

## Submission on the Review of Corporate Insolvency Law (Report No. 2)

### Chapter 1: Voidable Transactions

1. Do you agree with the Insolvency Working Group's assessment of the impact of the Supreme Court's decision in *Allied Concrete v Meltzer* on New Zealand's voidable transactions regime?  
If not, what is your assessment of the impact of the decision? (page 15, para. 32-34)

Yes

2. Do you agree with the Insolvency Working Group's listed objectives of the voidable transactions regime, with these being; consistency with the equal sharing principle, fairness to individual creditors, and administrative and compliance efficiency? Should other objectives also be considered? What weighting should be given to the objectives, eg equally or differently? (page 19, para. 53)

Yes, we consider that the objectives should have equal rating but that the concept of *pari passu* is paramount.

3. Do you agree with the Insolvency Working Group's views on the problems with the status quo? (pages 20-22, para. 56-69)

Yes. We consider that the current regime is too creditor friendly in that the defence of "gave value" often defeats what could be a legitimate preference. There is often evidence of a director or shareholder preferring a creditor who holds a personal guarantee.

4. What are your views on the package of changes (pages 22-23, para. 72-77) recommended by the Insolvency Working Group in Chapter 1, with these being to:
  - Repeal the 'gave value' part of the test in section 296(3)(c) of the creditor's defence, restoring the defence to one that operates only where a creditor, in good faith and without suspicion of insolvency, relies on the payment itself.
  - Reduce the period of vulnerability for insolvent transactions (section 292) from two years to six months where the debtor company and the preferred creditor are unrelated parties.

We believe that the "gave value" test should be repealed.

Based on our experience we consider that the clawback period be reduced to 12 months. The first six months the onus should lie with the creditor on the basis of presumed insolvency. The second six month period the onus should be on the liquidator to prove insolvency.

In our opinion Directors/Shareholders will manipulate (where possible) the formal date of insolvency in order to defeat voidable claims in order to preserve their personal position for guarantees that may be outstanding. In the scheme of commerce a clawback period of only six months is insufficient.

5. Are there other feasible options?

We don't see any.

## **Chapter 2: Other issues relating to voidable transactions and other recoveries**

6. What are your views on the other changes to the voidable transaction regime and other recoveries recommended by the Insolvency Working Group in Chapter 2? (*page 8, r. 3-11*)

Are the recommendations likely to have a material impact on the total amount of funds that liquidators would be able to recover under the voidable transaction for the benefit of creditors and, if so, how?

Do you agree that the limitation period for voidable transaction clawback claims should be reduced from 6 to 3 years? How often are voidable transaction claims initiated 3 years after the commencement date of the liquidation?

We agree with the recommendations.

There is likely to be benefit to the general pool of creditors by increasing the related party claw back period.

In terms of general creditor voidable claims we do not see that the amendments will provide a greater return to creditors. The costs and uncertainty of litigation for voidable claims in the current 12-24 month period are costly and difficult.

Yes we agree that the timeframe should be reduced from 6 to 3 years. We have initiated a voidable claim that would have been more than three years post commencement of the liquidation.

7. Do you agree with the Insolvency Working Group's view that the recommendations contained in Chapter 2 can be made with or without making the changes recommended in Chapter 1?

We don't have an opinion.

## **Chapter 3: Procedural Issues**

8. What are your views on the procedural changes proposed by the Insolvency Working Group in Chapter 3? (*pages 8-9, r. 12-15*)

In regard to recommendation 13 (content of liquidator's notice to set aside transactions) what standard and basic (**additional**) information should a liquidator's notice to creditors under section 294 provide and why? How would the creditor receiving the notice benefit from receiving this additional information and what would be the costs to the liquidator in providing the information?

We believe that the Code of Conduct should provide boundaries and general guidelines for the liquidator.

## **Chapters 1-3: Voidable transactions and recoveries generally**

9. Are there any other issues with the voidable transaction and other recoveries regime that are not covered by Chapters 1 to 3 of the Insolvency Working Group's report?

No

#### **Chapter 4: Ponzi Schemes**

10. What are your views on the possible changes to the Property Law Act 2007 outlined by the Insolvency Working Group to aid the recovery of funds (adding a Ponzi presumption and a good faith defence)? *(page 9, r. 16a)*

We do not believe that this a matter for insolvency law.

#### **Chapter 5: Other corporate insolvency issues**

11. What are your views on the other corporate insolvency law changes proposed by the Insolvency Working Group in Chapter 5? *(pages 9-10, r. 17-30)*

We agree with IWG (r.17).

We agree with IWG (r.18) unless the secured creditor wishes to fund the proceedings and to this extent they should rank ahead of preferential and unsecured creditors. We believe that where the assets of the company have been realised, the balance of the debt owed to the secured creditor should rank equally with unsecured creditors in respect of any recoveries for reckless trading.

R.19 – r.23 agree with IWG

Do you agree that it is not clear whether long service leave forms part of Schedule 7 of the Companies Act?

Yes we agree that this is not clear.

What are your views on establishing a new preferential claim for gift cards and vouchers? *(page 9, r. 25 and pages 51-52)*

Whilst the intention is good we do not consider that it is equitable to prefer one type of pre-payment (which is effectively what a giftcard or voucher is) over another form of pre-payment (such a deposit for a new kitchen).

What are your views on the recommendation to limit the preference claims of the Commissioner of Inland Revenue and the Collector of Customs to six months prior to the date of the commencement of the liquidation? *(page 10, r. 26 and pages 52-53)*

We agree that this would incentivise Inland Revenue to be a more pro-active creditor. Whilst they are an involuntary creditor this should not enable them to flout their preferential status to the detriment of unsecured creditors. In many cases, preferential tax can date back several years prior to liquidation due to ineffective collection policies.

What aggregate information, if any, would be useful for the Registrar of Companies to publish and why would it be useful? *(page 10, r. 30 and page 56)*

Liquidation figures by location would be helpful for internal purposes.

12. What are your views about the Insolvency Working Group's comments on the corporate restructuring processes in New Zealand? (*page 40, para. 173-177*)

Does New Zealand's insolvency regime meet the OECD's objectives outlined in paragraph 173?

How important is it for New Zealand's insolvency regime to be aligned with the Australian regime?

We don't hold views on these matters

13. Are there any other changes to corporate insolvency law not covered in Report No. 2 that should be made?

No

### **Chapter 6: Implications for Personal Insolvency Law**

14. Do you agree that if recommendations 1-13, 15, 17 and 24-27 were implemented, that these changes should also be made to the Insolvency Act 2006? (*pages 8-10*)

Yes

### **Other Comments**

15. Do you have any other comments on Report No.2?