McGrathNicol

Submissions on:
Review of Corporate Insolvency Law

Report No. 2 of the Insolvency Working Group on voidable transactions, Ponzi schemes and other corporate insolvency matters

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Questions for submitters on Report No. 2	
Chapter 1: Voidable Transactions	
1	*(a) 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? (paragraphs 32-34)* McGrathNicol agrees with the working group's assessment of the impact of the Supreme Court decision in Allied Concrete v Meltzer
2	*(a) Do you agree with the Insolvency Working Group's listed objectives of the voidable transactions regime? (paragraph 53)* McGrathNicol agrees with the working party's listed objectives of the voidable transaction regime. *(b) Should other objectives also be considered?* No *(c) What weighting should be given to the objectives, e.g. equally or differently?* McGrathNicol's view is that the greater weight should be given to objective (A) for transactions closer to the date of liquidation, compared to the objective (B) concerning fairness to individual creditors. McGrathNicol consider that the recommended change to a 6 month period achieves an acceptable balance between objectives (A) and (B).

3	*(a) Do you agree with the Insolvency Working Group's views on the problems with the status quo? (paragraphs 56-69)* McGrathNicol agrees with the working group's view on the problems with the status quo following the decision of the Supreme Court in Allied Concrete. *(b) Are there other problems?* McGrathNicol considers that the working group has identified the relevant problems.
4	*(a) What are your views on the package of changes recommended by the Insolvency Working Group in Chapter 1? (recommendations 1 and 2 and paragraphs 72-77)* McGrathNicol agrees with recommendations 1 and 2. *(b) Do you agree with the Insolvency Working Group that recommendations 1 and 2 need to be implemented as a package? (paragraph 70) If possible, please provide information on the number of voidable transactions that you are aware of that fall within the specified period (but not the restricted period) and the dollar amount of such claims.* McGrathNicol agrees that the recommendations (1) and (2) need to be implemented as a package. Taken together these recommendations provide an acceptable balance between providing commercial certainty and preserving the pari passu principle of equal sharing.
5	*Are there other feasible options?* McGrathNicol considers the amendments proposed by the working group are pragmatic and sensible. There are a wide range of options but those proposed appear workable and clear.

Chapter 2:	Other issues relating to voidable transactions and other recoveries
6	*(a) 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? (recommendations 3-11)* McGrathNicol agrees overall with recommendations 3 to 11 from the Insolvency Working Group. We make the following specific comments relating to some of these recommendations, as follows: R4 We agree entirely with the suggestion to standardise the period of clawback for all provisions in the listed section. R5 We consider the recommendation ensures consistency and avoids confusion when interpreting the statute. R11 We agree that the present uncertainty should be clarified by statute. *(b) 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?* We have no comment. *(c) Do you agree that the limitation period for voidable transaction clawback claims should be reduced from 6 to 3 years? (recommendation 7) How often are voidable transaction claims initiated 3 years after the commencement date of the liquidation?* We agree with the working group's recommendation to reduce the period for filing claims in the High Court from 6 years to 3 years. This agreement, however, is subject to consideration of the situation of when a company is both in receivership and in liquidation, and the receiver remains in office for a considerable period of time. In these situations the liquidator may require longer than 3 years, although we appreciate that there is statutory provision for the High Court to extend this period.
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?* McGrathNicol agrees that the Insolvency Working Group's recommendations contained in chapter 2 could be implemented, whether or not the changes in chapter 1 occur.

Chapter 3: Procedural issues	
8	*(a) What are your views on the procedural changes proposed by the Insolvency Working Group in Chapter 3? (recommendations 12-15)* McGrathNicol's views on the working group's recommendation in chapter 3 are: R12 – Agreed. R13 – Agreed. R14 – McGrathNicol agrees with this recommendation and understands that this is the position under Australian legislation. In our experience as appointed Administrators on most of the largest Voluntary Administrations undertaken in New Zealand to date (eg. Pumpkin Patch, Dick Smith, Intueri Education Group) extensions to the Watershed meeting can often be for a long period and this should not prejudice creditors from benefitting from voidable transaction recoveries. R15 – we agree that this should be clarified by statute and agree with the recommendation. This would avoid unnecessary costs and ensures consistency amongst liquidations if it is clearly specified by statute. *(b) 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?* McGrathNicol suggests that the working party recommendation R13(c) is sufficient. This would avoid creditors incurring unnecessary legal costs. A benefit for the creditors receiving the notice would be that some creditors may be persuaded to repay obvious voidable transactions without either them or the liquidator incurring further cost in the matter. The costs of a liquidator providing this information should be minimal if the information is prescribed.
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?* McGrathNicol suggests that irrespective of who may benefit from voidable transaction recoveries it should be clarified that the creditors to be included will include the value of any secured claim that is treated in the liquidation as an unsecured claim, and that all payments paid to the liquidator under the voidable transaction regime are treated as an additional amount to the creditor's claim in the liquidation.

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)? (recommendation 16(a))* McGrathNicol agrees with the working group recommendation 16a that the Property Law Act 2007 be amended by adding a Ponzi presumption and a good faith defence. Ponzi schemes often involve unsophisticated investors unwittingly caught up and it is important these investors have a good faith defence available to them.
Chapter 5: Other corporate insolvency issues	
11	*(a) What are your views on the other corporate insolvency law changes proposed by the Insolvency Working Group in Chapter 5? (recommendations 17-30)* McGrathNicol's views on the recommendations 17-30 are as follows: (note where there are specific questions on those recommendations below we have commented on these later) R17 – we agree with the working group that the definition of secured creditor needs to be clarified for liquidation purposes. However we have some concerns if an amendment is not carried out at the same time to Regulation 22 of the Companies Act 1993 Liquidation Regulations 1994 (rules) concerning the voting of secured creditors at a creditors' meeting. In practice creditors with a purchase money security interest in respect of stock will not know the value of their secured interest at the time of a first creditors' meeting. These creditors often have a substantial portion of their claim ultimately found to be unsecured because the stock they supplied has already been sold. If the present rules are not changed these creditors will be unable to vote at a creditors' meeting if it is held prior to them being in a position to ascertain the value of their security without losing their entitlement to their security. R18 – We agree with the recommendation providing that the shortfall on secured creditors' claims and preferential claims are included as unsecured claims for the purpose of distribution. R19 – We agree that all administrators' reports should be filed with the Registrar of Companies. R20 – We agree concerning the meaning of telecommunication services. If the revised definition is not wide enough it should be expanded to ensure suppliers of EFTPOS services are regarded as essential services. R21 – We agree that fines and penalties should be subordinated to the claims of unsecured creditors. R23 – We fully support that communication by electronic means between the liquidator and creditors should be permitted. In addition we believe that this should be expanded to shareholders. In our experience of managing many of the largest insolvency appointments in New Zealand we have had to incur significant legal costs through applications to the High Court to enable this approach to be taken. We also suggest that where it is clear there will never be any funds for shareholders, a liquidator should not be required to send shareholders copies of 6 monthly reports, since shareholders can have access to these

	reports via the Registrar of Companies website. We suggest that shareholders should be permitted, however, to request the liquidator for a report to be sent to them directly if they ask. R24 – We agree that it would be helpful if the position regarding long service leave is clarified. Currently our legal advice is that long service leave does not fall within the classification of preferential creditors. However, we have had at least one major insolvency appointment where the relevant trade union sought to incorporate long service leave entitlements into the redundancy provisions of its collective agreement, thereby attempting to make it a preferential claim R28 – We support the recommendation that the priority for administrators' fees and expenses should continue to apply when a company is both in receivership and in liquidation. Presently there is considerable confusion in this area, and unnecessary costs are being incurred to resolve the issues in dispute. R29 – We support the recommendation that the present section 30 (2) of the Receiverships Act be aligned with that of the Property Law Act 2007 *(b) What are your views on allowing liquidators to obtain, by right, certain information from third parties without having to go to the High Court? (recommendation 20 and page 48) What are the costs involved in seeking an order from the High Court? Does the High Court routinely approve such requests?* We support recommendation 20 that liquidators be able to obtain information that would otherwise be available to the Company from third parties without needing to apply to the Court. The costs involved in seeking an order from the High Court are the same whether it is a small or large liquidation, and in the case of smaller liquidations liquidators will not make these applications, as they do not have the funds to do so. *(c) Do you agree that it is not clear whether long service leave forms part of Schedule 7 of the Companies Act? (recommendation 24 and page 51) How often does the possible recognition of long service leave as a preferential claim arise?* We agree clarification would be helpful. In our experience it is often the insolvencies of companies with large unionised workforces where this can become a major issue. *(d) What are your views on establishing a new preferential claim for gift cards and vouchers? (recommendation 25 and pages 51-52)* We do not support recommendation 25 that gift cards and vouchers should have the same ranking as lay-by purchases unless further thought is given to some specific rules around claims of the gift card holders. We believe that the costs associated with giving these creditors this priority need to be taken into account in relation to the overall benefits achieved. Some gift vouchers can be as small as $5 and in our view there should be a minimum amount in respect of the unredeemed value of the gift voucher before the holder is entitled to this priority, in view of the high administration costs involved in dealing with

	such claims. We suggest $100, with this amount being reviewed as for preferential employee claims every 3 years. In our experience gift vouchers and cards generally frequently arise in a receivership scenario. The receiver and the company issuing the vouchers often will not know who the actual holder of the voucher is and may well have no means of contacting the current voucher holder. A liquidator has the ability to fix a time by which claims must be lodged by public advertising, whereas a receiver does not. We suggest that if this priority is to be accorded to gift cards and vouchers, a receiver should have the ability to fix a time by which claims if they are to be entitled to a preferential claim must be lodged. Without the ability to fix a time for claims the receiver will be unable to disburse funds to creditors of a lower ranking, in case further claims subsequently arise and the receiver will as a consequence no longer have funds available to meet them where the funds had been disbursed. Creditors who fail to make a claim within the time fixed would still retain an unsecured claim against the company. In addition to the above, we have observed that some companies operate a group structure such that one entity in the group owns all the stock, and another company in the group issues the gift vouchers but does not own any stock or have any accounts receivable. Under the current preferential regime, in the above scenario, the preferential gift card holder's claim would be unable to be met. One solution to this could be some form of pooling of the assets. McGrathNicol considers that further thought needs to be applied in this area so that a practical and pragmatic solution is developed. *(e) 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? (recommendation 26 and pages 52-53)* We support recommendation 26 that a 6 month limit on preferential claim amounts unpaid to the Commissioner of Inland Revenue and the Collector of Customs apply. We also suggest that further clarification of the Collector of Customs preferential claim is required. Presently the Collector of Customs also has a statutory charge over inventory, and consequently this provides an additional preference to the Collector of Customs. *(f) What aggregate information, if any, would be useful for the Registrar of Companies to publish and why would it be useful? (recommendation 30 and page 56)* In respect of recommendation 30 we are unable to form a view at this time until we review what prescribed information a liquidator would be required to file in another report. We are concerned that further additional costs are not imposed on liquidators, particularly in respect of smaller liquidations, which are the more common in New Zealand.
12	*(a) What are your views about the Insolvency Working Group's comments on the corporate restructuring processes in New Zealand? (paragraphs 173-177)*

	McGrathNicol are generally supportive of the Insolvency Group's comments contained in paragraphs 173 – 177. *(b) Does New Zealand's insolvency regime meet the OECD's objectives outlined in paragraph 173?* McGrathNicol's view in respect of voluntary administrations is that the present work that Administrators have to do comparing the outcome under administration compared to liquidation is too onerous. As a consequence high costs are involved in meeting this requirement. *(c) How important is it for New Zealand's insolvency regime to be aligned with the Australian regime?* McGrathNicol does not consider that New Zealand's insolvency regime should necessarily in all aspects be aligned with that of Australia. If we consider our approach is better in some areas, this should be followed in preference to total alignment with Australia. McGrathNicol has, however, long advocated for the IRD preference to be abolished. This is the case in Australia and has been for several decades. New Zealand is significantly out of step with international best practice in this regard.
13	*Are there any other changes to corporate insolvency law not covered in Report No. 2 that should be made?* There is no mention in the report concerning deposits paid by customers, although there is a recommendation relating to gift vouchers. We suggest that consideration should be given as to whether customers paying deposits are given some protection in the event of insolvency if it is decided to give protection to gift card holders. We also refer to the points made at 12 above in relation to the IRD preference. This issue needs to be addressed as part of meaningful insolvency law reform in New Zealand.
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?* McGrathNicol support the change being made to the Insolvency Act 2016 so that there is consistency between corporate and personal insolvencies where appropriate.
Other comments	
15	*Do you have any other comments on Report No.2?* None specific.