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From:
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6/7/18

Dear Sir/Madam,

RAMIG represents a group of approximately 450 RAM investors.
RAMIG would like to thank MBIE for this initiative and for the opportunity to make this submission.
Our view is that the unravelling of the RAM Ponzi has been a tragedy that has inflicted untold and avoidable suffering on hundreds of small investors. Urgent action is required to ensure that in future Ponzi schemes can be unravelled in a more fair, timely and economical manner. This review is a promising start and we hope it will progress quickly to a good completion.
We believe we have no option but to accept the process will not be retrospective for RAM investors, but we are in contact with the victims of the other Ponzi's that have been recently discovered and we hope the revised process can be applied to them.

Yours sincerely,

Bruce Tichbon for RAMIG

Submission on discussion document: *A new regime for unravelling Ponzi schemes*

Your name and organisation

Name	Bruce Tichbon
Organisation	Ross Asset Management Investors Group (RAMIG)

Responses to discussion document questions

1	Are there currently any other methods for resolving a Ponzi scheme which officials should keep in mind? If so, what are they?
	The use of legal equity or fairness has been a topic of discussion throughout the 5+ year RAM debate. The view was put forward early in the debate that legal equity arguments should be used rather than the Companies Act (CA) or Property Law Act. This approach was dismissed by the liquidator and seemed to be raised again by the Supreme Court in their judgement. RAMIG believes it is equity considerations or fairness (including as raised outside the court) that have contributed materially to this review taking place. The RAM outcomes obtained under the CA and PLA were simply too unfair and illogical to be accepted. So, we ask the question, have the proposals for a new Ponzi unwinding regime outlined in the discussion document provided a way to provide fairness in the case of Ponzi's, and thus avoid a confrontation with the issue of generally using equity to protect small investors who have been repeatedly fleeced by NZ's poor unwinding laws (of Ponzi's and other corporate frauds and failures). We thank the writers of the document for pointing out the amazing large range of legal remedies available. It staggers us that with so many tools available the RAM unwinding to date took so long, cost so much, and come up with the wrong answers. We must question the nature of the tools and the culture of the industry tasked with unwinding the many disasters that have occurred in recent years in our financial markets.
2	Do you agree with Glazebrook J's statement that "an accident of timing as to when funds are withdrawn should not favour one defrauded investor over another"?
	Absolutely agree. Seems like a simple and logical equity argument to us. Similarly, it was profoundly unjust that investors who withdrew funds could retain their capital even though when they withdrew it, it was principally money stolen from other investors. They all gave value, but it became timing dependent, which harks back to Glazebrook J's statement.
3	Do governing documents ordinarily cover the scenario where an investor is overpaid? If so how is this provided for?
4	Do you consider that, where investors are all the subjects of fundamentally the same fraud, the strict legal form of a Ponzi scheme should not impact the outcomes of investors?

	Agree
5	Do you agree with the objectives we have identified for the regime for unwinding Ponzi schemes?
	Agree
6	Do you agree with problems identified with the status quo? Are there any additional issues which we should seek to address?
	Agree
7	Do you agree with the preferred option we have chosen?
	Agree. We are concerned that the compensation scheme has been discarded, for Ponzi and other fraud. We note: 1. The compensation scheme to protect small investors has been implemented for 50 odd years in the USA and the problems raised in the discussion document (P29) don't seem to be apparent. 2. The compensation scheme to protect small investors in the USA has been instrumental in helping investors to unwind the Madoff and other Ponzi's. 3. The NZ approach dumps the cost and the problems of failures and frauds onto investors, especially small investors, and lets the finance industry walk away mostly scot free. 4. If the finance industry was forced to be more engaged in solving its worst problems we would have a far better unwinding environment by now. Further, it would provide the finance industry with more incentive to spot fraudsters like Ross earlier. It is galling to RAMIG that other finance companies channelled investors to Ross and yet have seemingly not been investigated or obliged to assist. 5. Concern about a need for government contribution to a finance industry funded compensation scheme seems strangely misplaced when no such funding has ever been provided to investor funded unwinding operations. 6. Investors would only be better protected against fraud by a compensations scheme, not normal commercial losses. Hence the incentive to invest irresponsibly (moral hazard) is not there, because all risk has not been removed.
8	Do you agree with our design goals? Are there any other goals which the system should be designed to achieve?
9	Are there any other factors which you think should be treated as indicating that an investment scheme is a Ponzi scheme?
10	What are your views on our proposed definition of a Ponzi scheme: • Do you consider that our definition of a Ponzi scheme might capture any investment

	structures or products which it should not? • Do you consider that the definition of a Ponzi scheme should seek to capture any other investment structures or products?
	We want as much protection for small investors as possible, over the widest range of frauds.
11	Do you consider that the third limb of the proposed definition of a Ponzi scheme should be expanded to capture investments more generally?
	We want as much protection for small investors as possible, over the widest range of frauds.
12	Are you aware of any cases in which our proposed definition would have failed to capture a Ponzi scheme?
13	Do you agree with the criteria for identifying when an investment scheme should be able to be declared a Ponzi scheme?
	We don't want Ponzi schemes to lose their protection because it is too easy to exclude them.
14	Do you consider that there are any additional or alternative criteria which should need to be met in order for a scheme to be declared to be a Ponzi scheme?
15	Do you consider that proving fraudulent intent on the part of the operator of an investment scheme should be a necessary requirement to establish that that scheme is a Ponzi scheme?
	No intent test should be needed.
16	Do you consider that the test for whether an investment scheme is a Ponzi scheme should be: • based on a set of fixed criteria? • At the absolute discretion of the courts? • a combination of limited discretion by the courts based on a set of criteria?
	Whatever protects investors.
17	Is it appropriate for the liquidator of a Ponzi scheme to have the same duties and powers of the liquidator of a company under the Companies Act?
18	Do you agree that a liquidator should be able to exercise all powers, rights, and privileges that the operator of the Ponzi scheme had prior to that liquidation – notwithstanding that any arrangements contemplate that those powers, rights, and privileges would end on the appointment of a liquidator?
19	Do you think that liquidation is an appropriate model for resolving a Ponzi scheme? If you think a different model is more appropriate, please explain why you consider this to be the

	case.
20	Do you agree that the process for appointing a liquidator is an appropriate model on which to base the process for declaring an investment scheme is a Ponzi scheme?
21	Do you agree that that in order to declare an investment scheme to be a Ponzi scheme the High Court must be satisfied on the balance of probabilities that it is in fact a Ponzi scheme?
	Seem reasonable
22	What are your views on the list of parties that would be able to seek a declaration that an investment scheme is a Ponzi scheme?
23	Do you agree that where the courts consider that a scheme may be a Ponzi scheme, but lack sufficient evidence to make an order to that effect, that the court be able to appoint an insolvency professional to examine the affairs of the scheme?
	If its done with the real intent and purpose of improving things for small investors, it's a good idea.
24	What level of certainty that a scheme may be a Ponzi scheme should be required to make such an appointment?
25	How long would it take, and what do you think the cost would be, for an insolvency professional to examine the affairs of a scheme and advise the court whether, in their professional opinion, there is sufficient evidence to conclude that that scheme is in fact a Ponzi scheme?
26	Where an investor seeks a declaration that an investment scheme is a Ponzi scheme should the Crown be required to fund the appointment of the relevant insolvency professional if it is found that the scheme is not a Ponzi scheme? If not who should bear that cost and why?
27	Should there be a set period for which an insolvency professional should be able to be appointed?
28	Do you consider that investment schemes which are invested in only by investment businesses, large persons and government agencies should not be able to be declared to be Ponzi schemes?

29	Do you consider that it may be in investors' interests for investment schemes, which have invested substantially in a Ponzi scheme, to be able to be wound up as if they were a Ponzi scheme themselves?
	Agree
30	Do you think that measures are needed to minimise or mitigate the consequences for an investment scheme or its operator of a failed attempt to have it declared to be a Ponzi scheme?
	Yes
31	Should there be a limit placed on the ability of investors to bring proceedings to have a scheme declared to be a Ponzi Scheme?
	Yes
32	Should a defence be available to investors who in good faith bring a proceeding that a scheme is a Ponzi scheme from claims for damages brought by the operator of the investment scheme?
	Yes
33	Do you consider that there should be a presumption that a Ponzi scheme was a Ponzi scheme for all time (so there is no need to identify when the scheme became a Ponzi scheme unless there is evidence to the contrary)?
34	Do you think that there should be a statutory default (say 5 years) for how far back a scheme is a Ponzi scheme in cases where a liquidator is not able to identify a point (or period) at which the scheme became a Ponzi scheme?
35	Do you agree that, in the case of Ponzi schemes, tracing is an inappropriate remedy to resolve investors' claims?
	Agree, remove tracing.
36	If you favour keeping tracing as a potential remedy in the case of Ponzi schemes how would you address the issues identified with its application?
37	Do you agree that investors should not be able to retain any fictitious profits paid to them?
	Agree
38	Do you agree that there should be a limit on the period of a clawback?
	It should depend on the quality of the records, and go back as far as practicable. In the case of RAM it appears the Ponzi had been running probably since year 1992, and better quality RAM records are available from year 2000. The availability of the banks records in the RAM

	case remains a mystery to us. With modern electronic systems (providing record keeping, storage/archiving, processing, comparing and reporting) we should be able to do better for small investors and roll back the Ponzi further.
39	Do you agree that four years is a reasonable period for a clawback to operate? If not what alternative would you propose?
	Four years it is an arbitrary choice, trying to balance the factors you mention, and made in the absence of quality information. RAMIG does not have data to analyse the impact of various roll back periods in terms of RAM, but it would be useful if PwC could do that modelling, as they are to only party right now who it seems has the required information. RAMIG believes in the case of RAM less than 20% of the stolen money (about $115m stolen) will ultimately be returned to investors by the liquidator. What would be the figure if the proposed four-year, full claw back of profit and capital, regime was to be applied? We expect it would be higher than 20%. We believe that at least 60% or even 80% recovery of the stolen money should be an aspirational target for claw back in the absence of other mechanisms (eg independent recovery through say professional indemnity insurance). What would the figure be for RAM and the other Ponzi's being wound up in NZ now? We must have better information to make this decision on this aspect. Policy need to be set by real targets and outcomes, not notional concepts. The notional concept of 'value given' as used in Fisk v McIntosh looked ok to start with but it failed totally to give a fair or even logical outcome.
40	Do you think that the liquidator of a Ponzi scheme should be able to apply to the courts to extend the period of vulnerability, in respect of specific investors, where it can be shown that the investor received distributions in bad faith?
	Yes, certainly. There should be penalty for bad faith actions that have almost certainly disadvantaged other investors who acted in good faith. The issue of bad faith remains a vexation to RAMIG. From the evidence we have seen we find it practically impossible to believe there was not significant knowledge of the state of RAM, or bad faith, in at least the last 2 years of RAM's operation. There were many investors struggling to get their money out and apparently even forming queues at Ross's door. There were written warnings to the authorities 2 years out (ignored). The RAM staff were seeking legal advice 6 months out. Money was rushing out the door. We have heard many stories from RAM investors. Yet we are seemingly told there was no bad faith or knowledge by a single investor. We do not wish to cast dispersions, but it seems there is perhaps some perverse reason (commercial or otherwise) why bad faith issues were not a factor in the RAM case. Or perhaps, despite all indications to the contrary, there simply was no substantive evidence of bad faith, that may or may not have reached the hands of the liquidator or other parties. Or perhaps the barriers to proving bad faith are impossibly high.
41	Do you agree that in order to have the benefit of a defence against the clawback powers of the liquidator investors should be required to demonstrate that *a reasonable person in their position would not have suspected, and they did not have reasonable grounds for suspecting, that a Ponzi scheme existed*? If not, what alternative test would you propose?
	RAMIG does not fully understand the legal implications of the 'reasonable investor' test but

	we understand it is a major factor in US Ponzi's enabling a 'knew or should have known' test to be applied which considerably aids claw back. RAMIG is concerned that such an explicate test seems absent from the proposal. We are not certain that the words in italics constitute a reasonable investor test nor are we clear whether such a test would improve matters for investors. Resolution of this issue seems desirable for investors.
42	Do you agree that significant financial hardship is an appropriate criterion for determining whether an investor merits retaining funds received from a Ponzi scheme?
	Yes. We wouldn't want to see widows bankrupted or thrown out of their homes if they are clawed back. Similarly, widows who have lost their life savings deserve a fair proportion of their stolen money back.
43	Do you consider that alternative criteria should be used for determining whether an investor merits retaining funds received from a Ponzi scheme?
44	Do you consider that a whistle blower safe harbour should be provided to investors in a Ponzi scheme? If there is to be a safe harbour, do you consider that this should be available to all investors or just the first investor to 'blow the whistle'?
	Seems like a good idea. First investor only seems reasonable.
45	Do you think that a defence should be provided for investors who substantially alter their position in the reasonably held belief that a distribution or withdrawal was valid and would not be set aside?
	Agree to remove this defence.
46	Do you agree that recovery against trade creditors of a Ponzi scheme should continue to be dealt with under the ordinary principles of insolvency law?
47	Do you agree that a proportional distribution of assets is preferable in the case of all Ponzi schemes regardless of the legal structure of the Ponzi scheme?
	Seems right in principle
48	Do you have any information about the cost to find out whether the losses specifically attributable to individual investors are able to be identified?
49	Do you agree that investors in a Ponzi scheme should not be entitled to the benefit of any fictitious profits allocated to them when deciding their proportional entitlements to the assets of a Ponzi scheme?
	Yes
50	What is the most appropriate model for distributing assets?
	RAMIG prefers the Alternative Distribution Model (ADM). The Rising Tide also has merits but

	we find investors are more comfortable with understanding the concepts of the ADM. Our understanding is that there are a range of calculation methodologies that might be used by a liquidator, which may affect the outcomes. We are familiar with some of the calculations used by PwC in the case of RAM.
51	Are there any additional models which we should consider?
52	Should investors' losses be able to be adjusted to take account of inflation or any other factors?
	Yes. RAMIG has found in its discussion with members that most are in favour of inflation adjustment.
53	Are there any additional or alternative criteria which we should use to assess the various models for distributing assets to investors?

Other comments

RAMIG acknowledges that our area of understanding and expertise rests mainly with the RAM Ponzi. RAMIG does not have a full knowledge of the situation with RAM because much of the relevant information has been held confidential. We do not know why investors have been denied so much information, but we presume commercial considerations and reasons of potential legal liability have much to do with it.

From our experience we believe the liquidation and legal fraternity have a very closed and secretive culture that borders on elitist. This culture in our view has contributed to the problems experienced with RAM and contributed to the delays in getting workable fraud unravelling mechanisms. It never fails to amaze us how the liquidation industry, equipped with a bewildering array of commercial legislation, could not unravel in a fair, timely or affordable manner something as structurally simple as a Ponzi scheme. It seems to us the complexity of the law was one of the main obstacles.

There have has been approximately 70 major frauds and failures in the financial markets since the Global Financial Crisis (GFC) which have cost NZ investors billions of dollars. RAMIG remains concerned however that even if the process of unravelling Ponzi schemes is clarified there will remain a huge exposure for small investors to a large range of other frauds for which unravelling has not been clarified.

RAMIG is concerned that it may be difficult to prove in many cases that a Ponzi scheme has actually occurred and therefore a large number of future frauds may be excluded from the simplified and streamlined process that MBIE is proposing for unravelling future Ponzi schemes. In other words, the basic flaws in NZ's commercial and liquidation law that were revealed by the unravelling of the Ross Asset Management Ponzi will still be in place and will lead to similar injustices for small investors when other frauds that are not judged to be Ponzi's are being unravelled.

The revised Ponzi unravelling process proposed by MBIE should result in a far more certain, timely and streamlined process for unravelling Ponzi fraud. However, the method of calculation used by the

liquidator may vary from case to case and have a substantial impact on the outcomes for investors. The MBIE document does not appear to specify calculation methods. We are familiar with some and only some of the calculation methods that we used by PwC for calculating claw back and distribution amounts for RAM.

RAMIG is not certain that the issue of 'capital out first' has yet been resolved. By this we mean the assumption used by PwC for the RAM Ponzi that any money withdrawn by an investor is capital first until the amount withdrawn exceeds the amount deposited and then withdrawals becomes fictitious profits. We believe that this was accepted by the courts but that it was only tested in the case of Fisk v McIntosh and not in the more general cases that applied? For instance, if an investor invested $100,000 and this appreciated with fictitious profits to give the investor a balance of $200,000, then the investor withdrew $100,000, we ask what the nature of the money withdrawn was? Was the $100,000 withdrawn pure capital? Some argue that it should be treated as $50,000 capital and $50,000 fictitious profits as it is not possible to distinguish which dollar was capital and which dollar was fictitious profits. Others argue the $100,000 withdrawn is all fictitious profits as investors regard their capital investment as sunk. 'Capital out first' may still be highly relevant, even for the revised Ponzi law.

RAMIG remains concerned that a compensation scheme has not been introduced for small investors. Further, wider issues of the use of legal equity appear not to be covered, unless they are explicit in the proposals made. We have covered these issues in more detail in our answers to the questions provided.