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

Your name and organisation

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Organisation	*Bell Gully*

Please select if your submission contains confidential information:

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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?
2	Do you agree with Glazebrook J's statement that "an accident of timing as to when funds are withdrawn should not favour one defrauded investor over another"?
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?
5	Do you agree with the objectives we have identified for the regime for unwinding Ponzi schemes?
6	Do you agree with problems identified with the status quo? Are there any additional issues which we should seek to address?
7	Do you agree with the preferred option we have chosen?
	In our view, the extent to which there is a need for a bespoke Ponzi-specific insolvency regime depends in large part on which reforms the Government decides to

	pursue. *For example, if the Government decided to legislate for a specific distribution model to be applied to Ponzi schemes (i.e. the Alternative Model/Rising Tide Model), we consider that this would be such a significant amendment to the existing legislation, that a bespoke Ponzi-specific insolvency regime would be more appropriate.* *Many of the other changes discussed in the Discussion Paper could be implemented through changes to the Companies Act 1993 (the **CA**) and the Property Law Act 2007 (the **PLA**). It would not be necessary to create a new regime to implement them, especially since the Supreme Court clarified the law relating to clawback claims in the context of Ponzi schemes in McIntosh v Fisk [2017] NZSC 78. That case has addressed many of the practical problems relating to clawback claims that might otherwise have justified a bespoke scheme. Since that case, we expect that the process for liquidators of future Ponzi schemes to claw back "fictitious profits" paid to investors will be more streamlined than it was in the case of RAM, where for much of the time the law was uncertain. This is evident from the significant progress made by the RAM liquidators once the law was clarified by the Courts. Following the High Court, Court of Appeal and Supreme Court decisions, the liquidators of RAM wrote to 212 investors seeking repayment of the "fictitious profits" they received. By October 2017, (five months after the Supreme Court decision was released), 80% of those claims by number had been resolved.*[1] *Accordingly, if the Government does not decide to implement significant change to the distribution processes, we consider that many of the changes discussed in the Discussion Paper could be implemented through changes to the CA and the PLA.*
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?
11	Do you consider that the third limb of the proposed definition of a Ponzi scheme should be expanded to capture investments more generally?

[1] See affidavit of John Fisk filed in support of application by liquidators of RAM for directions as to distribution, available at www.pwc.co.nz/services/business-recovery/liquidations/ross-group.html

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 agree with the proposed criteria for identifying when an investment scheme should be declared a Ponzi scheme.
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?
	We agree that proving fraudulent intent on the part of the Ponzi operator should not be a necessary requirement to establish that the scheme is a Ponzi scheme.
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?
	We consider that the test should be based on a set of criteria, as it would: *(a) provide some guidance for applicants as to what needs to be proven in order to have a scheme declared a Ponzi; and* *(b) ensure that the provisions are being applied in a consistent manner.* *The absence of set criteria may increase the risk of unsuccessful applications being made to the Court, if it is unclear to applicants what threshold is required to be met. However, we consider that the Court should have a discretion to order that an investment scheme is a Ponzi where some, but not all, of the elements are met. This would enable the Court to react to something which has all the hallmarks of a Ponzi but, for some reason, does not fall squarely within each of the listed criteria.*
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?
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?

We consider that the question of whether an investor should have the right to bring such an application is balanced, even if such an application can only be made with leave of the Court. On one hand, it is the investors' interests that are most directly protected by the regime, and investors may have the strongest motivation and the earliest opportunity to make a claim. However, on balance, we suggest that an investor should not have standing to make the application, because:

(a) An investor who has concerns can raise those concerns with the FMA or SFO. The FMA and SFO is more experienced in such matters, has more resources and various statutory powers to hand that an investor does not. This means the FMA and SFO are in a much better position to:

(i) assess the relevant information and whether that information raises a cause for concern; and

(ii) consider how best to take matters further – whether by applying to the Court for interim orders immediately or investigating the scheme using their various statutory powers.

(b) If an investor's concerns are insufficient for the FMA and/or the SFO to investigate, those concerns will unlikely be sufficient to justify the Court granting leave for the investor to bring the application.

An investor often has insufficient visibility over the operations of the scheme and insufficient understanding of investments schemes generally. This means their individual concerns will likely not be sufficient, without some further context which in most cases the investor will not be equipped to provide to the Court.

An investigation by the FMA or the SFO may be triggered by investors raising concerns about how long the scheme operator is taking to satisfy withdrawal requests. An example of this is RAM, where the FMA investigation was triggered from complaints by Ross Group investors that their requests to withdraw funds were not being honoured and that some were experiencing difficulty contacting Mr Ross. However, if any of these investors had raised an application with the Court directly, it would have been, by itself, simply a complaint by an investor that a scheme operator was taking too long to satisfy

their withdrawal request and a suspicion that something was amiss. It is difficult to see how this could meet the requisite threshold for leave, without the Court having some understanding of whether the delay complained of is normal, whether there are market factors which could explain the delay and whether other investors are having similar issues. All of these factors would be matters the SFO or FMA could submit on, but of which the investor will likely have no knowledge.

(c) This additional knowledge and experience the FMA and SFO have also enables them to move quickly to bring the necessary applications to the Court. Again, this can be illustrated using the example of RAM. The investor complaints triggering the FMA investigation were first received in late October 2012. By 6 November 2012 the FMA had:

(i) exercised its statutory powers to obtain information from the Ross Group; and

(ii) applied to the Court, and successfully obtained, orders freezing the assets of the Ross Group and appointing receivers to the Group.

(d) As the discussion paper identifies, investors having the ability to bring an application themselves raises a significant risk of meritless applications (whether made in good faith or vexatious) being made in respect of investment schemes. However, there is no need to provide an investor with a direct route to make the application themselves. If an investor had evidence of a Ponzi operation sufficient to satisfy the court that an order declaring a scheme is a Ponzi should be made, then if that evidence were provided to the FMA or SFO, it would be expected those organisations would apply to the Court for the required orders. Accordingly, we consider the risk that an investor makes a valid application to the court in circumstances where a complaint to the appropriate authorities would not achieve the same result is very low.

(e) An investor informing a scheme operator that they will apply (or have applied) for leave to seek a declaration that the scheme is a Ponzi may tip off the Ponzi operator and could unwittingly prejudice an existing FMA and SFO investigation.

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?
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?
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?
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?
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?
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?
	We do not support a proposal to disapply tracing as a general rule in Ponzi schemes. We consider that such a proposal is a significant encroachment on property rights and goes beyond what is necessary to balance concerns regarding the costs and inefficiencies of requiring tracing. *There will be circumstances where tracing assets in a Ponzi scheme will be difficult, time-consuming and inherently uncertain but in our view the law adequately currently caters for those circumstances.* *As the discussion paper acknowledges, the current law provides a route for liquidators to seek orders from the court confirming that they are not required to trace investors' assets generally. The courts have repeatedly adopted a pragmatic approach to such applications in the context of a Ponzi scheme, recognising that where tracing is inherently difficult, time-consuming, costly and uncertain, it is not in the creditors' interests for tracing to occur. This approach sufficiently balances the significance of upholding proprietary rights with the pragmatism needed in a liquidation context.* *However, it is important to recognise that even in a complex Ponzi operation, where tracing of investors' assets generally cannot be done, there may still be some assets which can be readily and efficiently traced. For example, if an investor transferred shares they already owned to the Ponzi operator to be managed as part of their investment portfolio, and those shares were still held by the Ponzi operator at its liquidation and were readily identifiable as the same shares transferred by the investor, we consider that the investor should be entitled to the return of those shares. This is on the basis that although they invested in a Ponzi scheme, the particular shares were either not misappropriated or were misappropriated, but can be located and returned to the true owner.* *We note the argument that whether an investor has a tracing claim likely depends on factors beyond their control – namely whether the Ponzi operator chose to steal from that investor's funds or another investor's funds. However, this is no different from any theft or fraud. If a thief enters a carpark building and chooses to steal the red car instead of the blue car parked next to it, the owners of the blue car should not be required to bear some of the burden of the theft because they were fortunate that the thief chose the red car instead. Subject to the issue of efficiencies, the same principles should apply to misappropriation of investor assets in a Ponzi scheme.*
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?
	We agree with this as a general principle, subject to the appropriate defences, discussed below.
38	Do you agree that there should be a limit on the period of a clawback?
	We agree that there should be a limit on the period of a clawback.

39	Do you agree that four years is a reasonable period for a clawback to operate? If not what alternative would you propose?
	We consider that the period of vulnerability should not be considered in isolation from the defences available to an investor subject to a clawback claim. *In the absence of a specific provision stating otherwise, the applicable limitation period for such a claim would be six years.[2] Assuming this six years runs from the date the liquidator was appointed (as is the case with a voidable transaction claim and a claim to set aside a transaction by the Official Assignee under the Insolvency Act 2006),[3] this means that an investor can be subject to a claim to clawback funds paid to them up to 10 years prior. In the absence of a change in position defence, this could cause significant hardship (and arguably injustice) to a person who is, fundamentally, an innocent and defrauded investor themselves.* *The change in position defence mitigates this risk, as it would take into account the position an innocent investor would be in, if they were required to repay significant amounts arising from payments they received up to ten years earlier. Accordingly, if the change in position defence is retained, we support the four year period of vulnerability. If the change in position defence is not retained, we consider the four year period of vulnerability may cause injustice and hardship to innocent investors. For the reasons explained below, we do not consider that the financial hardship defence adequately addresses these concerns. Accordingly, if the change in position defence is not retained, a shorter period of vulnerability would be more appropriate.*
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?
	We agree that the liquidator should be able to apply to the courts to extend the period of vulnerability, in respect of specific investors, where it can be established that the investor received distributions in bad faith. However, the definition of "bad faith" will be a key issue. Bad faith could be seen as requiring the liquidator to prove the subjective intention of another person before the extended period would apply, which can often be difficult to prove. Accordingly, we propose that "bad faith" be defined to include objective knowledge – that is, where a recipient knew, or ought to have known, that the payment was made in furtherance of a fraud.
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?
	We support the proposed knowledge test save for one change. *As is detailed in Part 2 of the Discussion Paper, how one defines a Ponzi scheme is not straightforward. The requirement that the knowledge or suspicion is that of **the existence of a Ponzi scheme** is a fairly high threshold and could open the door to arguments that the suspicion was simply of low level or one off fraud, not of the pervasiveness associated with a Ponzi scheme. In our submission, the knowledge or suspicion should simply be of fraudulent activities. On this basis, an investor should*

[2] Limitation Act 2010, s11. Such a claim would fall within the definition of a "money claim".
[3] See for example *Levin v Titan Cranes Limited* [2013] NZHC 2628 at [86] to [88]; Limitation Act 2010, s16(1)(g) and 38(1)(c).

only be able to rely on the applicable defences where (proposed change underlined):

> *they can establish that a reasonable person in their position would not have suspected, and they did not have reasonable grounds for suspecting that the Ponzi operator was <u>engaging in fraudulent activities.</u>*

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?

We do not support the significant financial hardship defence.

Liquidators have a duty to realise assets efficiently and accordingly responsible insolvency practitioners will invariably take into account likelihood of recovery when pursuing clawback claims. A consideration inherent in that is the financial position of the clawback investor and whether pursuing full recovery will place an investor in significant financial hardship. In our experience, insolvency practitioners are well versed in making decisions on when a claim is likely to yield recovery and what they consider a defendant to a clawback claim could reasonably afford to pay and do not need prescriptive statutory tests.

Additionally, what is significant financial hardship for an investor will be inherently fact specific. The concept of financial hardship is difficult to define in the abstract, except by reference to a minimum threshold.

The definition in the KiwiSaver Act 2006 is that minimum threshold. That minimum threshold is appropriate for that Act, as it aims to ensure that persons are not accessing their retirement savings save for very limited circumstances. However, in our submission, that very basic standard being applied to this context is inappropriate, may be unduly harsh and will unnecessarily stifle liquidators using their discretion.

Allowing a liquidator discretion to determine where the threshold of significant financial hardship lies means their approach can be better adapted to the particular circumstances of an investor.

Consider the following, not uncommon, example.

> *An investor applied payments of $500,000 received from the Ponzi to purchase a family home which is now worth $1 million. There is no mortgage against the family home. The investor is retired, has no income to fund a mortgage and minimal cash or other liquid assets.*

In these circumstances, the investor is unlikely to suffer significant financial hardship if he or she is required to downsize the family home or obtain a reverse mortgage in order to pay the claim against them. However, the definition of significant financial difficulties in the KiwiSaver Act suggests that equity in the investor's family home is not required to be used to meet a clawback claim, where the investor has insufficient income to pay a mortgage. This example illustrates the importance of the liquidators having a discretion which can be adapted to the particular circumstances.

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'?

While we do not submit on the policy of a whistle-blower defence, we can see significant practical issues with its application.

(a) *A Ponzi will generally attract a number of family members/related parties due to persons recommending it based on returns received. Therefore, there may be issues with establishing which investors fall within the safe harbour when a report is made. For example, was the report made only on behalf of the specific investor who reported it, or was it also made on behalf of family trusts and/or family members associated with that investor? If a professional trustee makes the report, will all trusts associated with that trustee gain the protection of the safe harbour?*

(b) *It is not clear from the discussion paper the extent of the proposed protection. In particular:*

- *Is the whistle-blowing investor protected only to the extent of their lost capital contributions, or will the defence permit them to retain "fictitious profits" paid to them also?*

- *Is there a "cap" on the level of protection? The purpose of the whistle-blower provisions could be substantially undermined if a large amount of payments are protected under this provision, leaving minimal funds for remaining investors. This could be due to the number of investors protected by the defence or to a significant amount of payments received by a whistleblowing investor before reporting. A cap on the amounts protected under this defence could address this issue*

(c) *The defence encourages an investor with suspicions to withdraw money from the scheme before they make a report, as they will not get a financial benefit if they report before they receive funds from the Ponzi. However, it is not clear whether the investors are still entitled to the protection if they unnecessarily delay making a report, in order to get their money out first.*

For example, an investor may become suspicious if they are required to wait lengthy periods for payments to be made to them. However, it is not clear whether an investor will still get protection if they had suspicions, made a withdrawal request and waited several months for the payment to come through before reporting their suspicions to FMA or SFO.

Any whistle-blower defence would need to clearly define the parameters of the defence to address these issues.

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?

We consider that the change in position defence should be retained, but amended to:

(a) clarify that the requisite knowledge is not a subjective test but an objective test; and

(b) provide the Court with the discretion to grant relief where the core elements of the defence are otherwise established.

It is important to note that the change in position defences under the CA and under the PLA can result in different outcomes.
There are two key differences:

(a) The CA defence contains an objective knowledge element. Whether the knowledge element of the PLA defence is subjective or objective is not apparent on the face of the statute.[4]

(b) Under the CA defence, where an investor can establish the elements of the change in position defence, the Court "must not" grant relief.[5] *That is, the Court has no discretion. In contrast, under the PLA defence, where an investor can establish the core elements of the defence, the investor must then satisfy the Court that "it would be unjust to order that the property be restored or reasonable compensation be paid, in either case in part or in full."*[6] *That is, where the elements of the change in position defence under the PLA has been met, the Court retains a discretion as to whether to make any orders and if so, the extent of those orders.*

We consider that the change in position defence should be retained, but with the Court having the same discretion as it currently has under the PLA defence.

The change in position defence recognises that the investor subject to a clawback claim is an innocent party (and also a defrauded investor), who may suffer injustice as a result of the order through no fault of their own. In particular, it recognises that the effect of an order can put an investor in a worse position than they would have been in if they had never received the challenged payment.

Consider the following two examples (in each case the payment was received in good faith and without knowledge):

(a) An investor receives $100,000 from a Ponzi. He or she donates that money to charity, in circumstances where the charitable donation would not have been made but for the challenged payment. If the investor is required to repay the $100,000, that will likely result in the investor being put in a worse financial position than they would have been if they never received the payment.

Under the CA defence, the investor would have a complete defence to the

[4] Case law suggests it is objective. See *Regal Castings Limited v Lightbody* [2009] 2 NZLR 433 at [15] (a decision of the Supreme Court in respect of the equivalent defence under section 60(3) of the Property Law Act 21952. For the purpose of this issue, there is no material difference between the 1952 Act section 60(3) and the PLA, section 349). See also S*tanley v MacDonald* [2012] NZHC 597 at [32] and [33].
[5] See section 296(3) of the CA
[6] PLA, s349(2)(b)

	claim and the Court would be unable to make any orders for relief. Under the PLA defence, the Court can consider all the circumstances and decide whether it is just for the investor to repay any or all of the $100,000 received. *(b) An investor receives $100,000 from a Ponzi and uses it as a deposit on a house. He or she would not have purchased the house, but for the payment. Under the CA defence, the investor would likely have a complete defence. However, under the PLA defence, the Court could determine that even though the core elements of the defence have been established, the investor remains enriched by the increased equity in the home and therefore that it is just in all the circumstances to require the investor to repay some or all of the funds for the benefit of the defrauded investors.* *Accordingly, in our view a change in position defence which provides the Court with discretion as to any orders once the core elements are established better balances any hardship or injustice to the clawback investor arising from any order against those of the defrauded investors generally.*
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?
	We agree that recovery against trade creditors of a Ponzi scheme should continue to be dealt with under the ordinary principles.
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?
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?
50	What is the most appropriate model for distributing assets?
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?

53	Are there any additional or alternative criteria which we should use to assess the various models for distributing assets to investors?

Other comments

Process issues with the proposed process

If the Government decides to proceed with a bespoke Ponzi regime, there are some key process issues which need to be addressed in its current proposal.

In particular:

(a) The process does not address what happens to the scheme once the application is made, but before liquidators are appointed.

We suggest that the application regime include specific provision for interim orders, such as freezing orders and the appointment of receivers to the scheme while the application is being heard. It is likely that in some cases the Ponzi operator could transfer assets out of the scheme and/or destroy key documentation, which would significantly undermine the operation of the regime.

(b) The process also assumes that the application to declare the scheme a Ponzi scheme and the application to liquidate the scheme are two separate steps. However, the scheme could not continue to trade after the Court had declared it a Ponzi, but before the application to liquidate the scheme had been determined. Therefore, we consider the better approach would be for the application to be permitted as one application, seeking the two separate orders. This way if a Court were satisfied that the scheme were a Ponzi it could be liquidated immediately, without going through a separate process for liquidation.

Additional comments on clawbacks

It is not clear whether the proposed clawback regime would apply only to the initial recipients of the payment. The PLA provides that a Court can order relief against "any person who acquired or received property through the disposition."[7] The PLA further defines such a person as:

A person who acquired or received property:

(a) under the disposition; or
(b) through a person who acquired or received property under the disposition.

This provision enables the liquidator to seek relief against the ultimate recipient of the challenged payment, rather than being restricted to the initial recipient. This provision can be particularly useful when dealing with family trust investors.

In our experience, it is not uncommon for investments to be held by a family trust, with the family trust receiving the challenged payment and promptly paying those funds to beneficiaries of the trust. This provision in the PLA enables the liquidator to pursue both the trustees of the trust (who may then try to raise a change in position defence based on the

[7] PLA, s 348(2)(b)

distribution), but also the beneficiaries as the ultimate recipient. We recommend that any bespoke clawback regime retain this ability to seek recovery from the ultimate recipient.

Availability to meet

Bell Gully has a wealth of expertise and experience in insolvency, corporate restructuring, receiverships and liquidations. The practice is built around the multi-disciplinary expertise of experienced and highly regarded finance, litigation and corporate specialists. Our specialist team is regularly engaged to assist receivers, liquidators, other insolvency practitioners, and creditors, across the broad range of insolvency and restructuring matters.

Bell Gully has particular experience with advising liquidators on unravelling Ponzi schemes. In particular, Bell Gully is currently acting for the liquidators of two Ponzi schemes:

(a) Ross Asset Management Limited (in liquidation) (RAM) and related entities; and

(b) Arena Capital Limited (in liquidation) (Arena).

However, these submissions are those of Bell Gully and are not provided on behalf of the liquidators of either RAM or Arena.

We would be very pleased to provide further input as any proposed reforms are developed. In particular, we are available to meet to discuss these submissions if that would assist. At first instance, please contact Tim Fitzgerald, litigation partner, Bell Gully, Auckland (details below).

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