

Insolvency reforms 2020 – restructuring process overview for insolvency practitioners

Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Act)

Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020 (Regs)

Insolvency Practice Rules (Corporations) Amendment (Corporate Insolvency Reforms) Rules 2020 (Rules)

To assist potential restructuring practitioners to understand what might be involved in accepting an appointment and considering an appropriate fee for the same, we set out below an overview of the various touch points a restructuring practitioner will or may have in the restructuring process. This is based on the final version of the Act, Regs and Rules as at 20 January 2021.

The debtor-in-possession “DIP” restructuring process

Restructuring period

1. The beginning of the ‘restructuring period’ is marked by the appointment of a restructuring practitioner.
 - 1.1 Before the appointment of the restructuring practitioner, the company directors must, by board resolution, determine a fixed fee amount for the remuneration of the restructuring practitioner in relation to work to be done during the restructuring period (r 60-1B of the Rules). This determination may also include a method

of calculating remuneration in relation to necessary works conducted by the restructuring practitioner in the event the board of directors consent to commencing or continuing with proceedings (r 60-1B(3) of the Rules). Accordingly, the restructuring practitioner will need to spend time before any appointment making sufficient enquiries to determine an appropriate fee to propose to directors and to be clear on the scope of services provided.

- 1.2. The restructuring practitioner must consent in writing to the appointment (**s 456A of the Act**).
2. A restructuring practitioner is taken to be an agent and officer of the company (**s 435H of the Act, Consequential Amendment to s 9 of the Corporations Act**).
3. A restructuring practitioner must do the following within 1 business day of being appointed (**Reg 5.3B.50**).
 - 3.1. Lodge a notice of the appointment with ASIC in accordance with r 5.6.75(4) of the Corporations Regulations, and
 - 3.2. Give the information set out in **Reg 5.3B.50(2)** to as many of the company's creditors as reasonably possible

Note: Failure to comply with the above is an offence (s 1311(1) of the Corporations Act).
4. As soon as 'practicable' after being appointed, a restructuring practitioner must make a declaration of any relevant relationships (**DIRRI**), lodge a copy with ASIC and give a copy to as many of the company's creditors as reasonably practicable (**s 453D(1)-(3) of the Act**).
5. If, at any time, the restructuring practitioner realises that the DIRRI has become out-of-date or contains an error, they must prepare a replacement DIRRI and lodge a copy with ASIC and provide a copy to creditors (**s 453D(4)-(6) of the Act**).

Note: Failure to comply with the above is an offence (s 1311(1) of the Corporations Act)
6. If the appointment of a restructuring practitioner for the company terminates, a notice must be lodged to ASIC in the prescribed form by that restructuring practitioner. If the termination occurs due to the death of the restructuring practitioner, that notice must be lodged by the company (**Reg 5.3B.51**).
7. If a restructuring practitioner is appointed to replace another practitioner, they must within 2 business days after their appointment do anything that was required by the former practitioner under Subdivision B or C of Division 5 of the Regs that remains outstanding (**Reg 5.3B.09(3)**).
8. A restructuring practitioner has the power under the Act (as set out below) to inspect and take copies of all relevant records of the company. It would be prudent for a restructuring practitioner to utilise these powers as soon as possible.
 - 8.1. Directors of a company under restructuring are obliged to give the restructuring practitioner information about the company's business, property, affairs and financial circumstances (including allowing the restructuring practitioner to take copies of the company's books) in a time and manner that is reasonably required by the restructuring practitioner (**s 453F of the Act**).
 - 8.2. If the company's books are held by a person other than the company, they must permit the restructuring practitioner to inspect and take copies of the company's books within a reasonable time (**s 453G of the Act**).
9. Within 5 business days of the beginning of the restructuring (or any such longer period allowed by the restructuring practitioner), the directors must give the restructuring practitioner a declaration (signed by all directors) in the approved form under Reg 5.3B.65 (if any), which must:
 - 9.1. State whether the company has entered into any transactions that would be voidable under s 588FE of the Corporations Act (other than an unfair preference) in the circumstances prescribed, and
 - 9.2. State whether the directors reasonably believe that the company met the restructuring eligibility criteria at the start of restructuring and set out their reasons

(Reg 5.3B.49)

- 10.** During the 20 business days following the appointment, the restructuring practitioner is to assist the company's directors to prepare a restructuring plan (**s 453E(1)(b) of the Act**). This 20 day period is defined as the 'proposal period' (**Reg 5.3B.17**).
- 10.1. The restructuring practitioner may, on application of the company, extend the proposal period by a maximum of 10 days if satisfied on reasonable grounds that it would not be reasonable for the company to give a restructuring plan within the proposal period. The restructuring practitioner can only extend the proposal period once. (**see Reg 5.3B.17(2)-(3)**). If the proposal period is extended, the restructuring practitioner must within 2 business days, lodge a notice to ASIC in the prescribed form (and in accordance with Reg 5.6.75(4)) and give a copy of that notice to as many creditors as reasonably practicable (**Reg 5.3B.17(5)**).
- 10.2. During the proposal period, the restructuring practitioner may consent to a transaction or dealing by the company (**s 453L(2)(b) of the Act and Reg 5.3B.05**) and must record such consent in writing and provide a copy to the company within 2 business days of consent being given (if it was given orally). A copy of the consent given must be kept by the restructuring practitioner for a period of five years after the date it was given.
- 10.3. At any time, the restructuring practitioner may terminate the restructuring if they have reasonable grounds to believe the following (**s 453J(1) of the Act**).
- The company does not meet the eligibility criteria for restructuring, or
 - It would not be in the best interests of the creditors for a restructuring plan to be made and instead, the restructuring should end or the company be wound up

To terminate the restructuring, the restructuring practitioner must provide written notice to the company and to as many creditors as reasonably practicable (**s 453J(2), (3) of the Act**). The information that is required to be included in the notice is set out in **Reg 5.3B.06**.

- 11.** The contents of a restructuring plan must comply with the requirements set out in **Reg 5.3B.15**.
- 11.1. It must be in an approved form, identify the company's property that is to be dealt with (and how), provide for the remuneration for the restructuring practitioner for the plan and specify the date on which the restructuring plan was executed.
- 11.2. It may provide authority for the restructuring practitioner to deal with identified property in a specific way, provide for any matter regarding the company's financial circumstances and be conditional on a specified event occurring within a maximum of 10 days after acceptance of the proposal to make the restructuring plan.
- 11.3. It must not provide for the transfer of property (other than money) to a creditor, or for payments under the plan in respect of an admissible debt or claim after 3 years from when the plan is made.
- 12.** A restructuring plan must be accompanied by a restructuring proposal statement in the prescribed form that includes a schedule of debts and claims and any other information required to be included by that prescribed form (**Reg 5.3B.16**)
- 13.** Once the company executes a restructuring plan, the restructuring practitioner must prepare a declaration 'as soon as practicable' (**Reg 5.3B.18**) which must include the following:
- 13.1. On the basis that the restructuring practitioner 'believes on reasonable grounds' that they are true and correct, statements that:
- The restructuring eligibility criteria has been met and the company is likely able to discharge its obligations under the restructuring plan as and when they become due and payable
 - All required information has been set out in the company's restructuring proposal statement.
- (Reg 5.3B.16(2))**
- 13.2. If the restructuring practitioner does not believe any of the above is true/correct, the basis on which that conclusion is formed (**Reg 5.3B.18(2)(c)**).
- 13.3. If any related entity of the restructuring practitioner has become an affected creditor, the name of that affected creditor and their relationship with the restructuring practitioner (**Reg 5.3B.18(2)(d)**).

14. It is an offence of strict liability if the restructuring practitioner prepares a declaration but fails to make reasonable enquiries into, or take reasonable steps to verify, the company's business, property, affairs and financial circumstances (**Reg 5.3B.18(4)-(5)**).
15. 15. If, prior to providing the declaration, the restructuring practitioner becomes aware of any defect within the restructuring plan and has reasonable grounds to believe that it may affect the company's ability to meet its obligations under the plan, they must notify the company of this and provide an opportunity to address the defect (**Reg 5.3B.19**). Failure to do so is an offence of strict liability.
16. 16. The restructuring practitioner must sign the declaration (**Reg 5.3B.21**).
17. The restructuring practitioner must also attend to the following 'as soon as practicable' after the company executes a restructuring plan (**Reg 5.3B.19**).
- 17.1. Give to as many affected creditors as reasonably practicable, a copy of:
- The restructuring plan
 - The restructuring plan standard terms (see **Reg 5.3B.27**)
 - The restructuring proposal statement
 - The restructuring practitioner's declaration.
- 17.2. Ask each creditor (except excluded creditors) to give a written statement about their position on the restructuring plan (i.e. accept or reject), including if they agree or disagree with the company's assessment of their admissible debts and claims.
- Creditors will have 15 business days to do so – this is the 'acceptance period' (**Reg 5.3B.21(3)**).
- 17.3 Within 2 days after the restructuring practitioner attends to the matters in 17.1 above, the restructuring practitioner must lodge with ASIC (in the prescribed form) the plan, the restructuring proposal statement and the declaration (**Reg 5.3B.52**).
18. If a creditor disagrees with the company's assessment of the creditor's admissible debts or claims or the creditor's status as an excluded creditor, they have five business days from receiving the plan to notify the restructuring practitioner (**Reg 5.3B.22(3)**). This will then create certain obligations on the restructuring practitioner (as detailed below).
- 18.1. As soon as practicable after receiving a notice of disagreement from a creditor (as set out in **Reg 5.3B.22(3)**), the restructuring practitioner must give a written notice to the company and the creditor setting out their recommendation for resolving the disagreement with reasons (**Reg 5.3B.22(7)**).
- 18.2. If the restructuring practitioner recommends that the schedule of debts and claims is to be varied (and is of the opinion that the variation is significant), the restructuring practitioner must give written notice to the company and creditors stating that fact and setting out the creditors' rights in Reg 5.3B.23 (i.e. at any time before the end of the acceptance period, withdraw their statement about the restructuring plan and give a new statement) (**Reg 5.3B.23(2)**).
- 18.3 If a restructuring practitioner is appointed to replace another practitioner ('former practitioner') and prior to the appointment, the former practitioner was given notice of a creditor's disagreement with the schedule of debts and claims, the replacement restructuring practitioner must provide the relevant notice under Reg 5.3B.22(6) or (7) as soon as practicable after appointment (**Reg 5.3B.09**).
- 18.4. If a restructuring practitioner refuses to consider the disagreement or refuses to make a recommendation to vary the schedule of debts and claims, the company or a creditor can make an application to the Court to make one or more of the following orders:
- That the restructuring practitioner consider the disagreement and make a recommendation;
 - Vary the schedule of debts and claims;
 - Extend the acceptance period for the proposal to make the restructuring plan.



If the Court makes any such orders, the restructuring practitioner must within 2 business days after the order is made, lodge a notice to ASIC in the prescribed form setting out the terms of the order and outlining the creditors' rights under Reg 5.3B.23 and give a copy of that notice to as many creditors as reasonably practicable.

NOTE: Failure to comply with the above is an offence (s 1311(1) of the Corporations Act)

(Reg 5.3B.60)

19. A company's proposal to make a restructuring plan is considered to have lapsed if the plan is not accepted or if the restructuring practitioner cancels it (**Reg 5.3B.20(1)**), which they may do if they become aware:

- 19.1. That the information in the plan is incomplete/inaccurate and they have reasonable grounds to believe that if the plan is made, it will likely affect the company's ability to meet its obligations under the plan
- 19.2. That one or more creditors were not disclosed in the restructuring proposal statement
- 19.3. That a material particular in the restructuring proposal statement was omitted or incorrect
- 19.4. Of a material change in the company's circumstances that was not foreshadowed in the restructuring proposal statement and in the restructuring practitioner's opinion, may affect a creditor's decision to accept or reject the restructuring plan

20. Within 2 business days of the restructuring of a company ending (e.g. restructuring plan has lapsed), the person who was the restructuring practitioner immediately before the restructuring ending must attend to the following (**Reg 5.3B.53**).

- 20.1. Lodge a notice to ASIC in the prescribed form stating that the restructuring has ended and the reason for ending
- 20.2. Give a copy of that notice to as many creditors as reasonably practicable

Note: Failure to comply with the above is an offence (s 1311(1) of the Corporations Act)

21. If the restructuring plan is accepted, this signifies the 'making' of the restructuring plan and the restructuring period ends. The restructuring practitioner transitions to being the restructuring practitioner for the duration of the plan (unless the company resolves to appoint someone else) (**Reg 5.3B.33**).

21.1 Within 2 business days of a restructuring practitioner being appointed as restructuring practitioner for plan, they must lodge a notice to ASIC in the prescribed form in accordance with Reg 5.6.75(4) of the Corporations Regulations (**Reg 5.3B.54**).

22. The restructuring practitioner is bound by the plan (**Reg 5.3B.29**).

23. Within 2 business days of the company making a restructuring plan, the restructuring practitioner must do the following (**Reg 5.3B.55**):

- 23.1. Give written notice of the making of a restructuring plan to as many creditors as reasonably practicable that states that a restructuring plan has been made (and on what day), and
- 23.2. Lodge a notice to ASIC in the prescribed form, including information about:
 - a. the total value of the debts and claims set out in the schedule of debts and claims included within the company's restructuring proposal statement;
 - b. the number of affected creditors who were given a copy of the documents referred to in Reg 5.3B.21(1)(a); and
 - c. the proportion of affected creditors that gave a statement under Reg 5.3B.21(1)(b) accepting the restructuring plan.

Note: Failure to comply with the above is an offence (s 1311(1) of the Corporations Act).

Restructuring plan – things to note

24. The functions of a restructuring practitioner for the plan are detailed in **Reg 5.3B.37** (see below).

- 24.1. To receive money from and hold money on trust for the company
- 24.2. To pay money to creditors in accordance with the plan
- 24.3. If requested to do so by the directors, to realise company property that is available to pay creditors in accordance with that plan and distribute proceeds of realised property to creditors in accordance with the plan
- 24.4. To answer questions about the performance or exercise of any of the restructuring practitioner's functions and powers
- 24.5. To do anything that is incidental to the performance or exercise of their powers/functions or is necessary/convenient for the purpose of administering the plan

25. A restructuring practitioner must not dispose of any company property that is subject to a security interest or is used, occupied by, or in the possession of the company but someone else is the owner or lessor, unless it is:

- 25.1. In the ordinary course of the company's business
- 25.2. With written consent of the secured party, owner or lessor, or
- 25.3. With leave of the court

(Reg 5.3B.39)

26. A restructuring practitioner's remuneration under a restructuring plan is specified in the plan and is expressed as a "specified percentage of payments made to creditors in accordance with the plan". It may also include a method for calculating a restructuring practitioner's remuneration in the event that the board resolves to commence or continue with proceedings (this will relate to the necessary works done by the restructuring practitioner in respect of those proceedings) (**r 60-1C of the Rules**).

27. If a director becomes aware that a person bound by the plan has contravened the plan (or is likely to contravene the plan), they must give notice to the restructuring practitioner within 2 business days after the day on which they became aware (**Reg 5.3B.56(1)**).

28. Once a restructuring practitioner becomes aware of the above, they must give notice of the contravention (or likely contravention) to as many of the company's creditors as reasonably practicable and lodge a notice with ASIC in the prescribed form (**Reg 5.3B.56(2)**).

Note: Failure to comply with the above is an offence (s 1311(1) of the Corporations Act)

29. If a restructuring plan has been made and the directors become aware of certain matters (see below), they must give written notice to the restructuring practitioner within 2 business days of the event (**Reg 5.3B.47**).

- 29.1. An administrator of the company has been appointed under section 436A, 436B or 436C of the Corporations Act.
- 29.2. A liquidator (or provisional liquidator) of the company is appointed.

30. Within 2 business days of receiving such notice, the restructuring practitioner must lodge a notice to ASIC in the prescribed form of the happening of the event and give a copy of that notice to as many creditors as reasonably practicable (**Reg 5.3B.47(2)**).

30.1. If a restructuring practitioner for the plan is appointed under Reg 5.3B.34(1) (i.e. a replacement practitioner) and at the time of the appointment, notice of an event described above has not been lodged, the directors must give written notice to the replacement practitioner within 2 business days after the day on which the replacement practitioner was appointed (**Reg 5.3B.47(3)**).

31. If a company's restructuring plan terminates either under **Reg 5.3B.31(1)(a)** (all obligations under the plan have been fulfilled and all debts and claims have been dealt with) or under **Reg 5.3B.31(1)(b), (c), (d), (e) or (f)** (Court order, condition to initiate plan is not met, contravention of plan, appointment of administrator or liquidator), within 2 business days of becoming aware, the directors must give written notice of the termination to the 'person' (now the 'former practitioner').

31.1. If the restructuring plan terminated under Reg 5.3B.31(1)(b), (c), (d), (e) or (f), the directors must include the reason for termination in the written notice (**Reg 5.3B.57(2)(a)**).

31.2. Within 2 business days of receiving that notice, the 'former practitioner' must lodge a notice to ASIC in the prescribed form and give a copy of that notice to as many of the company's creditors as reasonably practicable (**Reg 5.3B.57(1)(b) and (2)(b)**).

NOTE: Failure to comply with the above is an offence (s 1311(1) of the Corporations Act)

32. If the appointment of a restructuring practitioner for the plan terminates, a notice must be lodged to ASIC in the prescribed form by that restructuring practitioner. If the termination occurs due to the death of the restructuring practitioner, that notice must be lodged by the company (**Reg 5.3B.58**).

KEY CONTACTS



Wendy Jones

Partner, Adelaide
D +61 8 8233 0645
wendy.jones@dentons.com



Delano Leen

Senior Associate, Adelaide
D +61 8 8233 0629
delano.leen@dentons.com

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