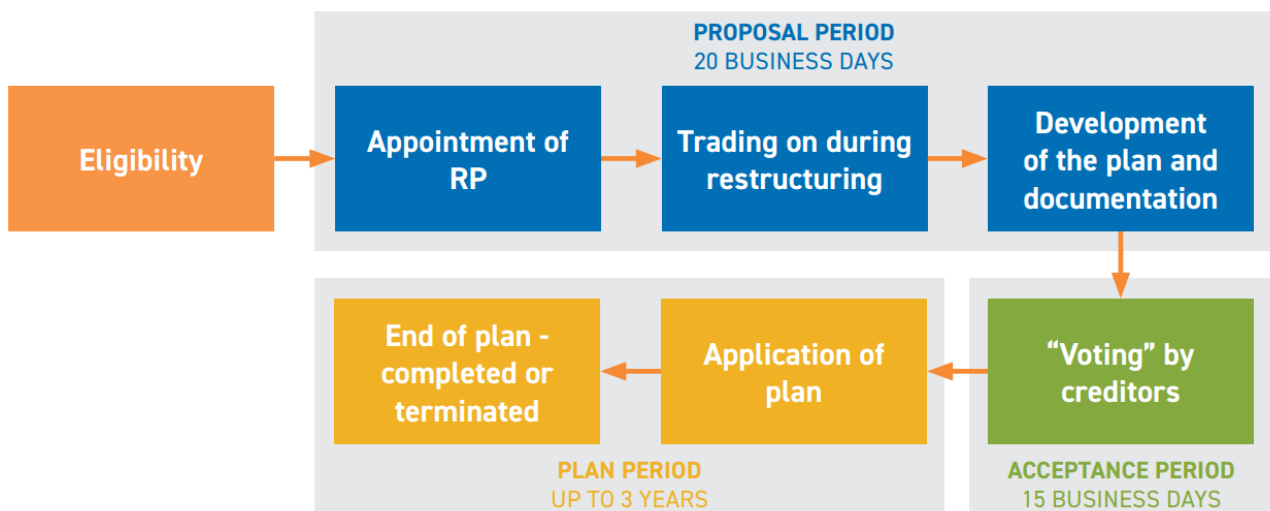


Small Business Restructuring (SBR): Factsheet for directors

In 2021, the Government made changes to Australia's insolvency laws to provide a restructuring alternative specifically designed for small businesses in financial trouble. The process allows financially distressed small businesses to access a single, streamlined process to restructure their debts, while allowing the owners to remain in control of their business.

It's designed to help small businesses to survive, giving better outcomes for businesses, creditors, employees and the economy.



Accessing the SBR process

To be eligible to access an SBR your company must:

- Be incorporated under the Corporations Act;
- Have total liabilities which do not exceed \$1 million on the day the company enters the process. This exclude employee entitlements;
- Resolve that it is insolvent or likely to become insolvent at some future time and that a small business restructuring practitioner should be appointed; and
- Appoint a small business restructuring practitioner to oversee the restructuring process, including working with you to develop your debt restructuring plan and restructuring proposal statement.

The SBR plan

The SBR plan cannot exceed a term of more than 3 years. The SBR plan sets out how a company's creditors would be repaid. The plan is flexible and describes how creditors will get paid, how much they will get paid and when they will get paid.

The plan is accompanied by a restructuring proposal statement, which includes a schedule setting out the company's creditors, and the amount they are owed by the company.

Frequently asked questions

How do I know if my company is insolvent?

A company is insolvent when it is not able to pay all the company's debts when they become payable.

Warning signs that a company is insolvent include accruing losses, cashflow difficulties, overdue taxes and lodgements, legal issues, and difficulty gaining access to new credit.

If you are unsure of whether your company is insolvent, you may wish to seek advice from Shaw Gidley or your external financial or legal advisor.

What does it mean to trade 'in the ordinary course of business'?

A company may continue to trade in line with its normal, day-to-day operations.

Certain transactions are deemed to be outside the ordinary course of business.

These are:

- Satisfying a debt or claim that would otherwise be dealt with under the restructuring plan.
- The transfer or sale of the whole or a part of the business; and
- The payment of a dividend.
- If a transaction is outside the ordinary course of business, the restructuring practitioner must approve the transaction.

Staying in control of the business during the SBR

Once a company enters the process:

- The company stays in control of the process, and may undertake transactions that are in the ordinary course of business;
- The company develops a debt restructuring plan and a restructuring proposal statement which is put to creditors for a vote; and
- The company is assisted in this process by its small business restructuring practitioner.



What do I need to do before putting a SBR plan to my creditors?

Before you can put a plan to your creditors, your company must be in substantial compliance with the following requirements:

- Employee entitlements which are due and payable must be paid. This excludes leave and other entitlements that are not currently due to be paid.
- Tax lodgements must be up to date. That means that all relevant tax returns and activity statements are lodged with the ATO. Tax debts do not need to be paid for a plan to be put to creditors.

What debts are included in the plan?

All unsecured debts which were incurred prior to the company entering restructuring are included in the restructuring plan.

- The exception is employee entitlements (including those not yet payable, like leave or redundancy entitlements), which are not included in the plan. Debts incurred after the company enters restructuring are not part of the plan and must be paid off outside of the plan.



How long does the SBR process take?

The company must put a restructuring plan to its creditors within 20 business days of entering the process.

The company's small business restructuring practitioner can extend this period by up to 10 business days where an extension is reasonable in the circumstances.

Once a plan is put to creditors, they have 15 business days to vote to accept or reject the plan.

What action can creditors take during this period?

When a company enters restructuring, a moratorium is applied on unsecured creditor claims and some secured creditor claims. This means:

- Unsecured creditors cannot begin, continue, or enforce their claims;
- Owners of property (other than perishable property) used or occupied by the company, or people who lease such property to the company, cannot recover their property;
- Secured creditors cannot enforce their security interest in the company's assets in some circumstances;
- A creditor holding a personal guarantee from the company's director/s or their relatives cannot act under the personal guarantee without the court's consent; and
- Ipso facto clauses (which are triggered during insolvency-related events) are stayed for some contracts.

How do creditors vote on a SBR plan?

The restructuring practitioner provides creditors with the restructuring proposal statement and the restructuring plan.

Once a plan is put to creditors, they may vote to accept or reject the plan. They have 15 business days to vote to accept or reject the plan. The restructuring practitioner oversees the voting process.

During this 'proposal period', creditors can seek to vary the debt the restructuring statement says they are owed if they believe it is not accurately reflected in the restructuring proposal statement.

A plan is accepted if more than 50 % of the creditors by value that vote, vote to accept the plan. To ensure integrity, related party creditors (that is those linked to the company, its directors, or its shareholders) are not entitled to vote on a restructuring plan.

What is the role of the SBR practitioner?

The small business restructuring practitioner oversees the debt restructuring but the company's directors remain in control of the business.

The small business restructuring practitioner assists the company to:

- Prepare its restructuring plan and restructuring proposal statement; and
- Circulate the restructuring plan and restructuring proposal statement to creditors.

The practitioner must also certify to creditors that they believe the company is eligible for restructuring, and that the company is likely to be able to meet its obligations under the plan. They must take reasonable steps to verify this.

Once a plan is made, the small business restructuring practitioner manages the disbursement of payments to the company's creditors based on the terms set out in the plan.

What happens once a plan is made?

Once a plan is made, payments must be disbursed to a company's creditors in accordance with the terms set out in the plan.

All admissible debts and claims rank equally upon repayment of the plan. That means that all creditors are paid the same 'cents in the dollar' and all are paid at the same time. When a company pays off its obligations under the restructuring plan, it is released from all debts or claims that were admissible under the plan.

A company 'exits' a plan if, for example, it fails to make payments under the plan. If this happens before its obligations are paid off, it remains liable for the original debt owed prior to the plan commencing, minus any repayments that occurred under the plan.

What happens if the SBR plan is not accepted by creditors?

The plan must be supported by more than 50 % of the creditors by value that vote.

If the restructuring plan is not accepted, the restructuring process ends.

You remain in control of the company but creditors are no longer prevented from enforcing their rights and you are no longer protected from liability for insolvent trading. You may wish to consider placing the company into liquidation.

What qualifications do SBR practitioners have?

SBR practitioners must be Registered Liquidators.

They must possess suitable experience, knowledge, and abilities, and have their registration granted by an independent committee convened by ASIC. Businesses should only deal with a practitioner who is registered.

What is the cost of a small business restructuring?

The cost of the restructuring will vary depending on the company and the complexity of the restructure. However, the SBR practitioner must offer a flat fee to assist you to prepare the restructuring plan and to put the plan to creditors.

You and the SBR practitioner must agree on this cost before the restructuring commences. In addition to the planning flat fee, once a plan is agreed by the creditors, the small business practitioner will be paid an agreed percentage of the disbursements to creditors under the plan. Creditors will be made aware of, and must consent to, this proposed remuneration when voting on a plan.

Contact us

Should you have any queries please

contact one of our specialists on:

P: (02) 4908 4444 or (02) 6580 0400

E: help@shawgidley.com.au

W: www.shawgidley.com.au/contact-us/



shaw | gidley

insolvency reconstruction