Submission to the Ministry of Business Innovation & Employment Insolvency Law Working Group Report No.2 (May 2017)

1. Preamble

My name is . I am a victim of the Ross Asset Management Ponzi fraud (RAM) and I am a current member of the Price Waterhouse Cooper (PwC)RAM liquidation committee. My submission concerns the sections of the Working Group Report No.2 Section E of the Executive summary and chapter 4., that covers Ponzi type frauds.

Shortly after my appointment to the liquidation committee I attended a presentation made by PwC's solicitor Bell Gully. The presentation informed the committee concerning the pros and cons of all the various laws that could be used to try and claw back stolen money from David Ross's clients who had benefitted from the crime. Reciprocally, the committee was informed about all the laws that those who had benefitted from the crime, could use to avoid returning the stolen money.
Ponzi fraud is not a new crime or a rare crime. It has been going on for years world wide as well as in New Zealand. Consequently, I and many of the committee, were astounded by the fact that in the cases on Ponzi type frauds, nowhere in New Zealand Law, is there any clear cut process and/or guidance that could be used to recover stolen capital and return it to investors in a fair and just way that minimised the use of court time and legal costs.

The committee was also informed concerning the large number of Ram's client's who pulled out of the scheme during 2010 and 2011. This was the main cause of the Ponzi scheme's collapse and indicates that many of RAM's clients had some prior inkling that something was not quite right with David Ross's business practices.

The fundamental principle behind our Justice system should be that no one benefits from a crime. I now know that in many areas, NZ law has been amended and altered so many times that it has ended up as a convoluted mess of contravening precedents that enables people who have benefitted from crime to hide behind laws that actually protect them and serve as a means for lawyers and solicitors to benefit financially from crime more than should be necessary.

It was agreed by PwC and Bell Gully, that David Ross had effectively used investor's capital to not only pay out fictitious profits but also to return capital to investor's who wished to withdraw their funds. In other words he had **not** used investor's capital for the purposes agreed between him and his clients. I, and many of the committee were amazed to learn that there was a question as to whether our capital was in fact legally classified as being stolen even though it was agreed that it had been effectively stolen.
We were also amazed to learn that money when transferred by any means other than cash, is not legally classified as being property, it is legally classified as something called a negotiable instrument. However, ironically, if cash in the form of notes and coins had been stolen and the actual specie recovered, then, it can be treated as property and returned to the victim of the crime. The point being that the ownership of a negotiable instrument is transferred to the recipient upon payment regardless as to whether the recipient delivers the goods or services for the which the payment was made.
From a Layman's point of view it would appear that the laws or law that deals with the ownership of money are very much out of date and are overdue for a complete overhaul. In the old days before

computers, it was difficult to trace where money went once it was spent. But now-a-days with the aid of computers and forensic accounting the situation has reversed and in most cases it is relatively easy to trace where funds end up.

The committee further learnt that although David Ross's records were sub-standard, his regular reports to his clients were sufficiently detailed to enable forensic accountants to trace and quantify what funds were paid to whom and when. This could also be backed up by bank records that show account numbers against each transaction that identify where money emanated from and where it was deposited. This makes it clearly possible to find out who benefitted from the crime and who were the victims. However, due to the inadequacies of the law, and the years and cost that would be needed to use the available legal recovery avenues, there was little likelihood that all the money could have been recovered, as a much of it would have been spent by the beneficiaries on consumable items well before the process of the law could be implemented and finalized.

2. With reference to Section E of the Report dealing with Ponzi Schemes

Para . E.17

Ponzi schemes are illegal and as such a crime. Criminals use various platforms to carry out Ponzi schemes. Sometimes it's the internet, sometimes is through the post and sometimes it's through the illegal use of a company etc. Currently when a business is used to effect a Ponzi type crime, the recovery of effectively stolen money, is not dealt with under criminal law but under the Company's Act, and associated laws.

From a layman's point of view when a business fails and goes into liquidation under circumstances where a crime has not taken place, it make sense to use the Company's Act to deal with the closure of a business and deal with any business creditors and debtors. However, when a crime has taken place, people who have suffered loss or injury as a direct result of the crime should be classified as victims not creditors. In addition, the recovery of stolen goods should be executed through laws that cover criminal acts and the return of stolen property.

As previously mentioned and also stated in the Preamble, there are many laws that could be used to try and recover stolen funds. This is confusing, ambiguous and costly, as proven in the case of the Ross Asset Management fraud where the Liquidator, Price Waterhouse Cooper (PwC), has been trying for over four-and-a- half years, to claw back money from those who have benefited from the fraud. Because they have been using the Company's Act and associated laws that were not designed to deal with crime, PwC felt it necessary to use liquidated assets to cover the cost of implementing three different test claims, each using different facets of Company and Property law. The reason for this costly exercise was to try and find out which law would improve the chances of winning future claims.

Para. E.18

Once it had been established that a Ponzi type fraud had taken place, it would be far better if a new process could be used that lay under the auspices of criminal laws that have been designed to deal with the recovery of stolen property. In addition, that the process would enable those responsible for recovering the stolen property, to broadcast to all parties known to have received any part or portion of the stolen property to return the property within a stated timescale. This would avoid the necessity to serve individual time consuming and costly claims on every individual beneficiary associated with the crime. This type of process would also transfer the onus and legal costs from the victims, onto those who have benefited from the crime should they wish to prove why they felt they should not refund the financial benefits they have received from the crime

In the case of the RAM fraud the liquidators knew who had received the stolen money, when and how much. If a fair and just law had been in place it wouldn't have taken four-and-a-half years for PwC to recover the stolen money and make a fair and just distribution all investors. In this manner all investors would have shared their portion of the downside of the crime.

The current system using appointed Liquidators working within the confines of the Company's Act, means that the victims, some of which have been made destitute by the crime, are adding to their losses through the use of liquidated assets to pay liquidators to use inadequate laws to try recover what's left of their life's savings.

As history reveals, in many cases once liquidators had used all money derived from liquidating the remaining assets to cover their fees, cases were closed as there was nothing left to distribute to creditors. This is situation is bad enough in the business world and many creditors do suffer, but it is a disaster when in the case of criminal Ponzi type schemes there are laws in place that prevent liquidators from getting access to assets held by those who have benefitted from the crime thus unnecessarily increasing the losses sustained by the victims. This situation is neither fair or just.

Para. E.19.

It seemed illogical for the working group to have waited for the outcome of the Supreme Court's ruling on the *McIntosh v Fisk* case before getting on with the process of identifying and compiling a fair and just process that could be used recover and distribute money stolen by criminals using a Ponzi type scheme. Unfortunately, the recently delivered Supreme Court ruling on the RAM fraud with *McIntosh* v *Fisk* has set a powerful preceident in that it condones people benefitting from a crime. The ruling allows around half of the investors to keep at least 50% of the money that had been stolen from the other half.

As previously mentioned there is no New Zealand law that will enable those responsible to deal with the damage caused by a Ponzi type scheme expeditiously . However there are overseas laws in use that are being used with varying degrees of success that could give the group a few pointers and the group is commended for its efforts in seeking overseas guidance from overseas experiences in this area.

The report (Chapter 4. Para 139) comments that Ponzi schemes are rare in New Zealand. This contravenes advice received from other sources that reveal over 140 Ponzi type frauds have taken place since records began. In any event due to the amount of money involved in the RAM Ponzi scheme alone it makes sense to ensure that NZ law is upgraded to protect NZ investors and enable those responsible for cleaning up the financial mess, to carry out their duties as quickly and cheaply as possible. It makes sense to compile a new law linked to the recovery of stolen property, using factors uncovered from many such cases and not clouded by just one. This is further supported by the probability that when making their ruling on the *McIntosh* v *Fisk* case, the judges may have only used the factors associated with that particular case.

Chapter 4

Compensation Para's 161 to 164.

The group made the comment that they feel the New Zealand financial investment market is too small for them to consider recommending that the government establish a compensation system similar to the United States Securities Investor Protection Act of 1970.

This is another example of anomalies between industries. A similar type of compensation system already exists in New Zealand in the legal industry where lawyers have to subscribe to a fund that is used to compensate clients for mistakes they make whether they be legal or illegal.

All the financial market needs is for all types financial advisors to subscribe to a fund to be used to compensate investors only when the advisor has committed a crime that has resulted in the investor losing all or part of their capital.

The New Zealand investment market is small by world standards but that doesn't mean that it doesn't require protection. If it had more protection it might be a lot larger by giving potential investors more confidence and aiding developments throughout New Zealand instead of leaving their money in the relative safety of a bank term deposit.

General Comment

1. When a business has been used to perpetrate a crime causing the need for the business to be closed down, one of the first things that needs to be done is to ascertain which parties involved with the business directly suffered from the crime and which parties suffered from the closure of a business operation. Those, such as goods and services suppliers, who sustained financial losses as the result of the company closure, should be classified as creditors as in the case of any company closure. Those who suffered as a direct result of the crime when the criminal uses a company as a tool with which to perpetrate the crime, should be classified as being victims not creditors.

2. There have been too many instances where government officials and appointees have used the analogy of comparing investors in the share market, to punters at a horse race. This analogy falls flat on its face when the third parties in the equation has been left out. Namely the TAB on one side and financial advisers on the other. When one places a bet on a horse one takes a risk, similarly a risk takes place when buying shares. However, on either side of the analogy everyone expects both the TAB and the financial advisor to place a bet or buy a share and not use the money criminally for other purposes.

3. The way things are currently in New Zealand regarding Ponzi frauds, some people benefit from the crime and others become victims. As previously stated it is not fair and just for anyone to benefit from a crime. As described in the report, in Ponzi type schemes the criminal uses capital paid in by new investors, to not only pay out fictitious profits, but to also pay back capital to those who wish to withdraw fully or partially from the scheme. A fair and just outcome would be for all investors to share the losses sustained by the scheme not just half of them. Consequently, endeavours should be made to not only recover fictitious profits but also any capital reimbursements made by the criminal. Any recovered funds should then be paid into a fund pool and subsequently distributed to all investors in a fair and just way. The distribution should be subject to a formula based on the amount invested, the length of time an investor had held an account with the criminal and how long the criminal had been operating in an illegal manner. If it turns out to be impossible to ascertain when criminal started to operate in an illegal way, those responsible for the recovery of the stolen money would need to use what data was available to make a fair assessment as to when this tipping point occurred. In the case of the RAM fraud, criminal activities progressively consumed all of David Ross's legitimate activities and thus the scope of the crime increased over several years. In these circumstances it would make sense to carve the length of time over which the crime took place, into several periods. In this way as each time scale was progressively triggered, a greater portion of capital and fictitious profits would be eligible for recovery and distribution to the victims.

4. In the case of *McIntosh v Fisk,* the Supreme Court, has ruled that McIntosh needs only to refund the fictitious profits he received from David Ross through the use of RAM and it's associated group of companies and not the return the capital he withdrew from RAM.
Based on comments made throughout this document, the logic behind this ruling was profoundly flawed as it effectively undermines a basic principal upon which the Justice system should rest in that **no one should benefit from a crime and that all the participants of a Ponzi scheme should bare their fair share of the damage caused by the crime.** The fictitious profits were paid out using investor's capital and not by using profits David Ross earned from any other means. This leads me to believe that in this instance, the courts had deviated from the fair and just path for reasons one can

only guess. Maybe they felt that enough tax payers money had been spent on this case. Maybe they took an expedient way out bearing in mind the perceived difficulties using current laws, and thus the time and cost to the courts associated with any attempt to try and recover all that was left of investor's capital David Ross paid out to over half of the investors **who are still benefiting from the crime and now due to an unjust ruling will continue to do so.**

May 2017