

Small Business Restructuring Practitioners (SBRP's) Submission

For Treasury Publication

nem Australasia Pty Ltd (nem)

nem is the largest specialist SME consultancy firm in Australasia with a partnership group that are drawn from a wide range of industries and who collectively hold a vast array of professional qualifications. In addition to working predominantly with small to medium businesses over the past twenty years, the firm has significant interconnectivity within the public and corporate sectors and currently has contracts with Department of Industry, is appointed by DFAT to the Australian Infrastructure Finance Facility for the Pacific, has supported small to medium businesses through the Industry EP Program since its inception, is a Victorian Forestry Business Transition Voucher Program Panel service provider, amongst others.

nem's Perspective

This is a bold and progressive initiative that will enable business professionals that are not registered insolvency specialists to undertake financial restructuring activities on behalf of small, privately owned and operated businesses.

Not only will this initiative expand the resources available to small businesses it will also provide access to a far broader range of business expertise, on a more affordable and sustainable basis, than is otherwise available through the appointment of insolvency specialists, being administrators, receivers or liquidators.

The primary objective of a SBRP should be to provide businesses access to a program that can enable them to continue trading while their financial difficulties can be attended to. As a consequence, SBRP's should be drawn from a far wider pool of professionals than insolvency specialists, being qualified accountants with a minimum period of experience in practice, or in business.

To restrict the role of SBRP to only registered liquidators is akin to having coroners working in the emergency department. While they have a wealth of knowledge and their experience probably exceeds that of the accounting profession, their focus is on what went wrong, how to salvage the assets while navigating through a myriad of legal requirements.

The SBRP's involvement should start from the position of "continuing to trade" and is the trading outlook viable into the future? This assessment and decision point will provide the pathway to a Plan to continue OR to proceed to a Liquidation.

Leading up to this DECISION point and assessment does not require the extensive experience and skills of a registered liquidator. It requires a skilled business advisor/s that can work with the owner/s and determine how the business is most likely to trade moving forward and what steps are necessary to remain viably trading. No doubt many Liquidators would fall into this category, but not exclusively to the expense of a broader range of qualified professionals.

If a pathway to continue is determined to be in the best interests of all parties the SBRP proceeds as outlined.

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nem's Perspective (continued)

If the pathway forward is to liquidation, then a registered Liquidator is probably the best party all be it with the streamlined process to minimise costs and improve the prospects of a higher return than would ordinarily apply with small businesses.

This process will provide business owners with a far higher probability of being able to continue to trade while their liquidity issues are assessed and dealt with independently and constructively.

With this in mind, the following recommendations are provided so that the new legislation can ensure the objectives of the program and streamlined processes can be achieved.

Eligibility

The desire to focus on the small of the small to medium business sector is clear, however the eligibility criteria of liabilities less than \$1M, may be restrictive and reject businesses that would otherwise be expected to qualify. For example; a small business with property ownership will more than likely have liabilities in excess of \$1M, or a small business that has, by necessity, been funded by a loan from the owner secured by his/her family home would also exceed the threshold.

Perhaps the eligibility criteria could be clarified by excluding secured liabilities or property-based liabilities, thereby ensuring that it is the operational liabilities that are receiving the appropriate attention.

Secured Creditors

For the appointment of a SBRP to be effective the legislation must ensure that the appointment of a SBRP is NOT deemed to be a default under the terms of secured creditor arrangements, and if the business or owner is in default (even if not financial default) at the time of the appointment, that the appointment of a SBRP restricts the ability of the secured creditor to act under any default for the term of the program.

The authority of the SBRP must be protected and once an appointment is made, secured creditors are both bound by the process and restricted from making any further appointments (administrators or receivers).

Related Party Creditors

While we understand the intent, in practice business owners are usually the largest creditors, directly and indirectly. As Directors they have limited claim to their employee entitlements and are also potentially personally liable for some specific liabilities of the business (i.e. superannuation, ATO liabilities).

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Related Party Creditors *(continued)*

Excluding bona fide related party creditors from voting for the restructuring plan is not reasonable for the majority of privately-owned businesses.

Most owners have funded their businesses through loans, often secured against their homes, and have also provided personal guarantees to lenders, landlords, equipment financiers and to a wide range of suppliers. Owners often carry significant contingent liabilities which can materialise quite quickly if liquidation occurs.

We believe Related Party Creditors should be able to be included provided the SBRP is satisfied that they are bona fide AND that they should be netted off against Related Party Debtors (that do not necessarily have the same ownership but are genuine related party debtors) for the purposes of voting and determining the value of creditors.

If the legislation is intended to provide a streamlined and affordable process for those businesses that are facing HONEST failure through no fault of their own, then a fail-safe mechanism could be introduced to provide all independent creditors with the ability to raise abuse of the provisions within a specified time frame (a 20 or 30 day period) that enables the SBRP Plan to be set aside by the regulator (e.g. ASIC) and the business to be put straight into liquidation.

Debtor in Possession Model

To continue trading the "Debtor in possession" or the owners who maintain control will need protection from the current Insolvency Laws relating to trading whilst Insolvent, similar to the current suspension of these provisions as a result of Covid-19.

Employee Entitlements

Paying any employee entitlements that are due and payable, needs to ensure that the provisions are up to date including superannuation entitlements in the ordinary course of business but cannot extend to paying out ALL employee entitlements.

If paying out ALL employee entitlements was required, the scheme would be largely ineffective for many smaller businesses.

Plan and Program

We believe the 20-business day period for the SBRP to develop a Plan for the approval of creditors is a workable timeline. With the objective being to trade through the immediate solvency issues requiring all stakeholders to participate in the process, not just the creditors and owners. All stakeholders include; staff and employees, customers, suppliers, communities (in some circumstances), landlords, finance companies, the ATO, statutory organisations and banks.

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Plan and Program (continued)

The SBRP needs to have sufficient experience to quickly assess asset values, likely realisation processes and potential proceeds and shortfalls in order to properly advise the owners and to ensure any plan is prepared in the best interests of all parties. The SBRP process should not be constrained by accepted industry practices such as advertising the business for sale.

SBRP

This appointment must have some real teeth and a safeguard mechanism to ensure their independence. With the owner appointing the SBRP there is a risk that the SBRP could be unduly influenced by the owners of the business.

The fail-safe mechanism referred to under related party creditors could be extended to include a mechanism for creditors to raise issues with regard to the independence of the SBRP.

Conversely the SBRP should be able to call on this mechanism to place the business into immediate liquidation should the owner of the business fail to co-operate with the SBRP process and the recommendations in the plan.

Remuneration of the SBRP

We believe the appointment of the SBRP by the business will be set out in an engagement letter or similar, supported by a Directors resolution if it is to be accepted.

We also see three steps as opposed to the two steps outlined. Presumably supported by an Agreement setting out the critical guidelines, responsibilities and proposed fees.

Step 1. An initial assessment which we believe should be based on an hourly rate and a maximum number of hours agreed with the owner at the outset.

Step 2. The development of the Plan by the SBRP in conjunction with the owner/s of the business including the presentation to creditors for acceptance.

This step could be a fixed fee scoped reasonable accurately during the initial assessment or step 1.

Step 3. Implementation of the Plan, monitoring adherence to the Plan and the disbursement of funds in accordance with the agreed milestones. The fee for these services should ideally be scoped as a the greater of or the lessor of the fee or % of funds disbursed in order to provide creditors with a clear understanding of the cost of the process.

We see a need for some flexibility in the fee structure as a percentage of funds disbursed may result in an ideal outcome for all parties in some instances and a poor outcome in others.

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Simplified Liquidation

There is a need to be able to claim back genuine unfair preferential payments that have been made to creditors, particularly those creditors that are in a position to leverage their position and which also hold guarantees. SBRP fees paid should be excluded from this process.

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8 October 2020