

DEVISING AND PUBLISHING *a business* RESCUE PLAN



The Companies Act 71 of 2008 sets out the timeframes to formulate a business rescue plan and the format in which it must be presented after you have accepted an appointment as a business rescue practitioner and have met with the distressed business' affected persons. The success or failure of the rescue will depend on the work undertaken and the proposals contained in the plan.

Assuming that you have followed the processes laid out in my previous articles on accepting¹ and commencing² work as a business rescue practitioner (BRP), you will by now –

- Have gathered detailed financial information regarding the distressed business
- Reviewed the systems in place to run and measure the business
- Have systems in place to manage the business processes
- Have satisfied yourself that there is a reasonable prospect of saving the business
- Met with all the affected persons, who have proved any claims they may have

You now need to focus on the critical work of devising a business rescue plan.

STATUTORY REQUIREMENTS

The Companies Act sets out detailed minimum requirements both in terms of timing and content of the plan, as set out in Chapter 6, Business rescue and compromise with creditors, Part D, Development and approval of business rescue plan.

Section 150(2) highlights the fact that the plan must provide information at a level of completeness which will allow the affected persons to undertake a sufficient

analysis of the distressed company's financial position in order to decide on whether or not to accept or reject the plan. The wording of this clause leaves no uncertainty as to the importance and depth of the professional skill which must be applied in developing the plan.

Section 150(2) then goes on to require that the plan is divided into three parts, namely background, proposals, and the assumptions and conditions underpinning the proposals. In Section 150(3) allowance is made for the presentation of alternative scenarios based on varying stated assumptions.

The section concludes by requiring that the practitioner provides a certificate (the detail we will discuss later) in respect of the information and projections provided and that the business rescue plan must be published within 25 business days of appointment.

DEVELOPING THE PLAN

Effectively the Act allows 15 business days from the date of the first meetings of affected persons for the BRP to research, collate and publish the plan. These timelines are extremely tight, and for this reason the Act does contemplate an extension being granted for the publishing date either by the court, on application, or by a majority of the creditors' voting interests.

My advice to practitioners is that they assess the practicality of the timelines during the initial assessment



period leading up to the first meeting of creditors and in that meeting ask the creditors, when proving their claims, to vote to provide an additional extension of time for the publishing of the plan. This will greatly reduce stress and the time should allow the BRP to publish a superior and more meaningful business rescue plan.

Given the tight timelines, the BRP now needs to apply knowledge most effectively to the distressed business of the economic, social and political climate, combined with specific business and industry knowledge, in order to develop a plan to save the company.

In my experience, the best starting point for this process is to undertake a deep analysis of the strengths, weaknesses, opportunities and threats (SWOT) the business is facing.

Through combining the information already gained about the business and the environment in which it trades, together with further research, the primary goal is to identify the reason(s) why it is distressed and from there, the solutions that could rescue the business.

The BRP should develop decision trees that allow for the identification of the problems that the business faces, how fundamental those problems are, and the solutions to resolving them. Where there is a problem which is fundamental to the business' success and no solution can be found, the practitioner will be faced with the prospect of concluding that the business cannot be rescued. But as

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solutions are identified, the ultimate business rescue plan will begin to develop.

The process needs to identify why the business is distressed and what has caused that distress. Typically, the obvious problem presents as a weak balance sheet resulting in difficulty with financing or servicing financial obligations in the short to medium term. What is more important, though, is to find out what has led to that weakened balance sheet and how to resolve those problems.

It is easy to conclude that the company requires additional funding or a restructure of its current financial obligations, but if the cause of those problems cannot be identified and resolved, then that solution will be merely temporary and does not provide a long-term solution.

Many businesses will have been challenged by unique and unexpected problems faced that stressed their business models, such as the COVID-19 pandemic. Due to these challenges, it is highly probable that the business is now distressed because it was unable to fund the shortfalls in operating profit over that challenging period. However, the business and its model remain viable in an environment that does not face such a situation or challenge.

The practitioner needs to identify what the business could have done to mitigate the effects of such an event. The BRP must attempt to plan to rebuild the business and provide solutions to manage such a situation should it recur. Additionally, the difficult question that needs to be answered, particularly in respect of the current pandemic, is when and will the industry ever return to trading in its previous environment. That is a question many businesses face today, whether or not they are distressed!

Is the business you are analysing one in which its offering will simply no longer have the reach and market it previously enjoyed?

It is clear that the practitioner is primarily faced with analysing the future business model to ensure that it has the ability to once more return to profitability. This may require changes to the business model, whether this is the introduction of new products, discontinuation of current products or operations, changes to marketing strategies or addressing operational overheads, processes and procedures.

From the above analysis, the circumstances and strategies required to return to sustainable profitability must be translated into projected cash flow and income statements over the short and medium term.

During this process, it may be identified that certain aspects of the expense structure need to be renegotiated to assist in the business' rescue. For example, the business may have premises that are not affordable but which could be restructured into a smaller space or at a lower rental, if negotiated with the landlord(s). The success of these negotiations may very well be critical to the success of the future operational profitability plans. Only at this point can the practitioner now identify the

capital expenditure that may be required to support the future profitable business model.

The focus can now turn to identifying how the balance sheet needs to be restructured to enable the company to return to solvency and liquidity.

What is recommended here will vary depending on the specific circumstance – the company may merely require a restructure of its short- and long-term obligations (including the terms it gives to its customers) to provide a longer period to meet such obligations.

In my experience, though, the capital structure will often require more than a simple restructuring of terms. The restructuring may include a combination of the following:

- The raising of new capital or borrowings
- The capitalisation of current obligations
- The compromise of current obligations

In summary, the plan which is formulated should show the ability of the distressed company to trade profitably, whilst the restructuring of the balance sheet should provide the correct structure to fund both the trading and the return to solvency and liquidity.

If, during the above analysis, it becomes clear that there are insurmountable obstacles to rescuing the business, then the practitioner is compelled to consider whether to proceed to place the company into liquidation or to develop a plan which will provide a better return to the company's creditors or shareholders than would result from the immediate liquidation of the company. This aspect of the rescue will not be explored in depth in this article.

DRAFTING THE PLAN

Having formulated this plan, the practitioner can commence preliminary discussions to establish the potential for the implementation of the plan.

The plan must also now be translated into the format as required by section 150(2) of the Act for publication.

It is important to note that the Act does not expect the practitioner to develop and certify a business rescue plan that will succeed. What it expects, as has been supported by the courts, is that a plan is developed based on supportable assumptions and not on speculation. Thus section 150(3) calls on the plan to 'include a notice of any material assumptions on which the projections are based' and allows for the possibility of inclusion of 'alternative projections based on varying assumptions and contingencies'. In my opinion, the contents of this section are very important and powerful and should be explored and detailed in full by the practitioner.

The Act in section 150(4) requires –

- ... the proposed business rescue plan to conclude with a certificate by the practitioner stating that any –
 - (a) actual information provided appears to be accurate, complete, and up to date; and
 - (b) projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.



This section clearly sets out what the legislation expects of the BRP in developing the proposed business rescue plan. It places a responsibility on the practitioner to apply professional scepticism in the course of performing his/her duties such that the plan is not simply the product of optimistic speculation but routed in deep analysis.

CONCLUSION

By following the requirements of the Act, the practitioner should develop a proposed plan which provides the affected persons (and any other users of the plan) with –

- A detailed insight into the current financial position of the distressed company
- An analysis of the reasons which have led to that position
- The expected liquidation dividend that they could receive if the company proceeded to liquidation
- The proposed plan, and the assumptions underlying that plan, to rescue the company
- The costs of the proposed business rescue plan
- The expected period required to rescue the company

- The forecasted income statements and balance sheets of the company for the next three years if the plan is successfully implemented
- The effect of the plan on the individual affected persons

The affected person is thus provided with all the information they might require to decide whether or not to support the plan.

NOTES

- 1 Accepting appointment as a business rescue practitioner, *Accountancy SA*, October 2021.
- 2 Commencing work as a business rescue practitioner, *Accountancy SA*, May 2022.

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