)

10. ARITA SMALL BUSINESS RESTRUCTURING

Current provision		Edits
		<ul style="list-style-type: none"> o Related party debt Suggest reconsider eligibility requirements regarding prior use of simplified liquidation and SBR – consider reduction from 7 years to 3 or 5 years.
5.3B.04 Transactions or dealings in the ordinary course of business	M	Move to Div 2, Subdiv D
5.3B.05 Consent to transactions or dealings outside the ordinary course of business	M	Move to Div 2, Subdiv D
5.3B.06 Termination of restructuring	M	Move to Div 2, Subdiv C
<i>Subdivision B – Restructuring practitioner for company under restructuring</i>	D	
5.3B.07 Authority	D	
5.3B.08 Powers of restructuring practitioner for company under restructuring	M	Move to Div 2, Subdiv C
5.3B.09 Replacement restructuring practitioner must fulfil certain past requirements	M	Move to Div 2, Subdiv C
5.3B.11 Protection from liability	M	Move to Div 2, Subdiv C
<i>Subdivision C – Stay on enforcing rights merely because the company is under restructuring etc.</i>		
5.3B.12 Prescribed kinds of contracts, agreements or arrangements under which rights are not subject to the stay in section 454N of the Act		
<i>Division 3 – Restructuring plan</i>		
<i>Subdivision A – Preliminary</i>	D	
5.3B.13 Authority	D	
<i>Subdivision B – Proposing a restructuring plan</i>	M	Div 3, subdiv B
5.3B.14 How a restructuring plan is proposed	M	Div 3, subdiv B
5.3B.15 Contents of restructuring plan	M	Div 3, subdiv B
5.3B.16 Restructuring proposal statement	M	Div 3, subdiv B Proposal statement should form part of plan – not separate
5.3B.17 Meaning of proposal period	M	Div 3, subdiv B
5.3B.18 Restructuring practitioner must make declaration in relation to restructuring plan	M	Div 3, subdiv B
5.3B.19 Restructuring practitioner must notify company of defect in restructuring plan	M	Div 3, subdiv B
5.3B.20 Proposal to make restructuring plan lapses	M	Div 3, subdiv B
5.3B.21 Proposing a restructuring plan to creditors	M	Div 3, subdiv B
5.3B.22 Creditors may dispute schedule of debts and claims before restructuring plan is made	D	Replace current process with a requirement for creditors to verify claims during the proposal period– similar to a liquidation proof of debt process
5.3B.23 Creditors may change vote	D	Will not be required if creditor claim verification process happens during the proposal period
5.3B.24 Company under restructuring must do certain things	M	Incorporate into the eligibility requirements in s453C
<i>Subdivision C – Accepting a proposal for a restructuring plan</i>	M	Div 3, Subdiv C
5.3B.25 Acceptance of restructuring plan	M	Div 3, Subdiv C
5.3B.26 How a restructuring plan is made	M	Div 3, Subdiv C
5.3B.27 Standard terms for restructuring plans	M	Div 3, Subdiv B
5.3B.28 Parties to restructuring plan		Div 3, Subdiv C
5.3B.29 Effect of restructuring plan		Div 3, Subdiv C
5.3B.30 Protection of company's property from persons bound by restructuring plan		Div 3, Subdiv C
5.3B.31 When restructuring plan terminates		Div 3, new subdiv

10. ARITA SMALL BUSINESS RESTRUCTURING

Current provision		Edits
5.3B.32 Effect of termination or avoidance		Div 3, new subdiv
<i>Subdivision D – Restructuring practitioner for a restructuring plan</i>	M	Div 4, Subdiv E (new subdivision)
5.3B.33 Appointment of restructuring practitioner for restructuring plan	M	
5.3B.34 Vacancy in office of restructuring practitioner for restructuring plan	M	
5.3B.35 Declaration by new and replacement restructuring practitioners – relevant relationships	M	
5.3B.36 Replacement declarations – relevant relationships	M	
5.3B.37 Functions of restructuring practitioner for restructuring plan	M	
5.3B.38 Replacement restructuring practitioner must lodge outstanding notices etc	M	
5.3B.39 When restructuring practitioner may dispose of encumbered property	D	RP to only collect and distribute funds. Plan limited to cash only
5.3B.42 Protection from liability	M	Div 4, Subdiv E (new subdivision)
5.3B.43 Right of indemnity	D	These provisions are not necessary and should be deleted. Remuneration can only be a % of payments made under the plan so there is no need for an indemnity or a lien to secure it.
5.3B.44 Right of indemnity has priority over other debts	D	
5.3B.45 Lien to secure indemnity	D	
<i>Division 4 – The restructuring practitioner</i>	D	Not necessary
5.3B.46 Authority	D	
5.3B.47 Company must notify restructuring practitioner of certain matters	D	Repeats reg 5.3B.57
<i>Division 5 – Information, reports, documents etc.</i>	D	No longer required
<i>Subdivision A – Preliminary</i>		
5.3B.48 Authority		
<i>Subdivision B – Information, reports, documents etc. during restructuring</i>		No longer required
5.3B.49 Declaration by directors – eligibility to be under restructuring and other matters	M	Move this declaration as part of appointment in s453B
5.3B.50 Notice of appointment of restructuring practitioner for company	M	Div 2, Subdiv B
5.3B.51 Notice of termination of appointment of restructuring practitioner for company	M	Div 2, subdiv B
5.3B.52 Notice of restructuring plan etc. given to affected creditors	M, C	Div 3, Subdiv B
5.3B.53 Notice of end of restructuring	M	Div 2, Subdiv A
<i>Subdivision C – Information, reports, documents etc. once restructuring plan is made</i>		No longer required
5.3B.54 Notice of appointment of restructuring practitioner for restructuring plan	M	Div 3, Subdiv C
5.3B.55 Notice of making of restructuring plan	M	Div 3, Subdiv C
5.3B.56 Notice of contravention of restructuring plan		Div 3, new subdiv on contravention of restructuring plan
5.3B.57 Notice of termination of restructuring plan	M	Div 3, new subdivision on variation and termination of plan
5.3B.58 Notice of termination of appointment of restructuring practitioner for restructuring plan	M	Div 4, subdiv D
<i>Division 6 – Powers of Court</i>	D	No longer required
5.3B.59 Authority	D	
5.3B.60 Court may make orders in relation to creditor disputes before restructuring plan is made	D	Process replaced with creditor verifications during proposal period. Court will need powers for new process
5.3B.61 When Court may vary restructuring plan	M	New subdivision in Div 3
5.3B.62 When Court may void or validate restructuring plan	M	
5.3B.63 When Court may terminate restructuring plan	M	
5.3B.64 Court may limit rights of secured creditor or owner or lessor	M	Move and incorporate into Court powers regarding secured property in Div 2, Subdiv F

10. ARITA SMALL BUSINESS RESTRUCTURING

Current provision		Edits
<i>Division 7 – Other matters</i>		
5.3B.65 Approved forms		May need to include a similar provision in the Act if forms provisions have now been moved to the Act from the Regulations.