Australian Small Business and Family Enterprise Ombudsman

INSOLVENCY PRACTICES INQUIRY – Discussion Paper – December 2019

Submitted by: **Lisa B**

Type of businesses undertaken which relate to my personal experience:

Road transport company providing heavy haulage and specialised freight movements
Mechanical workshop (also an Approved Inspection Station - Qld)

1. **At the initial consultation with a registered liquidator, should the registered liquidator be required to provide a small business with:**
    a. **a hard copy plain language fact sheet that outlines the various types of external administration and the role the directors and owners in each?**
    b. **The reasons for recommending a particular course of action to the directors?**

Response:

Absolutely.
At the time of accepting that we required assistance in regards to the cash flow issue that our businesses were experiencing over the industry known as the 'slow period' of the Christmas and New Year period, I Google searched for a financial/debt advisory firm that I may have been able to contact to discuss what options were available to us.

It is to be noted that:

- Our accountant's firm was completely closed over this period, so therefore, we were unable to contact them for advice and/or assistance; and
- I had provided detailed and up to date financials to the gentleman from the debt recovery firm.

At an arranged meeting with a gentleman from the debt advisory firm, my husband and I were blindsided by the fact that there was also a gentleman from an Administration/Liquidation firm in attendance - a person who was in attendance without our prior consent and/or knowledge.
These gentlemen proceeded to 'bombard' us with questions and directions, that in our overwhelmed and emotional state, my husband and I felt belittled, stupid, incompetent – therefore resulting in the gentlemen to pressure us into following their directives.
After the barrage of rudeness and pressure, we left the meeting with no understanding of our rights and that from all accounts, these gentlemen had us believing that the businesses were to continue trading and 'they had our best businesses interest as a priority and would get us out of this mess' …

We were given no written direction/advice/options for us to go through or given the opportunity to obtain any further advice from any other external/independent party – namely our accountant.

There was to be no follow up meetings to go through financials in depth to determine an accurate position of the business' financial position or options that may have been available to be implemented to turn the businesses around.

We were, upon reflection, what could be considered as 'asset rich, cash flow poor' at this particular time.

2. **Should there be a control mechanism to prevent total costs of an external administration from consuming the value of the company's assets? What form could this take?**

Response:

Yes - there should be a control mechanism put in place to ensure that the external administration / registered liquidator's fees (remuneration) do not erode any potential funds that may be available to both secured and unsecured creditors.

The hourly fees charged are too high – especially when many small businesses struggle to compete in the market place and have to drop their rates/prices in line with market expectation.

Due to the situation that once an Administrator/Liquidator is 'appointed/engaged', they have an 'open cheque book' as to what fees they can charge.

When you are dealing with a small enterprise, many of the associated creditors are also small family owned businesses.

Where do these creditors get the knowledge and understanding to question and refute the Liquidator in regards to the potential exorbitant fees to be incurred?

Where do the creditors have recourse when Liquidator's fees are quoted in Creditor Reports, only to have the Administrator/Liquidator substantially increase these fees without the ability to place a cap on said 'approved' fee increases?

The creditors 'approve' the fees at an amount quoted by the Liquidator – why is the Liquidator then not held accountable for any increase in this quote?

Liquidators often state that businesses become insolvent due to the fact that the owners/directors/managers 'do not have an understanding of their costs and expenses when undertaking work' – why are the Liquidators not held accountable for their poor ability to quote a job?

If a price is quoted by the Liquidator, they should honour that quote – as anyone operating a business in the 'real world' would have to. Why cannot the fees be capped at a certain amount? Why not have the hourly rate charge capped at a level relevant to the complexity of the job?

As there is mention in the *Discussion Paper* of the cost involved for even a 'vanilla' voluntary administration – why not have the hourly rate fee reduced?

As to what form this control mechanism could take, I wish to propose the following:

- Liquidators should be made to operate in a more real world environment.
- Liquidators remain required to be registered with ASIC (or similar new body/authority created).
- When a business experiences financial stress, the business should contact ASIC outlining the situation.
- ASIC then determines if the business can be 'turned around' by allowing the business to utilise services that may enable them to do so. Possibly a Legal Aid style system.
- ASIC is the one that determines which liquidation firm *may* be best suited to the business' needs – industry related experience (eg: transport, retail, farming and agriculture, hospitality ..)
- ALL funds received in the closure of the business are deposited into a 'trust fund' operated by an independent party (preferably ASIC) – NOT to the liquidation firm.
- The liquidation firm then has a capped time frame – say six months – to assist and/or close the business.
- The liquidation firm has capped fees.
- Should the liquidation firm take longer than the predetermined time frame, they must explain themselves to ASIC to justify why this has occurred.
- The liquidation firm MUST submit a detailed/itemised invoice to ASIC outlining services undertaken and await payment from ASIC for same (as ANY other business operating in Australia has to …)
- At NO point does the liquidation firm receive funds prior to work being completed until approved and to the satisfaction of ASIC, similar body and creditors.

3. **Should an information sheet of the average costs for a 'day in court' and the average numbers of court days for particular actions, be included with each creditors report?**

Response:

Yes.
The more information available to creditors to make an informed decision in regards to Liquidator fees and charges the better.
In regards to Small Business and Family Enterprise, the majority of unsecured creditors in particular, do not possess the knowledge and full understanding of their rights as creditors. Liquidator's discussion at meetings and the corresponding Creditor's Reports, often use terminology not familiar to many of said creditors.

The secured creditors (most often financial institutions) are large corporations that have the respective resources and staff to understand the fees and processes involved in a liquidation. Being a secured creditor also means that they will receive either the monies owed to them in full or chase the former director/s personally for the debt recovery due to securities held.

The Liquidator's ability to strip available funds from the company's assets for their own pockets, instead of to the creditors who have actually provided services and/or goods and who are justified in receiving payment, are the ones who loose out through the Liquidators ability to charge excessive fees – often taking tens or hundreds of thousand dollars over what the Liquidator previously 'quoted' an any previous Creditor's meeting.

It seems unfair that a creditor that has legitimately provided goods and/or services, issued a tax invoice and have received payment for same, can potentially be told to 'refund' said payment back to the Liquidators if the Liquidators deem it to be a 'voidable preference payment'.
Payment legislation in respects to the transport industry, are as such that a 'contractor/subbie' is to be paid in 30 days of tax invoice date. Why can this then be deemed as a preferential payment?
Payment plans arranged in good faith and transparency – either in conjunction with an accountant – with the Australian Taxation Office (ATO) if not paid on time and in full, results in the ATO possibly winding up a company. How can these be deemed as preference payments? – when these payments are required to be paid?

I believe that the six (6) month preferential payment recall is too much. Many small businesses find themselves in financial difficulty due to circumstances outside of their control (as mentioned within your Discussion Paper) and the impact of these circumstances can occur in a very small time frame – therefore, maybe reduce the preferential payment time frame to two (2) and at maximum, three (3) months.

Small Business and Family Enterprises do not have the resources, knowledge, time and/or funds to pursue unfair recall attempts on payments that they have legitimately received, through the courts – and the Liquidators know this.

Again, this results in more money in the coffers of the Liquidators to take as 'professional fees'.

4. **In consideration of technology available today, how beneficial would it be to automatically provide the *Annual Administration Return* report lodged with ASIC to creditors, directors, owners?**

Response:

It would be very easy to provide this report utilising the available technology today.
To date (to the best of my knowledge) the creditor, director or owner must contact the Liquidator to request a copy of said report.

In the instance of unsecured (smaller) creditors, they may not even be aware that this report exists.
If they are aware and do make such a request with the Liquidator, this only erodes further into any available funds, as the Liquidator adds this cost of supplying said report/s to their Administration and/or Liquidator fees.
To obtain the report through the ASIC website incurs a cost also.

The Liquidator has to provide a copy to ASIC as required guidelines and the report should also be sent to creditors, directors, owners WITHOUT this being included as 'disbursements/expenses' by the Liquidator.

This would hopefully, make the undertakings of the Liquidator more transparent as they are in the knowledge that others may scruitinse the work undertaken – or more the case, 'reported' though not actually undertaken.

In saying that, the amounts included in the reports should be itemised and detailed, not merely noted as Administrators Fees, Liquidator Fees, Legal Fees, etc.

The Liquidators need to be held more accountable to ALL as to what work they have or haven't undertaken.

In addition, the *Supplementary Reports* that the liquidator currently submits to ASIC outlining their reasons for the external administration/liquidation, should also be made available to creditors to review.
The liquidator can write <u>anything</u> in this report to justify their actions and no-one has the ability to scrutinise or right of reply to the contents of these reports.
How can ASIC make a determination when they have nothing to compare the liquidators 'findings' to?
There is currently no mechanism in place in regards to these reports, that holds the liquidator to account – the liquidator just spins some spiel that covers themselves in justifying why they have stripped funds from the financially stressed small business and why they drag the liquidation out for two (2) years or more.

Hence, I refer back to my response in *Questions for Comment* - number 2.

5. **Should valuations be provided to, and proposed marketing strategies require approval from, creditors?**

Response:

Yes.

In our personal experience, we had a professional valuation of the companies undertaken 4½ months prior to our Voluntary Administration, due to a proposed purchase of our companies from another transport company. This valuation cost thousands of dollars – which inevitably impacted our cash flow.
Due to confidential reasons, the proposed sale did not eventuate.

Once the Administrator pressured us into signing a Voluntary Administration, we provided them with this valuation – resulting in them having a very recent and professional valuation on hand, at no cost to them.
This also gave them a fairly accurate appraisal of the assets of the companies and what funds were available to them to obtain for their own benefit – not creditors, employees – though purely and solely to line their own pockets …. I will happily swear to this in an Australian Court of Law.

I believe that this valuation was not shown/provided to creditors nor did the Liquidator follow up on any potential purchasers that may have had interest in buying the companies.

The Liquidators did advertise the companies for sale .. in *The Financial Review* !!
I do not know of many (if any) prospective transport companies that would even read this publication.

Had the creditors possibly had access to the valuation and financials to show that the assets and debtors would have been sufficient to continue trading (possibly with a DOCA implemented), then this is far more transparent than the Liquidators only providing information and documentation that they wish the creditors to have access to.

The Liquidators spin whatever correspondence works best for themselves – and I do not believe that ANY Administrator or Liquidator have any creditor's 'best interests' as a priority …

The Liquidators manipulate information and figures to the creditors to give the false sense that they have the creditor's interests as a priority. If this were the case, Liquidators would not charge such exorbitant fees and keep the available funds for themselves instead of the creditors – who are the ones who are legitimately owed the money.

How Liquidators can advise creditors that there will be no (or very minimal) dividend to come from a liquidation, fully knowing that they have pocketed all available funds for themselves, is criminal.

NO other business is permitted to operate in this manner – so neither should Administration/Liquidation firms.

6. **Should demands to recover payments determined to give a creditor an unfair preference in a winding up require the registered liquidator to include the evidence they relied on in making that determination?**

   Response:

Yes.

Once again, the total lack of transparency by Liquidators is something that would not be permitted in any other business that operates in Australia. How the Liquidator is permitted to just demand a payment back from a business that has legally and legitimately received said payment for services/goods provided, is wrong.

All the Liquidator has to do is go through the list of creditors who received payments six (6) months prior and demand it back. This is lazy and unacceptable behaviour – and in doing this, the Liquidator then charges fees to the creditors for doing so. The more the Liquidators are able to take in fees, the less is available for creditors in regards to receiving a dividend.

The Liquidator has to be held to account for their decisions/actions and provide transparency in their undertakings. As a creditor myself in the liquidation of our companies, when I phoned or emailed the firm to request information, I was usually pushed aside and told 'not to worry about it, we are doing what has to be done and these things take time.' Quite often, the staff member assigned to our matter could not answer my questions/requests so didn't respond or responded with a very generic answer – leaving me to ask further questions to obtain an answer that I was satisfied with – which I must admit never happened.

This was also the case when I requested information for the employees, only to be told that 'they can contact us to find out that information'. When I replied that the employees are probably not aware of their rights to contact the Liquidator, I was told that 'this is not our problem – the employees can contact us.' As I was still in contact with a few of the employees, I advised them of what the Liquidators told me. One of the employees did contact the Liquidator, though their call and email were never returned by the Liquidator.

In our personal circumstance, we had approved payment plans in place with the Australian Taxation Office (ATO) that had been arranged through our accountant.
We strictly adhered to these payment plans and all repayments were up to date and paid on time – whereupon, the Voluntary Administration we had signed was changed without our consultation or knowledge to liquidation.

The Liquidators then spent a good part of a year, endeavouring to obtain the past six (6) months payments made to the ATO back, as they deemed these to be preferential payments. We were legally obligated to adhere to the ATO repayment schedule, otherwise, the ATO would have wound us up had we not.

To have the Liquidator provide evidence as to why they deem any payments to creditors as 'voidable preference payments', would place the onus on the Liquidator to prove this was the case.

I can accept that it may be possible in large corporate liquidations that there may be situations were funds are tunnelled to other parties to benefit the directors/office holders.

However, in the view of micro, small and family enterprise businesses, this mainly is not the case. Small businesses often are the ones who pay their debts on time whilst the large corporations drag their payments out to 60,90 or 120 plus days.

7. **Should it be mandatory for individuals seeking to be directors of companies undertake core education on running a business and the potential risks of personal exposure before being eligible for appointment?**

   Response:

Possibly - This would no doubt be highly beneficial, though sometimes not achievable for various reasons.

I believe that many small businesses and family enterprises usually commence their companies due to having worked in the industry for a considerable period of time or the business is handed down from family members.

Many small business operators know their industry well, though may lack the academic side of starting and maintaining a business.

A potential business owner and/or director can possess 'core education', though the main issues usually arise due to changes in Government legislation, guidelines, rules and obligations.

Large companies often have the staff employed to keep on top of these changes, though most small businesses do not. The small business owner believes they are doing the 'right thing' though are often not aware that the goal posts have moved in regard to some laws, regulations, obligations, etc, relating to their business practices.

I feel that it is extremely important for those applying for an ACN and/or ABN, that if they 'estimate' a potential annual turnover of $X.xx, then they should engage and note a registered accountant on the said ACN or ABN registration.

We did this and worked closely with the accountant. Due to our company size and staff abilities, we also engaged external firms to oversee and assist with our Human Resources (HR) and Work Place Health and Safety (OH&S) obligations and requirements. This came at a substantial cost, though we wished to ensure that these areas of the business were being conducted in an up to date, compliant and legal manner. This was especially pertinent in regards to adhering to the large corporate client base that we were able to achieve – either contractually or as preferred suppliers.

So in our personal experience I, as the accounts officer and my husband as the general/operations manager wished to undertake formal training to enable us to understand the academic side of our roles better – myself a Diploma in Business and my husband a Business Management and Health and Safety course.

To our complete dismay, for us to undertake further education in our respective fields, was to cost us $4k+ each. However, we could receive Government subsidies should we have enrolled our employees in these or other courses. At the time I said to the Education provider – 'would the Government not wish for the owners/directors of the company to have this knowledge, so they can then pass same knowledge onto staff?'

We did pay and commence said courses, though due to family obligations I did not complete my course and my husband's course was made obsolete half way through and he was told that he would have to re-sign and pay, for the new updated course. We then decided that the funds for these courses were best put towards the day to day running of the business.

So it appears that my question muttered so many years ago, has now raised itself for discussion in this inquiry. Australia runs off the back of small business and family enterprise, however, all levels of Government seem to put every road block possible in the way for these businesses to run profitably. Legislation, rules and guidelines need to be drawn up for smaller enterprises as opposed to the large national, multi-national corporations.

8. **Should it be mandatory for individuals seeking to start a company or register an ABN to undertake core education on running a business and the potential risks of personal exposure to business?**

Response:

Preferable – though not always possible.

Maybe prior to the individual wishing to start a company or register for an ABN, there could be information provided by ASIC on their website, followed by a 'questionnaire' to be completed prior to being able to gain access to the registration sections?

Should the individual not read the information provided by ASIC – which may be the case for many utilising the current online process - the individual would have to achieve a certain percentage of the questionnaire correct before being able to go further in the application/registration process.

If anything, this may at least 'highlight' some areas that the individual was not aware of prevously and may wish to research further – to bring to their attention regulations, obligations, personal exposure and the like.
The individual may research further to enable them to complete the ASIC questionnaire or engage professionals – accountants, lawyers – to assist them to understand certain areas better.

To encourage the individual to seek professional assistance with this, the charges must be capped across the board for any accountant, solicitor to charge for this service – similar to how an Approved Inspection Station can only charge a predetermined amount for the cost of having a Roadworthy Certificate written out.
If the individual is aware that for them to obtain professional assistance with completing the ASIC questionnaire and subsequent registration will cost (say) $100.00, they will be more open to having this completed with the assistance of a professional who can advise them (at no extra charge) the potential risks of personal exposure to operating a business.

If this service of assisting those to start a business and/or register for an ABN is offered at a fixed cost by said professionals, then I believe that many individuals would openly use this service.

If the professional is to obtain some sort of reimbursement/subsidy for providing said service from ASIC, that could also be looked into – however, taking into account steps to ensure that the same professionals didn't 'rort' the system.
So maybe to resolve this, the professional would have to 'sign off', that they believe that the individual seeking to start a business/register an ABN, has an understanding of their position, obligation and personal role associated with operating said business. To ensure transparency, the professional is to be held to account should things 'come undone' in a given timeframe?

It must be emphasised that this capped charge cannot be too expensive, otherwise, individuals will 'struggle/muddle' through the (proposed) ASIC questionnaire by themselves and possibly not understand the potential risks involved with starting/registering a business.

It could also be looked at to implement a tiered level of obligations in relation to the size, turnover etc of companies. It is very difficult for a small business to adhere to and understand the same rules and obligations than large corporations (who have the staff and resources to do so).

I am aware that there are some levels in place in regards to this, though many of the laws and understandings of same, are applicable to all. Yes, there needs to be certain mechanisms in place to ensure honest and reputable conduct of businesses, though a review of some areas is required in regards to small / family enterprise businesses.

9. **Where a small business seeks advice when facing financial difficulties, should the individual proposing a course of action be required to provide a small business with:**
    a. **a hard copy plain language fact sheet that outlines the various types of external administration available and the role of directors and owners in each?**
    b. **the reasons recommending a particular course of action to the directors?**

Response:

Yes.

Whether this advice be from an accountant, bookkeeper, 'debt solver' or the like, the person/firm providing this advice must be able to provide to the directors and owners detailed/itemised information of the whole overall position of the business experiencing financial stress.

The same people providing this advice MUST also be held to account for information provided to the directors and owners at this time.

Many micro, small business and family enterprises put their trust and spend thousands of dollars to engage an accountant and to a lesser extent a bookkeeper, to assist with the financial health of the business. These same micro, small business and family enterprise directors and owners believe what they are being told is correct and that their respective businesses are doing well and/or may need financial reviewing.

Personally, my situation virtually ran the same as outlined in the *Discussion Paper* in that we sort assistance from a 'debt solver' due to our accountant's firm being completely closed for the Christmas/ New Year break. Unfortunately for us, this was in January 2017 – prior to Safe Harbour being implemented on 19th September 2019. Had Safe Harbour been available to us, this would have allowed us time to wait for our accountant to re-open and address the cash flow issues directly with him.

Following our initial phone contact where the 'debt solver' was completely empathetic and understanding of our businesses (3x) cash flow position, he requested detailed financials and similar information.
When we met the 'debt solver' for a face-to-face meeting, to our shock also present (without our consent or consultation) another gentleman was present – who was introduced as a director of an administration/liquidation firm. Talk about being railroaded and completely set up without our knowledge and leaving us no escape route.

Excluding certified and registered accountants, I do not believe that these 'debt solvers' should be permitted to operate. They prey on vulnerable people and line their own back pockets instead of genuinely assisting the businesses experiencing financial stress.

These 'debt solvers' tell you one thing and lure you into a false sense of security that they are looking out for your best interests and may outline 'procedures' to assist.
The real trouble is that these 'debt solvers' are not held to account when the director and owners believe the advice (spin) they are given, only for the goal posts to be moved – resulting in the directors or owners then being caught with no escape – Voluntary Administration then Liquidation.

10. **How can the safe harbour provision be improved to encourage small businesses to take action early and gain time to assess the viability of the business?**

    Response:

As our businesses (3x) liquidations occurred prior to safe harbour being implemented, I can only respond in retrospect to this question.

From reading some information in regards to safe harbour, it appears that for small businesses there are some possible ambiguities and judicial interpretation that may be a key determinant to directors and owners, of its effectiveness. As it is fairly new, it appears that many areas are 'open for interpretation' until they are contested in court.

Maybe if ASIC was more approachable to those suffering financial stress, more small business directors and owners would contact them for advice?
From my personal experience, having to contact ASIC and/or the ATO for advice or assistance feels like you are sending a 'red flag' to these Government organisations that your business is struggling.

My consideration would be to 'remove' all 'debt solver' and Insolvency/Administration/Liquidation companies (unless registered and approved with ASIC) and have a Government department to assist small business directors and owners in respects to financial stress.

If a small business, at the first sign of cash flow or other issues, felt that they can contact ASIC and/or the ATO for advice or assistance without any retribution, I am certain a very large percentage of said directors and owners would do so.

If upon a small business director or owner contacting ASIC or the ATO and the advice is to contact an accountant moving forward, that accountant MUST be registered and approved with ASIC and the ATO to provide honest and not self-benefiting advice, as required.

I understand that this most likely would require some form on 'capping' to ensure that the service advice is for micro, small business and family enterprises only.

If ASIC or the ATO direct the small business director or owner to consult with their accountant, the fee for this service should be capped – and potentially have mechanisms in place to ensure that the accountant is not missing out on possible income. Possibly have something implemented that is similar to a Medicare type set up for registered and certified accountants?

If small business directors and owners knew that they had the option to seek advice and direction early in regards to financial stress – without retribution from Government agencies – I am fairly certain this would be greatly utislised.

Leave the Administrators/Liquidators out of the equation until deemed necessary following the findings of the assigned accountant reporting to ASIC and/or the ATO …. Therefore, placing the assignment of micro, small businesses and family enterprises in ASIC's jurisdiction to potential Administration/Liquidation firms – who will then have to work in the best interests of all parties and report to ASIC prior to receiving any approval on remuneration and time frame for any necessary processes to be competed.

The Administration/Liquidation firms currently have to report their 'findings' to ASIC, so why not reverse the process and have ASIC assign any potential small businesses to relevant Administration/Liquidation firms?

11. How can accountants and bookkeepers best support small businesses to seek help early?

Response:

As outlined in part from my response to Question 10, I strongly believe that a Medicare type system be implemented for accountants and bookkeepers to assist micro, small business and family enterprises.

As bookkeepers are mainly engaged by the smaller businesses, they could be the first port of call, though many small businesses do utilise the services of registered and certified accountants at great expense to their businesses.

I completely appreciate that both bookkeepers and accountants are also conducting a business and need to be profitable, though for businesses deemed to be micro, small or family enterprises, these should be able to access advice and information at a reasonable (capped) cost.

At present, I believe that ASIC's definition of a small business is not correct. The current turnover, number of employees etc, is too low to encompass the majority of what, in essence, are small businesses or family enterprises.

Possibly to encourage more directors and owners of small businesses to engage the services of professionals to assist with financial and/or legal aspects of their businesses, this 'Medicare' type approach may have to be seriously looked at.

In conjunction with my response to Question 8 of the *Discussion Paper*, small business and family enterprise directors and owners need to be able to access professional services to assist them without incurring huge costs to do so.

If the small business and family enterprise director and owner are able to access and have assistance from certified and registered accountants and bookkeepers without a huge financial expense, they may be more open to seeking their services more than once a year …

12. **Should increased funding and resources be provided to the financial counselling sector to enable them to provide services to small businesses experiencing financial difficulty?**

Response:

Depends – what is defined as 'the financial counselling sector'?

If this includes 'debt solver' and/or Insolvency/Administration/Liquidation companies – a huge NO.

If this is applicable to ASIC approved certified and registered accountants and bookkeepers – YES.

The 'cowboy' operation currently available to 'debt solver', insolvency, turnaround, administration and liquidation companies only results in more micro, small and family enterprise businesses being placed into administration and more often than not, liquidation. This allows the Appointed Administrator to claim fees as 'the Administrator', then also claim additional fees once they appoint themselves Liquidators – double dipping of the most obscene degree !!!

I wholeheartedly believe that in regards to micro, small and family enterprise businesses, that the directors and owners are able to approach ASIC and/or the ATO when required and ASIC or the ATO, upon assessing the businesses situations, assigns the business to the director or owners' own approved certified and registered accountant or other for review (under my proposed Medicare style system).

The accountant then reports back to ASIC with their recommendations whereupon ASIC then determine, if required, as to which creditable and ASIC approved Administration/Liquidation company is to handle the matter moving forward.

If an improved Safe Harbour provision is implemented, this should enable many small businesses to turnaround.

Please remember that the majority of small business and family enterprises are impacted by seasonal/industry changes out of their control. If the small business is able to access Government backed and certified assistance without repercussions, the large proportion of the small businesses conducting their businesses in the best way possible, will be open to seeking assistance early should they encounter seasonal and/or industry downturns.

Insolvency/Administration/Liquidation companies should be the absolute last resort for a small business or family enterprise director or owner – especially if it has been determined prior that the said director or owner has conducted the business in the best way possible and following best practice.

Debt solvers/Insolvency/Administration/Liquidation companies are purely out to line their own pockets and have no interest in a business turning around to the potential benefit of all creditors, employees, the directors and/or owners. If this were the case, they would not charge such exorbitant fees, stripping away any available funds for distribution to those legitimately owed the money and drag a simple process out for years on end.

I can appreciate the complexity that large corporation administration/liquidations can be, so leave the administrators/liquidators to pursue these appropriately - as these larger companies often have the resources to negotiate loop holes and have experienced advisors to ensure that the creditors end up with nothing, though directors and Liquidators walk away with millions …

Leave the micro, small and family enterprise businesses to seek and access financial advice without being charged the same obscene hourly rate as large national or multi national corporations.

13. **Should the impact of mental health of small business owners and directors be cause for a pause in the proceedings?**

    Response:

Yes, absolutely - this should be mandatory.

Having a mechanism in place to pause proceedings of external administration/liquidation could save many, many lives.

In our personal experience, from the initial phone call I made to a 'debt solver', where I cried multiple times as the reality that our successful businesses were experiencing cash flow issues, the mental stress and anguish was completely unbearable – even with the companies being 'proprietary limited'.

It is my strong belief and I honestly would state in a court of law, that these 'debt solver' companies prey on people when in their most vulnerable state. They come across as being empathetic to your circumstances and that they will do all they can to assist you, only to then throw you under the bus – ensuring that you have no escape. Our personal experience seemed 'amplified' due to the fact that we were to discover that the 'debt solver' we spoke to (and handed over detailed and up to date company financials) was wholly owned, managed and operated by an Administration/Liquidation firm ….
How is this permitted? How is this not an absolute conflict of interest? Where is the independency/arm's length association between the two firms?
Talk about an absolute and utter self-benefiting rort for both the 'debt solver' and subsequent taking over by the administrator/liquidator? Where is the transparency when not told in any verbal, face-to-face and/or written correspondence at the time of initial contact of this fact? – only to find out in micro writing on the website?

Had we had the opportunity to 'pause' things after our initial meeting (until our accountants re-opened), the outcome could have been so different.

Different in the fact that we wouldn't have the mental anguish of 'have we taken the correct path, can we seek alternative advice (which the administrator did not permit us to do as they plied us into a false sense of security that the businesses were to continue trading and that they 'would get us out of this mess' (I have this in writing from the 'debt solver' stating as such).

The small business owner, as you say, pours their entire selves and gives everything to keep the business operational (and profitable), often at the cost of family time and assets. They operate on a personal level with their customers and do everything they can to ensure that their services are equal to or above what the customer was expecting. The small business owner takes responsibility for any customer issues and often absorbs the cost of any dispute to ensure they met the customer's needs and in return, future business with the customer. Small businesses do not have the capacity to 'wipe' customers as the larger corporations are able to do.

Unlike said large corporations that may find themselves in financial stress, their personal assets are not usually secured against the company. You often see in the media that these large corporations are placed into administration and/or liquidation where the employees and creditors receive minimal funds/dividends available to them, only to find that the directors, CEO's etc, are still living in their multi-million dollar homes and going on overseas holidays. – seemingly untouchable.

When the small business or family enterprise finds themselves in the situation of administration/liquidation, they are held accountable for any guarantees they may have signed to cover the costs to secured creditors. Just the thought of losing the family home is enough to send the director/owner down the path of suicide – as they can see no other way out as the feeling of humiliation, guilt and failure envelopes them …
This is written from personal experience as my husband and I both very nearly succumbed to taking this path ..

Once the 'debt solver' and then subsequently the administrator, took over and filled us with a sense of hope that they were going to assist us to ride out the short period of cash flow issues that we were experiencing , we could very minutely glimpse a light at the end of the tunnel.
We thought the employees would be safe in their jobs – which would allow them to provide for their own families – and our customer's requirements would be looked after.

Oh how wrong we were …

Our situation occurred prior to Safe Harbour being introduced and implemented, though should we have had an option to say - 'Hey .. time out please. We need time to go over everything that you have told us and digest what is happening at this point.'

It would have allowed us to (possibly) halt the sale of all of our transport fleet and mechanical workshop equipment – whilst obtaining advice from other parties (namely, our accountant …)

We were told and under the honest belief, that our businesses were to continue trading upon us signing a Voluntary Administration (to provide us with a 'safety bubble' against creditors we were told) - only to have the administrator change this without any consultation or in depth meetings or discussions of possible options available to us. The administrator knew that our accountant was closed and uncontactable, so I believe, took the opportunity to take everything for themselves thus not allowing our accountant to assist us.

The thing that was blindingly apparent to me is that the administrator/liquidators have no compassion or empathy for the small business or family enterprise director/owner in regards to their mental health. They are purely out to get what they can for themselves. The administrator/liquidator also appears to have no interest in assisting employees or creditors either – if they did, they would not take such exorbitantly high fees from any funds available.

If the administrator/liquidator is unable to quote and/or estimate the cost of individual liquidations and have a 'short fall', that onus is on them - if they do not understand the job at hand prior to appointing themselves. It is not acceptable that they quote expected costs to creditors at meetings, only to increase the costs as they go along (presumably due to the knowledge that there is more money in the company that they are liquidating than they initially anticipated).
It is ironic that in our case, the liquidator concluded and reported to creditors, that the main reason for our companies experiencing cash flow issues, was due to the fact that 'we did understand the costings of our transport and mechanical repair jobs'. Though unlike the administrator/liquidator, small businesses and family enterprises must honour their quotes and cannot just increase the charges as they please.

This brings me back to the question at hand and to some of my responses throughout the *Questions for Comment* in this Discussion Paper.

Take control away from the administration/liquidation firms and place small business, sole traders, family enterprises businesses under the control of ASIC.

If ASIC was made more approachable - or a dedicated small business department implemented –which was to honestly work in the best interest of small business directors and owners, as well as employees and creditors - then ASIC (or newly formed Government body) could be the 'buffer' from the administrator/liquidator.

Possibly look into having the Government body incorporate qualified and accredited administrators and liquidators into a Legal Aid type scenario. This may be in the guise of individual administrators or liquidators working under and being paid by the Government body.

Taking the 'lure' of huge remunerations - as is currently the practice – hopefully would have a positive result in the turning around of the small business? If available funds weren't eroded by the greed of the administrator/liquidator, these funds can be utilised to restructure the business or pay the amounts owed to employees and creditors ….

Administration and Liquidation firms would only be able to 'deal' directly with the larger organisations – organisations where more often than not, their structure enables the director's, CEO's, etc, to keep all their assets at the detriment of employees and creditors.

Surely, if there was a mechanism in place where the small business owner can access impartial and expert advice at no or minimal cost, this would have a positive impact in regards to their mental wellbeing? If the small business owner was able to act 'sooner rather than later', the magnitude and impact of the financial stress could be minisimised and/or negated.

Anti-bullying education and policies are implemented in schools, workplaces and the 'hatred' towards bullies in the wider community is applauded.

Administration/Liquidation firms are glorified bullies – though they are not held to account nor have any repercussions should someone 'call them out' for their unacceptable behaviour and conduct …

If there was an option to stop the unconscionable conduct of the administrator/liquidator as they rip the heart and soul out of a small business, this must implemented…

If it saves one life, it has to and must be done.

14. Are there other changes that could assist the parties where there are mental health issues?

Response:

Yes.

In my opinion, ASIC (or a similar or new Government controlled body) **must** be the ones who look after small and family enterprise businesses in regards to financial stress.

If within ASIC or similar, a department was created that comprised of certified and qualified accountants, financial advisors, psychologists and the like, that dealt as an advisory team solely with small business and family enterprise interests, this would be the point of call for many small business directors and owners to contact.

This in my thoughts would operate in a similar manner to Medicare and/or Legal Aid – whereupon small business directors and owners can seek professional and impartial advice as to what may be the necessary course of action required, should the small business and/or family enterprise be experiencing financial stress.

This would be beneficial to those small businesses that may engage the services of a bookkeeper or may not (at the time) have access to their accountant.

It could also be beneficial should the small business director/owner wish to seek advice on their business' financial position without incurring the expense of the accountant.

This in essence, would remove the need for the small business director to possibly make contact with a 'debt solver', who is only interested in the small business owner's plight with the vision of lining their pockets for their own financial gain.

With no insinuation implied, a Government employee receives their wages regardless of the outcome of the service/s they provide. They are not there to line their own pockets, so I am hoping, that they would be open and honest in their services provided to small and family enterprise directors and owners who may seek the services provided.

If it is then determined that the small business or family enterprise requires to be placed into administration or liquidation, the ASIC (or similar) body appoint the relevant industry Administration/Liquidation firm to undertake this process. This Government body could work in a similar fashion to Legal Aid – in that the administration/liquidation firms are paid by the Government body or payments only approved for release from the Government body to the external administrator.

As ASIC would have all the information relating to the assigned small business prior, ASIC would outline the cost and timeframe for the liquidation process to be finalised and completed.

Should the liquidation firm not adhere to ASIC's schedule, the onus would be on the liquidator to validate and hence, seek approval from ASIC for any deviation in costs and timeframe.

This would result in the liquidation firm being held to account for their undertakings. The creditors would also be able to make complaints/draw attention to anything that they feel the liquidators may be doing that is not in the employees, creditors best interests.

If this 'loss of control' were to be removed from a small business owner, the mental stress, I believe, would not be so prevalent and devastating. All businesses pay excessive amounts of tax, surely some of these taxes could be put towards implementing something like this?

15. **General submissions are sought on the fairness of having one system and the benefits and risks of implementing different processes, so the costs and time to complete external administration achieves the optimum outcome for creditors, employees and the company.**

As mentioned in some of my previous responses, I believe that the current 'one size fits all' operating in Australia is unfair and that this system currently seems to purely benefit the Administration/Liquidation firms.

These firms are the ones who seem have been given unbridled freedom to pretty much undertake proceedings to their financial benefit – not those of employees, creditors or in fact, strive to turn the business around.

Upon reading the processes outlined in *Appendix D: International comparisons*, it appears that these international processes main aim is to achieve a positive turnaround for the company in financial stress and to work in a positive manner to have the company remain working and profitable for all concerned.

Your mention of implementing a '*Financial health check* – a confidential concierge for a fixed fee', is along the lines of my suggestion of having ASIC (or similar body), assess the financial position of the small business and when and only when, there is no other option, ASIC, 'concierge', then place the small business with an approved and accredited external administrator.

In must also be maintained, that the external administrator is to adhere to a fixed cost/fee and that all monies obtained through the external administration, are deposited into 'trust fund', whereupon the external administrator is to provide evidence to ASIC (or similar) of works undertaken and then and only then, are the external administrators 'paid'. No more of the external administrator taking funds as they please, with virtually no transparency as to why they are taking these funds – funds that are rightfully owed to the employees and creditors.

To have this *Financial health check* in place and incorporate the benefits outlined in page 17 of the Discussion Paper, is a far more openly transparent and fairer process than currently being used in Australia.

You would think that the Government would wish for businesses to thrive – thus assisting with employment and the economy as a whole. The current system seems to set the small business/family enterprise up to fail. The current system works on the notion that as soon as a small business experiences financial stress, the 'vultures' come in and strip everything bare – with no positive outcome except for the administration/liquidation firms.

In Australia, many small businesses are subject to seasonal periods, whereupon, the small business may be asset rich, though cash poor at certain times. If this situation arises, the *Financial health check* that you have suggested, would work well in seeing many businesses turned around.
Should a small business find themselves referred to a 'concierge', then as well as working to turn the business around, that the small business owner is also 'educated' in how to address these issues and implement financial strategies to hopefully ensure that the small business avoids the same 'errors' moving forward.

In regards to small businesses and family enterprise, external administration should be the final option – after exhausting all other options to turn the small business around.

The external administrator is to have the small business assigned to them only after being the small business is reviewed by ASIC /'concierge'.

The fees and time frame in which the external administrator must complete the process is to be set by ASIC/'concierge', and anything outside of these set guidelines, the external administrator must prove to ASIC why they have adhered to the set fees and time frame.

I honestly believe that if there was a 'concierge' – one that holds no judgment and/or prejudice towards the small business owner – then the small business owner would be more open to seeking assistance in the early stages of them experiencing financial stress.

Like anything, if you 'catch/diagnose it early', there usually is a positive outcome.

To also possibly implement a two tiered system – or multiple tiers – in conjunction with the 'concierge' would also be beneficial in having a small business seek assistance early.

The Discussion Paper in the *Short form process for companies under a threshold* notes 'that over half of all insolvencies had total estimated assets of less than $50,000 and the majority concerned companies with less than 20 employees'.
In my personal situation, we had assets in value exceeding $500,000 (excluding equipment under finance) and had ten (10) employees plus the owner/director. The external administrator saw the potential for a 'cash grab' for his own benefit and not working in the best interest of our employees or creditors.

It may be said that at times, the external administrator must make up any shortfall resulting from the liquidation (due to their inability to 'quote' the job efficiently). If they 'take a hit' with one liquidation, they top themselves up with another where they know there is sufficient funds available to strip from the small business.

It may also be said that some Administration/Liquidation firms are themselves small businesses – and here in lies a significant problem. Operating a small business themselves, automatically has the Administrator/Liquidator working in their own self-interests – not that of the 'customer' – the employees and creditors.

The Administrator/Liquidator can provide all the 'empathy' and spin they wish, though at the end of the day they are out to look after themselves … to strip as much from any available funds for their 'remuneration'.

It is unjust, and in my opinion criminal, that the system currently operating in Australia, benefits the Administrator/Liquidator – not the employees, creditors or small business owner. How the Administrator/Liquidator is permitted to virtually run their own race, with minimal accountability, is deplorable.

This is where the 'control' is to be removed from the Administrator/Liquidator and placed into the hands of an impartial and non-private enterprise – meaning a Government department/organisation/body. Someone who will receive no financial gain from the liquidating of a small business and/or family enterprise, someone who has the expertise, qualifications and the transparency to enable the small business owner to seek assistance early should they be experiencing financial stress.

How a 'debt solver' company is permitted to be owned and managed by an Administrator/Liquidator firm is abhorrent and an absolute conflict of interest, resulting in the small business owner and/or family enterprise being bullied and coerced into an external administration that could most possibly, be avoided.

There needs to be extreme and massive changes in the insolvency practices currently in place in Australia. This may take time and resources to implement better processes and procedures, however, it must be done to ensure that small business and family enterprise continue to carry many of the industries that provide employment and services to so many …

My opinion/suggestions as to how the current Insolvency Practices for small businesses, family enterprise may be able improved include, though would not be limited to, the following:

- Structure/implement a Government department/body to be the initial point of call should a small business believe that they experiencing financial stress – in alignment with your 'concierge' suggestion. This would enable the advice provided to the small business owner (preferably with the assistance of their accountant), to obtain impartial, creditable and non-judgemental advice and direction early resulting in hopefully being able to turn their business around.

- Remove the involvement of Insolvency Practitioners – external administrators and liquidators – from all small business and family enterprise matters unless deemed as a last resort by the Government body, to be the only option left available to the small business owner.

- Small businesses and family enterprise – if deemed necessary by the Government body – are assigned to administrators/liquidators approved and accredited by the Government body.
  This in essence, could work similar to the Legal Aid system – where said administration/liquidation firms work for and are paid by the Government body.

- Implement a Medicare type system, where codes are used to determine the capped fee of any of the processes undertaken by the administrator/liquidator.
  Time frames must also be outlined and adhered to by the assigned administration/liquidation firm and any deviances from the fees and time frame are to be reviewed, scrutinised and approved by the Government body as well as the employees and creditors.

- Implement an independent 'trust fund' style system whereupon any funds obtained during the liquidation are deposited. Liquidators cannot access these funds unless approved and released by the Government body.

- Transparency is the key and all undertakings carried out by the assigned administrator/liquidator must be made freely available to employees and creditors. No 'secret' reports, as is currently in place between the liquidator and ASIC.

- Implement a questionnaire type approach when a small business owner or family enterprise is wishing to register and/or apply for an ABN – supplementary to the current application.
  This questionnaire would contain important information in regards to running a small business and a Minimum pass rate would be require to be obtained prior to the small business owner accessing the application section.

- Permit small business owners to obtain Government subsidised access to relevant business courses to enable the small business owner to operate to best practice and have the knowledge and ability to enact processes and procedures to minimise/eliminate any possible financial stress.

- Allow accountants to have access to Government subsidies to enable them handle small business and family enterprise accounts with capped fees – similar to a Medicare type system.
  This would allow the small business owner to liaise with their accountant more frequently and possibly Resolve any financial stress in the earliest of stages – not leaving it until the point of no return.

- Do not permit private 'debt solver' companies to operate.
  If this is not possible, more importantly, do not permit these 'debt solver' companies be owned and operated by administration/liquidators.

- Seriously review and look at incorporating and/or implementing some or all of the international systems currently used – as these appear to work in the interests of the employees, creditors and small business owners to ensure that the business remains operating, therefore ensuring job security for the employees and services to the community.

- Small business owners and family enterprises initially commence a business to provide services and work in the best interest of the customer. This is not apparent within the current Insolvency Practice system operating in Australia – they are in in for themselves only.

- Safe Harbour is an improvement to date, though this still does not prevent the administration/liquidation firm working for their own self gain – and with no transparency throughout the process.

- Administration and liquidation firms are only to work directly with large and/or corporate businesses.

- Possibly reduce, or preferably remove State Government Payroll Tax obligation from small business and possibly have a much more affordable/practical 'tax' for small businesses and family enterprises that would assist in funding this Government body.

Thank you for providing me opportunity to put forth my situation and allowing me to hopefully have an input into having the current Insolvency Practices system in Australia reviewed, scrutinised and completely overhauled.

I greatly appreciate that this is not something that can be fixed overnight, though it must also be ensured that 'Band Aid' measures are not used for the final outcome.

Sure, it would be beneficial to implement changes as they are able, though the whole current system is to be extensively changed – not just patched up.

Please note that I am more than happy to discuss any of my Responses in more detail and/or be able to provide the specifics to my personal experience.

Lives are being unnecessarily lost under the current system in regards to small business insolvencies.

This has to change as a matter of priority. The current system cannot be permitted to continue where it is mainly the 'boys looking after the boys', without any consideration, understanding or compassion for the personal sacrifices and hard work involved in operating a small business where services are provided *prior* to any monetary reward.

Currently, the Insolvency Practitioners, External Administrators and Liquidators are just vultures circling - waiting for the next small business to show any sign of weakness (financial stress), so that they can strip the business bare to feed themselves ….

**** END *****