

## **Terms of Reference Insolvency Review Working Group October 2015**

This document outlines the objectives, membership and deliverables for the Insolvency Review Working Group (**Working Group**).

### **1. Objectives**

The objectives of the Working Group are to:

- provide expert advice to the Minister of Commerce and Consumer Affairs (the **Minister**) on corporate insolvency law in New Zealand; and
- if appropriate, recommend possible changes to New Zealand's corporate insolvency regulatory system.

### **2. Background**

The Companies Act 1993 and the Receiverships Act 1993 provide a menu of options, including liquidation, voluntary administration, receivership and compromises, in relation to companies that are in financial distress or may be heading towards financial distress.

The objectives of corporate insolvency law include:

- providing interested parties with appropriate incentives about whether to rehabilitate or liquidate a financially distressed company;
- discouraging directors or management from wasting the company's assets;
- ensuring all creditors of the same class are on an equal footing (i.e. the *pari passu* principle);
- providing collective debt resolution procedures that are managed by a single person;
- minimising the disruption to business activity by providing efficient insolvency procedures;
- promoting the efficient and effective operation of credit markets; and
- not undermining benefits of limited liability as a means to raise capital and encourage business risk taking and innovation.

In recent years a number of recurring issues have arisen with New Zealand's corporate insolvency law, particularly in the areas of voluntary liquidations, voidable transactions and the regulation of insolvency practitioners. A working group comprising insolvency practitioners and legal experts is being formed to investigate these issues and recommend improvements to corporate insolvency law.

### 3. Scope

The Working Group will provide the Minister with a report containing advice and recommendations on the matters outlined below, including analysis of the regulatory impacts of any proposed changes.

<b>A Voluntary liquidations</b>
<p>Whether there are problems with voluntary liquidation of companies (including with respect to the use of phoenix companies and companies being liquidated to avoid liability for latent defects, paying arrears of wages to employees, other employee entitlements and employment related penalties) and, if so:</p> <ul style="list-style-type: none"><li>• whether any problems are confined to the building sector or are of a general nature;</li><li>• whether existing protections against abuse are effective;</li><li>• whether there are sufficient incentives for parties to use available civil remedies in cases of abuse;</li><li>• whether there is benefit to be able to publically search for directors of companies which have gone into liquidation; and</li><li>• how any problems could be dealt with by amending company law.</li></ul>
<b>B Voidable transactions and Ponzi schemes</b>
<p>Continue examining the voidable transaction regime and provide advice on:</p> <ul style="list-style-type: none"><li>• possible areas of reform of the voidable transactions regime;</li><li>• whether there are any additional issues associated with the regime and, if so, how they could be addressed; and</li><li>• any changes to company or investment law that could be proposed to aid the recovery of funds and compensation of lost funds by Ponzi scheme investors.</li></ul>
<b>C Insolvency Practitioners Bill</b>
<p>Provide advice on whether the Insolvency Practitioners Bill should:</p> <ul style="list-style-type: none"><li>• be withdrawn;</li><li>• be progressed;</li><li>• have elements progressed; or</li><li>• be replaced with a licensing regime and, if so, identify the key features of the regime, how the licensing regime should be funded, and how the regime would impact on company insolvencies.</li></ul>
<b>D Other corporate insolvency issues</b>
<ul style="list-style-type: none"><li>• Identify if there are any other potential improvements to corporate insolvency law.</li><li>• Identify the main priorities for reform of corporate insolvency law.</li></ul>
<b>E Implications for personal insolvency law</b>
<p>Identify whether there would be any implications for personal insolvency law arising from any recommendations under B and D.</p>

#### **4. Chair and membership**

The Working Group will comprise:

- an independent Chair;
- two insolvency practitioners;
- two insolvency lawyers;
- a person who has a specific creditor focus; and
- the Official Assignee or her nominee.

Members of the Working Group will be appointed for their expertise and experience in corporate insolvency law and not as representatives of any stakeholder or sector groups.

The Ministry will act as Secretariat for the Working Group.

#### **5. Confidentiality**

Working Group members may, from time to time, be provided with sensitive information for consideration and discussion. Working Group members will treat all information provided as 'confidential' in status, unless informed otherwise.

Any information provided to the Working Group, the Ministry and the Minister may be subject to release under the Official Information Act 1982.

#### **6. Operation of the Group**

Working Group meetings will be held as required from November 2015 to March 2016. These meetings will be held generally in Auckland or Wellington. Members will be required to attend and be prepared for all Working Group meetings.

The ability to develop trusting relationships and to communicate openly and honestly with other members of the Group will be a key factor in the ability of the Working Group to work as a team.

The Chair will meet with the Minister monthly, except for January 2016, to discuss progress.

#### **7. Costs and resources**

As Secretariat, the Ministry will arrange the Working Group meetings, take minutes, distribute papers, and gather information and carry out research requested by the Working Group.

The Ministry will pay members of the Working Group a sitting fee for each meeting attended and cover travel and incidental costs of members attending meetings based on the *Fees Framework for Members appointed to bodies in which the Crown has an interest* and where those costs are agreed to in advance by the Ministry.

In Confidence

The Ministry will also cover the direct meeting costs, such as venue hire and refreshments. As a principle, costs will be kept to a minimum, and low cost meeting options (e.g. video/phone conferencing) will be considered before each meeting.