30 June 2017

Ministry of Business, Innovation and Employment
PO Box 1473
Wellington 6140

By email: corporate.law@mbie.govt.nz

To whom it may concern

ANZ submissions on the Review of Corporate Insolvency Law – Report No. 2 of the Insolvency Working Group, on voidable transaction, Ponzi schemes and other corporate insolvency matters

Thank you for the opportunity to provide feedback to the Ministry of Business, Innovation and Employment on Report No. 2 of the Insolvency Working Group (**IWG**) (Submissions on the Review of Corporate Insolvency Law).

ANZ Bank New Zealand Limited (**ANZ**) appreciates the detailed analysis undertaken by the IWG and the IWG's focus on balance between the interests of individual creditors and the general body of creditors taken as a whole.

ANZ's specific responses to the questions in the consultation document and other key messages from ANZ are set out in the attached appendix.

ANZ also made submissions on the IWG's Report No. 1.

Contact for submission

We welcome the opportunity to discuss our submission directly with MBIE officials. If you would like to establish a time to do so, please contact:

Once again, thank you for the opportunity to provide feedback.

Yours sincerely

Head of Lending Services, New Zealand

Appendix – Responses to consultation questions

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)
(b) If not, what is your assessment of the impact of the decision?

ANZ generally agrees with the IWG's assessment of the impact of the *Allied Concrete* decision on NZ's voidable transactions regime.

2.
(a) Do you agree with the Insolvency Working Group's listed objectives of the voidable transactions regime? (paragraph 53)
(b) Should other objectives also be considered?
(c) What weighting should be given to the objectives, e.g. equally or differently?

ANZ agrees with the listed objectives, being: consistency with the equal sharing principle (as between creditors of the same class), fairness to individual creditors and administrative and compliance efficiency.

Another objective is to avoid unnecessary diminution of the assets of the insolvent company. This objective relates to compliance efficiency (minimising costs of liquidation and creditors' costs) and the liquidators' conduct (as addressed in IWG's report No. 1).

ANZ agrees with the IWG that equal sharing between similar creditors and fairness to individual creditors are both important but potentially conflicting policies. Although it is difficult to assess where the balance should be struck, ANZ is of the view that recommendations 1 & 2 aim to strike an acceptable trade-off between these objectives and also achieve the efficacy goals in respect of administrative and compliance costs. However, ANZ is concerned as to how this regime will impact trade creditors, as outlined in more detail below.

3.
(a) Do you agree with the Insolvency Working Group's views on the problems with the status quo? (paragraphs 56-69)
(b) Are there other problems?

The first problem identified by the IWG is inadequate weighting of creditors' collective interests, particularly in light of *Allied Concrete*. The IWG observed that in effect, companies become incentivised to not actively monitor their debtor companies because diligent creditors would be punished and inactive creditors would be rewarded.

ANZ generally agrees with the IWG's observation. ANZ also notes that in practice, diligence does not necessarily lead to knowledge of a debtor's financial position, nor does lack of knowledge signify inactivity. In its experience:

- notwithstanding the diligence of any creditor, a debtor who is experiencing financial difficulty inherently has an interest in withholding its true position from a creditor, whether due to ill-intention or simply on an innocent/naïve belief that they will be able to "ride out the bad times"; and

- in some circumstances, a creditor may have become accustomed to receiving payment late for various reasons unrelated to the debtor's solvency.

Whether regarded as "proactive" or not, both sets of creditors may legitimately seek to rely on the defences to voidability.

The second problem identified by the IWG is excessive business uncertainty. ANZ agrees that this is a problem.

Another problem that ANZ has observed is the use of speculative notices for setting aside transactions. In this regard, ANZ supports R13 and adds that serious consideration should be given to requiring a liquidator to provide the basis on which a transaction is claimed to be voidable in the liquidator's notice. Currently, a number of liquidators do provide this information and it is not unduly onerous to provide for this requirement in the legislation (rather than rely on the matter being addressed through the licensing regime to be added to the Insolvency Practitioners Bill). Liquidators should have already formed a view on the basis for a voidability claim before sending a notice so inclusion of this information in the notice itself should not be problematic and is preferable to leaving it to the creditor to raise an appropriate defence in the absence of any context.

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)
(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.

In respect of R1, ANZ tends to support the recommendation but notes the following:

- ANZ's understanding is that trade creditors acting in good faith would naturally rely on having given "value" as they see it, rather than "new value". The commercial viability of these creditors may also depend on the payments received based on this reliance. The *Allied Concrete* decision appears to affirm this natural reliance on having given value if goods or services were provided.
- In light of the above, ANZ simply observes that serious consideration should be given to the effect of this recommendation, in respect of whether this recommendation does ensure that similar creditors will be treated equally and whether R2 is sufficient to temper down the potential negative effect on individual creditors' interests.

In respect of R2: ANZ supports this recommendation.

ANZ does not agree that these recommendations need to be implemented as a package, but R2 may be implemented on its own for the purpose of maintaining an appropriate level of commercial certainty for individual creditors. However, if R1 is adopted, R2 is required to maintain an appropriate level of commercial certainty for individual creditors.

ANZ does not hold information on the number of voidable transactions that it is aware of that fall within the specified period (but not the restricted period) and the dollar amount of such claims.

5. Are there other feasible options?

At this stage, ANZ has nothing to add in this regard.

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)
(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?
(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?

ANZ generally supports R3 – R11, and provides the following additional comments:

- In respect of R7, the suggested reduction of the limitation period is reasonable and assists with achieving commercial certainty.
- ANZ supports R8 in theory but suggests that clearer statutory parameters around what is "just and equitable" is required to ensure that extensions are not simply granted as a matter of course. For example, the Court should take into account the cause of the delay: for example, was delay caused by the liquidator's inefficiency or deliberate concealment of information by another party?
- R9 addresses a gap in the law that leads to an unfair outcome for secured creditors. A payment to a secured creditor in reduction or discharge of the secured debt is not a preference.

ANZ expects that R4 (standardising the period of vulnerability for all clawbacks under sections 292, 293, 297 and 298 at four years where the debtor company and the preferred creditors are related parties) has the potential to materially increase the total amount of funds that liquidators would be able to recover under the voidable transaction for the benefit of creditors. ANZ does not have a firm view as to whether the other recommendations are likely to have a material impact on recoveries.

ANZ is not in a position to comment on how often voidable transaction claims are initiated 3 years after the commencement date of a liquidation.

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?

Yes.

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)
(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

ANZ generally supports R12, R14 and R15.

In respect of R13, ANZ agrees with the majority of the prescribed content but repeats its comments from paragraph 3 above on adding a requirement to provide the basis on which the transaction is considered to be voidable in a liquidator's notice to set aside transactions.

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?

At this stage, ANZ is not aware of any other issues.

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))

Consistent with its view as outlined in its submissions on 7 October 2016 in response to IWG Report no.1 (on the latent defect problems in the building and construction sector), ANZ considers that it is not generally the purpose of insolvency law to provide protection against Ponzi schemes. ANZ's view is that it is difficult to isolate the treatment of one particular issue (i.e. in this case, fraudulent conduct) in a principled manner without giving rise to an uncertain position (for example, defining a Ponzi scheme in a manner which is precise and not wider than intended is likely to be challenging).

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)
(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?
(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?
(d) What are your views on establishing a new preferential claim for gift cards and vouchers? (recommendation 25 and pages 51-52)
(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)
(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)

ANZ generally supports R19, R21 – R22 and R27 – R30.

ANZ generally supports R17 and R23 but makes the following observations:

- R17: In principle, ANZ has no issue with ensuring consistency as between the definition of "secured creditor" for the purposes Part 16 (Liquidation) of the Companies Act and the PPSA but observes that the implications of any follow through effects need to be seriously considered before the change is enacted to avoid any unintended consequences.
- R23: This should not obviate the need for formal notices and Court documents to be served in the usual way. In respect of other communications, a liquidator still needs to take reasonable steps to ensure that communications (sent in whatever manner) will reach a creditor. ANZ envisages that in the case of each new appointment, liquidators will ensure that they obtain the current email address(es) of the relevant contact person(s).
- R26: ANZ supports this recommendation, noting that there is potentially scope to limit the preferential period further than the six month limit proposed.

R18: ANZ does not support R18 as it currently stands.

ANZ notes that the IWG appears to focus its policy basis for this recommendation on circumstances where directors of the debtor company who are the subject of the reckless trading claim (or interests related to them) hold a GSA. As a consequence, pursuing a reckless trading claim against directors in these circumstances would be pointless if they resulted in the directors (or their interests) being the major beneficiaries of successful reckless trading claims against themselves. ANZ's observations on this follow:

- ANZ agrees that directors (or their interests) with GSAs should not be able to benefit from or ultimately block a reckless trading claim.
- However, ANZ does not consider it is appropriate to address this issue by restricting all secured creditors from benefiting from reckless trading recoveries. ANZ considers there is no good policy basis why unrelated third party GSA holders should not have the benefit of recoveries from reckless trading.
- ANZ is of the view that a major change in law which will be to the disadvantage of all secured creditors is not justified in the circumstances. However, ANZ would support changes which specifically address the issue identified (such as a carve-out for secured parties that are also related parties).

Secured creditors, like other creditors, are impacted by losses in value resulting from reckless trading. Reckless trading tends to affect the value of the whole business, and in particular its value as a going concern which is generally the basis for lending by a secured creditor with a GSA. In that instance, a secured creditor will potentially be significantly exposed to losses in going concern value (as well as physical asset value) arising from reckless trading activities. As a consequence, ANZ considers there is no good policy basis why secured creditors should not have the benefit of recoveries from reckless trading.

Also, ANZ does not agree that secured creditors, including banks, will have access to better financial information from a debtor company enabling them to detect reckless trading more easily. In the case of most debtor companies, the information which banks receive does not necessarily put banks in a better position than other creditors to detect reckless trading. In fact other creditors with more direct and personal relationships with the debtor company may be better placed to detect reckless trading.

ANZ notes that:

- it is not always the case that ANZ requires its customers to deliver financial information on an ongoing basis, this is particularly in the case of business banking customers (with limits up to $500,000);
- in circumstances where ANZ requires ongoing financial information from its customers, generally this information is not required more frequently than on a quarterly basis. In addition there is always a grace period for delivery of such information, generally within 30 days of the quarter end, or longer for annual accounts (up to six months from financial year end). A supplier or other unsecured creditor with regular dealings with the customer would often have more up to date knowledge of the customer's true position;
- the issue of the lack of current information available to a bank is often exacerbated by the information provided being late, incomplete or inaccurate;
- ANZ does not always require financial covenants in loan documentation for customers with total debt of less than $3M (although property developers and investors (that are not owner-occupiers) are generally an exception to that rule). As a consequence, ANZ may not be able to take formal steps in circumstances where the financial position of such a customer deteriorates; and
- occasionally, debtor companies may have accounts with more than one bank either for innocent or deceitful purposes.

ANZ considers it is when a company is facing some financial difficulty that additional secured lending is required urgently to give the company any realistic prospect of survival, which would be in the best interests of all creditors. Despite being significantly impacted by reckless trading activities in this scenario, for the reasons outlined above it should not be assumed that a secured creditor faced with the decision to fund would hold all the necessary information to form a view on reckless trading at that time. The suggested amendment also may be a disincentive to secured creditors who would otherwise provide valuable funding which could assist a company's turnaround.

In respect of other avenues for secured creditors, ANZ does not always hold guarantees from the directors of closely held companies, and in circumstances where they are taken, ANZ will often not have securities to support these personal guarantees. In any event, it would be rare for ANZ to hold guarantees from directors of companies that are not closely held.

R20: ANZ supports a clarification of the law but makes the following observations:

- The examples given in the IWG report (for example, invoices, correspondence and credit notes) appear to be examples of company documents that are likely to be already caught by s261.
- The scope of any power to obtain information from third parties should be limited to documents that the company would ordinarily have in its possession.
- The liquidator's powers should not override a third party's right to confidentiality in respect of their banking records outside the scope of documents that a debtor company would ordinarily have in its possession.
- Third parties obliged to produce documents should be able to recover the reasonable costs and expenses of locating and providing documents.

R24: ANZ expresses no view in relation to R24 as to whether or not long service leave should form part of the preferential claim for employees. ANZ acknowledges that it is the prerogative of government to legislate to provide clarity on this issue.

R25: ANZ expresses no view in relation to R25 as to whether a new preferential claim for gift cards and vouchers should be established. ANZ acknowledges that it is the prerogative of government to legislate on this issue. Generally, ANZ has observed poor record keeping by retailers with respect to their exposure in respect of gift cards and vouchers, so this will have to be addressed by retailers.

12.
(a) What are your views about the Insolvency Working Group's comments on the corporate restructuring processes in New Zealand? (paragraphs 173-177)
(b) Does New Zealand's insolvency regime meet the OECD's objectives outlined in paragraph 173?
(c) How important is it for New Zealand's insolvency regime to be aligned with the Australian regime?

ANZ agrees that a director's safe harbour and ipso facto reforms should be considered further once the Australian reforms are implemented.

13.
Are there any other changes to corporate insolvency law not covered in Report No. 2 that should be made?

At this stage, ANZ has nothing to add.

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?

Yes.

Other comments

15.
Do you have any other comments on Report No.2?

At this stage, ANZ has no further comments.

23 June 2017

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To whom it may concern

ANZ submission on the consultation: Whether to Introduce a Director Identification Number

Thank you for the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on the proposed director identification number.

In principle, ANZ Bank New Zealand Limited (**ANZ**) supports the introduction of the unique director identification number. This would lead to efficiencies in company administration, as well as making it easier for creditors to identify and trace the activities of a director.

We also consider that verification of a director's identity by the Companies Office would bring considerable efficiency benefits for financial institutions which are reporting entities under the Anti-Money Laundering and Countering the Financing of Terrorism Act 2009 (**AML/CFT Act**), although this would require certain additional design features for the director identification number.

Further detail is set out in our responses to the discussion questions at Appendix I.

ANZ would also welcome the opportunity to submit on the issues surrounding the publication of the residential address of directors. We look forward to this consultation in early 2018.

About ANZ

ANZ is the largest financial institution in New Zealand. The ANZ group comprises brands such as ANZ, UDC Finance, ANZ Investments New Zealand, ANZ New Zealand Securities and Bonus Bonds. ANZ offers a full range of financial products and services including a significant range of financial advisory services, personal banking, institutional banking and wealth management products and services.

The ANZ corporate group includes 18 New Zealand incorporated entities, with 38 separate directors. In addition, ANZ's Company Secretary's Office deals with New Zealand Companies Office administration for 3 Australian companies in the Australia and New Zealand Banking Group Limited, which are registered as overseas companies in New Zealand.

Contact for submission

We welcome the opportunity to discuss our submission directly with MBIE officials. If you would like to establish a time to do so, [redacted].

Once again, thank you for the opportunity to provide feedback.

Yours sincerely

[redacted]

General Counsel & Company Secretary

Appendix I – Responses to questions in the Consultation Paper: Whether to Introduce a Director Identification Number

#	Question	ANZ response
1	Are you aware of the issues identified? Please describe the extent to which you think they are a problem.	ANZ is aware of the issues identified. ANZ considers that, while the issues identified are in general surmountable so long as the person searching the Register is aware of them, in aggregate there would still be significant efficiency gains from adopting a director identification number.
2	Are there any other issues that we have not identified? If so, please describe them and provide evidence if available	We are not aware of any other relevant issues.
3	Do you think a director identification number is the best way to address the issues identified?	We consider that a director identification number is the best way to address the issues identified.
4	What are your views on the proposed objectives for assessing whether to	ANZ supports the objectives. However, our view is that, when considering the objective of minimising compliance costs,

	introduce a director identification number?	MBIE should take into account any effect on compliance costs under other laws and regulations, rather than only considering compliance costs in respect of the Companies Office process. As discussed further below, ANZ considers that an appropriately designed director identification number could have significant benefits for reporting entities under the AML/CFT Act. In addition, we consider that an objective for the review should be to ensure compatibility and consistency with an Australian director identification number (should the Australian Productivity Commission recommendations be implemented), as well as other international director identification numbers. It is relatively common for individuals to hold director positions in Australia and New Zealand, and as such a consistent approach across jurisdictions (for example, as to whether identification numbers from one country will be recognised in the other) will increase administrative efficiency and enhance transparency.
5	What are your views on the benefits and costs of a director identification number? Are there any other benefits, costs or risks?	We agree with the identified benefits of introducing a director identification number. We note that introducing a director identification number will also assist with disclosure requirements under other regimes. We also consider that a director identification number system, which includes verification of director identities by the Companies Office, could have very substantial benefits for reporting entities under the AML/CFT Act, as well as benefits for directors themselves: • For reporting entities, an appropriately designed system would generate significant reductions in compliance costs by allowing reliance on the Companies Office verification process for directors, eliminating the need for reporting entities to undertake identity verification themselves; and • Directors would benefit by not needing to produce identity verification documents for each new reporting entity with which a company deals, significantly reducing administration costs for directors. We note that, to realise these benefits, the design of the director identification number system would need to incorporate certain features, which are discussed in our response to question 7 below.

		As regards the identified risks, our view is that the introduction of a director identification number is unlikely to increase the risk of identity fraud. The information which is currently available to the public via the Companies Office register (including signatures and residential addresses) does present a genuine fraud concern, but we do not consider the mere introduction of a director identification number to increase this concern. We also consider that the risk of individuals seeking to use the director identification number to give the impression they are directly supervised or regulated by the New Zealand authorities will be minimal. Issues of this type have arisen in respect of the Financial Service Providers Register, but should be minimised so long as the director identification number is referred to only as an "identification number" and not a "registration number."
6	Do you support the introduction of a director identification number?	ANZ supports the introduction of a director identification number.
7	If a director identification number is introduced, what are your views on how a number could work?	In general, ANZ supports the proposed design of the director identification system as set out in the Consultation paper. However, ANZ considers that certain additional design elements could enable greater benefits to be derived from the introduction of a director identification number, in particular in relation to identity verification under the AML/CFT Act. This would include: • providing for a further secure unique identifier (i.e. 2 factor authentication) for directors to provide to reporting entities; and • providing for directors' passport numbers to be updated in the identity verification records held by the Companies Office – we suggest this could be achieved in a way which minimises compliance costs by incorporating an option to notify the Companies Office of the issue of a new passport in the application form for a new passport. In addition, consideration should be given to including address verification as part of the process for applying for a director identification number. ANZ also has a number of specific comments and questions in relation to the design as

		described in the Consultation paper: • The Consultation paper says that an identification number will be issued when the Companies Office provides the director with their first consent form. Are there any circumstances, aside from already having one, in which the Companies Office could refuse to issue an identification number? We are especially interested in whether there would be any grounds on which a sitting director would not be issued a number. • Would it be an offence for a Director not to have an identification number? Or for a company to have a director who does not have an identification number? • In paragraph 41 the Consultation paper says that companies' historic records will not be amended to include the director identification number. However, will the director's record hold the historical director position? For example we agree that the Company X record should not be amended to show that between 1993 and 1997 Director #12345 held the position of a Director, but will the Director #12345 record show that between those dates she was a Director of Company X? • Paragraph 19 of the Consultation paper suggests that a Director's identification number will show current and past director positions, but will this include all positions prior to implementation date or will these only be recorded going forward?