

## The introduction of a Small Business Restructuring Practitioner to restructure your business

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With the recently proposed law changes to benefit small businesses this article explores the eligibility requirements for small business to restructure their business in a cost-effective way and the impacts on working capital.

Recent media articles indicate there are over 919,000 micro businesses in Australia with turnover less than \$2M a year on JobKeeper. On the recently announced proposal to provide cost effective restructuring tools to small business we unpack some of the proposed law changes and likely impacts on working capital for small business.

### Overview of proposed law changes

While this is not law yet and expected to be announced with the budget in the first week of October 2020, if passed, this may commence on 1 January 2021 to replace some of the COVID-19 insolvent trading laws.

Key proposed law changes include:

- Eligible for companies with liabilities under \$1M;
- Current employee entitlements are paid up to date;
- Directors remain in control;
- Directors engage a Small Business Restructuring Practitioner (SBRP) to develop a plan, and circulate the plan to creditors within 20 days;
- Creditors are provided 15 days to consider the plan, and accept or reject the restructuring plan;
- Creditors are bound by the plan if 50% of value in favour of the plan;
- Related parties prohibited from voting on plan;
- The plan is open to the directors discretion on the proposed discount or proposed timing of any return to creditors, however, creditors acceptance is likely to be guided by the expected return in a liquidation scenario; and
- Avoids cost and time requirements of convening creditors meetings in a Voluntary Administration, issuing a Deed of Company Arrangement (DOCA), and acting as the Deed Administrator to oversee the distribution to creditors.

At Wexted Advisors, as the market leaders in providing safe harbour corporate structuring plans (CSP) to ASX Listed companies and other corporates, we see this as a cost-effective bridge for small businesses between safe harbour and a voluntary administration / DOCA process.

Ultimately the success or failure of the CSP will be akin to a DOCA, and be subject to the creditors, including the ATO's, willingness to accept the viability of the plan and the proposed cents in the dollar return. The counterfactual return in an immediate liquidation scenario will need to be provided as a comparison to assist creditors in making an informed decision, which is the CSP will need to provide a better return to creditors than an immediate liquidation.

In order to provide creditors with an independent counterfactual of the estimated return in a liquidation scenario and to avoid potential abuse of process, we expect this work will need to be undertaken by a registered liquidator. Accordingly, similarly to a safe harbour advisor role, the proposed SBRP when developing the CSP is likely to be a registered liquidator.

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## **How long will the process take? And what will it cost?**

How long is a piece of string? Like a safe harbour advisory engagement you will need to understand the company's financial position, both assets and liabilities, the expected forced sale valuation of assets in a liquidation scenario, employee entitlements, the number and extent of secured creditors, the number of unsecured creditors, the plan and the expected timeframe of the plan. Where financiers or other secured creditors hold registered security interests on assets, any CSP developed will need to be prepared in consultation with the secured creditors. It is anticipated secured creditors under the proposed laws, will retain enforcement rights, although in the current environment will continue to look towards directors and their advisors for workout solutions.

The SBRP will work alongside the Director to prepare a CSP, the counterfactual liquidation scenario, and liaise with key secured creditors and any petitioning creditor. This could be undertaken within 2 to 4 days of engagement and on accessing the required company financial information.

The CSP and liquidation analysis will need to be reported and circulated to creditors for consideration. A special proxy form for voting either 'for' or 'against' the CSP will be included in the report to creditors, similar to a condensed version of a Voluntary Administrators Report under section 439A of the Corporations Act 2001 to creditors prior to a second meeting of creditors to vote on whether creditors wish to accept a DOCA, or liquidate the company. Creditors will be provided 15 days to vote on the CSP by circular resolution. To minimise the SBRP's workload the level of investigations into the directors conduct and potential preference recoveries against the director or third parties, i.e. the ATO, will be limited if undertaken at all. Accordingly, some critics will consider the liquidation counterfactual analysis to be incomplete without this analysis. However, on balance and to save costs, this work is not expected to be undertaken. The conduct and any directors' breaches may also be largely ignored to streamline the process.

As outlined above, as a result of limiting the level and detail of investigations the report to creditors will be condensed and produced in a short timeframe of between 2 to 4 days.

While the proposed legislation allows a company to take up to 20 days to develop a CSP, we expect the secured creditors will encourage the company and the engaged SBRP to shorten this period. In addition, the company will seek to limit costs of the SBRP by reducing the engagement timeframe. Based on the above, the CSP could be reported to creditors within eight days of SBRP engagement.

Allowing up to a further 15 days for creditors to vote on the CSP, or shorter period if the majority of creditors votes are received earlier. The SBRP may be required to address creditor concerns during this period and collate votes, possible a further 1-2 days of SBRP engagement time.

Where the majority of creditors vote in favour of the CSP, the SBRP will oversee the implementation of the CSP and the distribution to creditors, allowing the director(s) to continue to operate the business. In the event the company defaults in meeting the agreed terms of the CSP, we assume creditors will have recourse to either meet to vary the CSP or liquidate the company. Independence issues may prevent the SBRP being able to act as liquidator of the company.

As the overall period could potentially reduce from 35 days to under 23 days, and the SBRP's involvement, and their staff, during this period may be at least 10 business days. Where the SBRP's role is limited as outlined above, the cost of engaging a SBRP may be between \$10K to \$30K, plus GST and any disbursements.

## **Working capital**

Under the temporary relief support for businesses the statutory time frame for a company to respond to a statutory demand has been extended temporarily from 21 days to six months. The minimum debt threshold for creditors issuing statutory demands has also been increased from \$2,000 to \$20,000. These temporary measures were recently extended to 31 December 2020.



The temporary measures and the proposed changes to restructuring small businesses, not yet law, may lead to a shift in supplier trading terms and supply limits. If this occurs, companies will require additional capital to meet tightening working capital.

Secured creditors, including financiers who provide invoice finance to companies will be monitoring any shift in trading terms and the proposed restructuring changes closely to understand the impact on their security and any provisions.

While the relief packages are temporary measures they may have a longer term impact on trading terms.

### **Our view**

Wexted Advisors are cautiously supportive of the proposed legislation as saving mass insolvency and failure, however, in our experience any legislation needs to be carefully managed, so creditors are not exploited, information is fulsome and the process is properly managed.

Wexted Advisors are supportive of anything that permits effective restructuring for small business, but that failure needs to be taken seriously and people accessing the legislation need guideposts and need to be accountable.

### **About us**

Wexted Advisors are market leaders in providing safe harbour advice for ASX Listed Boards and large corporates in Australia. Wexted Advisors are also registered liquidators. Further information on our credentials and experience as the leaders in safe harbour is on our website [www.wexted.com](http://www.wexted.com).