

KordaMentha

Ministry of Business Innovation & Employment
Wellington

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By email: corporate.law@mbie.govt.nz

To the Minister of Justice

Submission on Review of Corporate Insolvency Law – Report No. 2 by the Insolvency Working Group

Introduction

Thank you for the opportunity to provide feedback on the Review of Corporate Insolvency Law: Report No. 2 of the Insolvency Working Group.

KordaMentha is a chartered accountancy partnership in Auckland. KordaMentha is a leading independent specialist in insolvency and financial consulting.

KordaMentha endorses the recommendations of the Report, except in or subject to the matters referred to below.

Chapters 1 and 2: Voidable transactions

R2 Period of vulnerability/ R7 Deadline for filing

We acknowledge the benefit to commercial certainty from reducing the current 2 year vulnerability period. However we are concerned that in many instances businesses in New Zealand do trade in a distressed state for periods in excess of six months. We also consider that a liquidator should be able to commence at least the majority of, if not all, claw back processes within 2 years of appointment. Any process required to exceed that timing could be subject to an application to the Court.

In our submission, the interests of certainty would be balanced more properly against the interests of equality among creditors if:

- The claw back vulnerability period is reduced to 1 year; and
- The deadline for filing be reduced to 2 years from the date of appointment (with discretion for the Court to extend).

In regard to the provision of a discretion to the Court to extend the period for filing in a claw back process, we suggest some guidance be incorporated as to the matters which an application must address, and the issues which should be taken into account in determining whether it is just and equitable that the period be extended. This may better support certainty and reduce the number of applications which may be declined.

Chapter 4: Ponzi schemes

We are concerned that corporate insolvency law is a very blunt instrument in the circumstances of Ponzi schemes. Issues which we have experienced include the inability to claw back payments to persons who are not 'creditors' (for a variety of reasons), and the division of individual payments made into voidable and non-voidable portions.

In our submission, it would greatly assist the administration of Ponzi schemes to have a central, specific set of rules governing administration of Ponzi schemes to include rules governing issues such as (without limitation):

- Claw back of payments made;
- Allocation of proceeds into pools, and the circumstances in which pools are to be maintained;
- Documentation of claims against proceeds;
- Ranking of creditor pools (if any) against proceeds;
- Allocation of costs of administration.

A centralised set of rules would reduce the costs and delays of administering Ponzi schemes. Consideration will need to be given as to whether such rules should be incorporated into the Companies Act or whether another structure is more appropriate.

Chapter 5: Other issues

R20 Power to obtain certain information

We suggest any power to obtain information without the need to apply to the Courts be accompanied by express provisions concerning costs claimable for the provision of the information.

R21 Essential Services

We suggest essential services be amended to include data hosting. More and more frequently we encounter circumstances where data that is critical to the business and the insolvency is hosted by third party organisations and disruption of supply is disruptive of the administration. This is linked to our comments on ipso facto clauses below.

This will enhance the administration of insolvent estates by ensuring data is available timeously, and reduce the costs inherent in disputes of rights.

R23 Electronic Communications

We suggest this be widened to allow all insolvency appointments to use electronic communications for all notices, reports and other communications, with all affected parties including shareholders.

This will reduce the costs of insolvency administrations and it will enable timely reporting and compliance with statutory notice requirements.

R24 Preferential claims

We suggest the review of preferential claims be extended in a number of regards, including:

- whether employer contributions to Kiwisaver are in fact to be accorded preferential treatment. This is a matter of policy and we take no firm view either way except to note that recent communications from Inland Revenue on this topic are at odds with legal advice and commercial practice in our experience.
- The standing of administrators as preferential creditors in a receivership and in a liquidation (including the status of any claim as to a possessory lien over circulating assets themselves, as against their proceeds).

Each of these measures will promote certainty and reduce the costs of disputes.

R25 Gift cards

We do not support the establishment of a preferential claim for gift cards and vouchers. We accept that there can be circumstances in which the honouring of gift cards is in the interests of creditors, whether secured or as the general body of creditors. However, we are equally conscious of circumstances in which honouring of gift cards would not be in the interests of creditors- for example, when gift card claims are greater than the value of stock on hand. We are also conscious of a number of practical issues which would arise from the proposal to establish a preferential claim for gift cards, including:

- How analogous claims would be distinguishable- for example:
 - simple deposits against purchase of unascertained goods. In certain administrations these have been substantial;
 - commercial holders of vouchers (or deposits), as against retail holders or depositors.
- How receivers would be protected against claims lodged after proceeds had been paid to the secured creditor. Receivers have no equivalent to the liquidator's protections afforded under the Regulations through the use of the Unsecured Creditors Claim form. In our experience companies' records of gift vouchers exposure may be totally unreliable guides as to actual exposure; and in regard to vouchers may contain no details of holders which a receiver could use to notify holders of their ability to claim or to verify such claims once received.

In general, we consider the issue of gift cards and vouchers is best dealt with on a case by case basis, taking into account all the relevant circumstances.

Ipsa facto clauses (Report clause 176)

We consider that further attention needs to be paid to exercise of ipso facto clauses based solely on the fact of an insolvency event, and not on breach of substantive terms such as delivery, quality or payment. We are aware of instances where counterparties have taken advantage of the appointment of administrators (when the terms of the contract otherwise had been and were continuing to be fulfilled) to cancel contracts which were material to the prospects of the Insolvent and its creditors. The counterparties seized the opportunity to cancel contracts which had become onerous to them over time, in circumstances where they would not have had the opportunity but for the insolvency event.

We do however concur that the matter should be considered further in the light of the actual positions taken in Australia following their relevant reform measures being implemented.

Administrators - costs

We suggest the ability to challenge administrators' costs under section 2390(2) be extended to receivers and liquidators.

Administrators - contracts

We suggest the Companies Act be amended to include express provision that the personal liability of an Administrator under a contract ceases on termination of that contract by a receiver whose appointment extends to that contract or the assets from which the contract is to be fulfilled. This is to address the suggestion that an Administrator's personal liability under an employment contract may extend past termination of the same contract by the receiver. While this is the context in which the issue arose in our experience, it may also arise in other instances.

Liquidators - reports

We suggest section 255(2)(c)(ii)(A) be amended to require that liquidators reports incorporate a clear statement as to the reasons for insolvency of the company. This will assist the creditors to understand the background to the liquidation and the reasons behind the proposals for conduct of the liquidation.

Yours faithfully

Partner

