



COVERSHEET

Minister	Hon Kris Faafoi	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Insolvency Law Reform	Date to be published	4 November 2019

List of documents that have been proactively released

Date	Title	Author
23 September 2019	<i>Insolvency Law Reform</i>	<i>Office of the Minister of Commerce and Consumer Affairs</i>
23 September 2019	<i>Insolvency Law Reform: Annex One - Minor Changes</i>	<i>Office of the Minister of Commerce and Consumer Affairs</i>
23 September 2019	<i>CAB-19-MIN-0491</i>	<i>Cabinet Office</i>
23 September 2019	<i>Regulatory Impact Statement: Insolvency Law Reform – Gift Cards & Vouchers</i>	<i>Ministry of Business, Innovation and Employment</i>
23 September 2019	<i>Regulatory Impact Statement: Insolvency Law Reform – Reckless Trading Claims</i>	<i>Ministry of Business, Innovation and Employment</i>
23 September 2019	<i>Regulatory Impact Statement: Insolvency Law Reform - Voidable Transactions</i>	<i>Ministry of Business, Innovation and Employment</i>

Information redacted

YES

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Some information has been withheld to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials.

Annex 1 – Minor changes to the *Companies Act 1993, Receiverships Act 1993 and Insolvency Act 2006*

	Problem	Recommended changes	Insolvency Act
	Issues relating to voidable transactions and other recoveries (items 1-10)		
1.	The definitions of “related creditor” and “related entity” in the Companies Act, insofar as they relate to natural persons, are not sufficiently wide to capture all at-risk transactions, charges and securities that will be voidable for up four years.	Widen the definition of “related creditor” and “related entity” to include the range of individuals covered by the definition of “relative” and “close business associate” in the <i>Financial Markets Conduct Act 2013</i> (schedule 1, clause 5). Add the concept of ‘shadow director’ (e.g. a person who is not a board member but directs or instructs one or more board members in the exercise of their duties or powers).	Equivalent change required
2.	Liquidators have six years from the date of the liquidation to bring a claim under the voidable transactions and other recoveries provisions under the standard limitation period for money claims under the Limitation Act 2010. This amount of time creates excessive uncertainty for creditors.	Reduce the deadline for liquidators to file claims under the voidable transactions and recovery provisions from six to three years. Provide the High Court with the discretion to extend the filing period, if it would be just and equitable to do so.	Equivalent change required
3.	The test for whether a creditor has been preferred by a transaction is to compare the amount received with the amount they would have received in the liquidation of the debtor company. This means that a creditor who had a valid security interest in property can have their interest defeated because the assets over which their interest was held were sold before the point of insolvency. This means	Add a defence for a creditor with a valid security interest who can demonstrate that there was no preference at the time they received payment.	Equivalent change required

	Problem	Recommended changes	Insolvency Act
	they no longer have an interest in the assets of the debtor company at the point of insolvency.		
4.	The Companies Act provides for a pre-liquidation transaction between the debtor company and a creditor to be netted off against other transactions between the parties in certain circumstances. This 'continuing business relationship' provision includes a requirement to enquire into the parties' intentions. This creates considerable complexity without commensurate additional benefit.	Simplify the continuing business relationship rule by removing the subjective element relating to the parties' intentions.	Equivalent change required
5.	The Companies Act does not specify the commencement date for a continuing business relationship. This has created unnecessary uncertainty and resulted in costly litigation.	Clarify that the starting point for a continuing business relationship is the start of the specified clawback period, or the point of the debtor's insolvency, whichever is later.	Equivalent change required
6.	The Companies Act prescribes the content and form of notices that must be filed when a liquidator applies to set aside a transaction. Having this list in primary legislation makes it difficult to update these requirements to reflect changing practice or address any other problems.	Amend the Act, relating to the content and form of a liquidator's notice for setting aside transactions, by replacing the current list with a power to prescribe the content and form by Order in Council.	Equivalent change required
7.	The Companies Act provides for a company to go into voluntary administration. After receiving advice from the administrator, the company's creditors will decide, at a watershed meeting, whether to allow the company to trade on or appoint a liquidator. When a liquidator is appointed, the clawback period is calculated by reference to the date of the watershed meeting. Consequently, the clawback period starts several	Provide that the clawback period be calculated by reference to the date of appointment of the voluntary administrator if the company's creditors decide to appoint a liquidator at the watershed meeting.	No change

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	weeks later than would have been the case had the company been placed in liquidation in the first instance. This can harm the collective interests of creditors because some transactions that would ordinarily have been voidable will be excluded.		
8.	Transactions which have been clawed back are paid to unsecured creditors. However, there is legal uncertainty about the resulting recoveries are payable to preferential creditors first, or can only be paid to ordinary unsecured creditors.	Clarify that recoveries are to be paid out in the order specified under preferential claims provisions of Schedule 7 of the Companies Act.	Equivalent change required
9.	There is currently uncertainty about the extent of an administrator's liability for general debts of a company in voluntary administration.	Clarify that voluntary administrators is only personally liable for debts incurred and arising during the course of an administration.	No change
10.	During voluntary administrations, there is uncertainty about whether a transaction authorised by creditors could be set aside if the business failed after an attempt to restructure it. This is unfair to parties who transacted with a company in a way approved by creditors.	Clarify that transactions that are specifically authorised by a deed of company arrangement are not subject to the voidable transaction regime regardless of who carries out the transaction.	No change
Other corporate insolvency law issues			
11.	The definition of 'secured creditor' distinguishes between creditors who hold security through being granted an interest in the debtor's property, and creditors who retain title to assets held or used by a debtor. This situation has created uncertainty about what type of security interests are within or outside this definition.	For the purposes of Part 16 of the Companies Act (Liquidation), amend the definition of 'secured creditor' to include all creditors holding a security interest as defined in the <i>Personal Property Securities Act 1999</i> .	Equivalent change required
12.	There is inconsistency in the Companies Act about	Require all administrators' reports to be	No change

	Problem	Recommended changes	Insolvency Act
	<p>which reports of an administrator are required to be filed with the Registrar of Companies.</p> <p>This can create issues in terms of transparency and consistency.</p>	filed with the Registrar of Companies	
13.	<p>Certain documents held by a third party (e.g. invoices) that the debtor company will have had at some point, may not be available to a liquidator because of poor record keeping by the company in liquidation.</p> <p>The time and cost associated with seeking a court order to obtain copies of the documents from a third party sometimes deters liquidators from fully investigating a company's affairs.</p>	Provide powers to liquidators to obtain information from third parties that would ordinarily have been available to the liquidator if proper records had been kept without needing to apply to the courts, subject to appropriate procedural safeguards.	No change
14.	<p>The Companies Act and the Receiverships Act prohibit refusing to supply essential services to a company in liquidation or receivership. The definition of 'essential services' includes telecommunications services.</p> <p>The definition of 'telecommunications services' was obtained from the Telecommunication Act 1987. However, it was not updated when a modified definition was enacted via the Telecommunications Act 2001.</p>	Align the meaning of 'telecommunications services' in the Companies Act and the Receiverships Act with the meaning of 'telecommunications service' in the Telecommunications Act 2001.	No change
15.	<p>Following on from the previous point, the definition of 'essential services' in the Companies Act and Receiverships Act refer to 'retail' supply of electricity and gas, but 'retail' is not included in connection with telecommunications services. This may have been because Telecom was a vertically integrated service provider when the Companies Act and Receiverships Act were enacted in 1993.</p>	Change the definition of essential services to exclude wholesale telecommunications services.	No change
16.	The Crown has a priority for unpaid fines and penalties,	Provide that fines and penalties are	No Change

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	<p>which means that it ranks ahead of unsecured creditors.</p> <p>The effect of the priority, when the fines and penalties are enforced, is to punish innocent parties (i.e. the company's unsecured creditors), not the wrongdoers (i.e. the owners or managers of the company).</p>	admissible claims in liquidation, but are subordinate to claims by unsecured creditors.	
17.	Creditors are able to challenge an administrator's remuneration. However, liquidators and receivers cannot. This is anomalous, given that liquidators and receivers stand in the shoes of creditors to exercise their rights where an administration is followed by a receivership or liquidation.	Provide for receivers' and liquidators' remuneration to be challenged.	No change
18.	There is no time limit for challenging the outcome of a creditors' watershed meeting. This can create ongoing uncertainty about the validity of any arrangements agreed at a meeting. This compromises the usefulness of the voluntary administration regime.	Add a 10 working day limitation period for challenging the outcome of a watershed meeting.	No change
19.	A receiver can be appointed during a voluntary administration. When that happens the receiver takes control of the assets over which a security is held (often all the assets of the debtor company) including cash and other liquid assets. However, the administrator has a statutory obligation to complete an investigation, report to creditors and hold a creditors' meeting. The question then arises as to whether the administrator has a priority claim over the assets of the debtor company for their fees and expenses. This is not clear under the Companies Act or Receiverships Act and can stand in the way of receivers performing their functions.	Clarify, in the Receiverships Act that the priority for administrators' fees and expenses continues to apply when a company is both in receivership and in administration.	No change

	Problem	Recommended changes	Insolvency Act
20.	<p>A circularity of priority issue can arise under the Receiverships Act in the following circumstances:</p> <ul style="list-style-type: none"> • The assignee of an account receivable has priority over preferential creditors • Preferential creditors have a priority over a general security agreement (GSA) creditor • The GSA creditor has priority over the assignee. <p>This circularity can only be resolved, in the rare circumstances that it happens, by seeking a court ruling that the 'assignee over preferred creditor' priority is not to be taken at face value.</p>	<p>As is the case under the Property Law Act 2007, limit the application of the assignee's priority to the circumstances where the account receivable has priority over the mortgagee's mortgage.</p>	<p>No change</p>

PROACTIVELY RELEASED