CHARTERED ACCOUNTANTS
AUSTRALIA + NEW ZEALAND

23 June 2017

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

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

Dear Corporate Law team

Submission on the Review of Corporate Insolvency Law: Report No. 2 of the Insolvency Working Group, on voidable transactions, Ponzi schemes and other corporate insolvency matters

Chartered Accountants Australia and New Zealand (CA ANZ) welcomes the opportunity to comment on the recommendations in the Insolvency Working Groups' second report ("the Report"). In our view the Report provides an appropriate and considered assessment of the key issues in relation to corporate insolvency regulation and the potential solutions to address these.

General comments

We support the modernisation of corporate insolvency law in New Zealand and we believe the proposed recommendations will help to reduce the complexity highlighted in recent court cases, We agree that improved clarity is required to ensure the principles of equal sharing and orderly process are supported through the relevant legislative provisions. In general, we consider the recommendations will provide adequate flexibility and allow the insolvency process to reflect the commercial circumstances of each case.

The recommendations in relation to the voidable transactions regime, in particular the proposal to reduce the period in which transactions can be voided from two years to six months, are likely to help to balance the competing interests of commercial uncertainty for individual creditors and protection for the collective interests of all creditors.

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Our responses to the recommendations made in the Report are set out in Appendix A. Appendix B includes more information about CA ANZ. Should you have any queries concerning the matters in this submission, or wish to discuss them in further detail, please contact me via email at

Yours faithfully

Head of Policy
Chartered Accountants Australia and New Zealand

Appendix A: Responses to recommendations

Chapter 1 – Voidable transactions

We support, in principle, the proposed changes in relation to the voidable transaction regime for unrelated parties. This includes reducing the voidable transaction period from two years to six months, and removing the "gave value" test on the basis that this test is passed in the significant majority of cases.

Our analysis is that Recommendation 1 and 2 will allow the liquidator to demand repayment if:

- The payment was made within six months of the liquidation appointment;
- The company was insolvent at the time the payment was made; and
- The effect of the payment was to put the creditor in a better position than they would have been otherwise at date of liquidation.

The creditor will be able to defend the demand on the basis that they:

- Received the money in good faith; and
- We're not aware that the company was insolvent.

We believe that the shorter time period is appropriate on the basis of the considerations put forward in the Report.

In practice we consider it will be relatively straightforward for creditors to argue the defence, where they were not aware that the company was experiencing financial difficulties. It may be beneficial to define 'knowledge' for the purposes of interpreting the 'knowledge' test to ensure that a consistent approach is taken. For example knowledge of financial difficulties may be assumed where the creditor has agreed to payments based on instalment arrangements.

Chapter 2 – Other issues relating to voidable transactions and other recoveries

Recommendation 3 proposes that for transactions at undervalue, the clawback period remains at two years on the basis that a transaction at undervalue has some element of un-commerciality. As such the creditor should not receive the extra protection provided in Recommendations 1 and 2 for transactions at full value. However we consider that an unrelated party subject to a transaction at undervalue would fail the 'good faith' test on the basis that the party would know it was an undervalued transaction. Therefore the six month limit on clawback would not apply. We believe that introducing a separate transition period would only add confusion. Without introducing this additional layer, there is a relatively straightforward six month period for unrelated parties and four years for related party transactions.

For related parties, it is proposed to extend the clawback period for all at risk transactions to four years (Recommendation 4). While we cannot see any evidence to support this time period, we support the principle of introducing an extended period for related party transactions.

Recommendation 5 proposes aligning the definitions of 'related creditor' and 'related entity' with the Companies Act 1993. We consider this is appropriate.

Recommendations 7 and 8 propose halving the time liquidators have to file High Court actions, while giving the High Court discretion to extend this period. We support the encouragement of timely action, but acknowledge that the liquidator's investigations are often dependent on others providing information and the action of third parties. As such, reducing the time to complete investigations and bring an action from six years to three years may prove difficult in practice. However we do not have information on the amount of time it takes to file High Court actions currently, nor the number of times that such filings occur after three years and so cannot comment on whether the extension will be extensively used. If examination of such information suggests that the extension would be required in a large number of cases, we suggest that it may be more appropriate to introduce a longer time period for filing High Court actions. .

We broadly support Recommendations 6, 9, 10, and 11, in particular the presumption of insolvency in relation to transactions and charges in the first six months prior to the commencement of a liquidation.

Chapter 3 – Procedural issues

We support the proposal to prescribe the content and form of a liquidators notice in an Order of Council (Recommendation 12).

Recommendation 13, proposing the standardisation of the content of these notices, appears to be a sensible proposal. However we consider that part (c) of this recommendation requiring standard information to be included in each liquidator's notice, will result in boilerplate wording which does not add value. If such information is considered necessary for every notice, we recommend the wording be determined externally.

We support moving the clawback period to the date of the Voluntary Administration (VA) appointment as proposed in Recommendation 14.

Chapter 4 – Ponzi schemes

We consider the discussion in relation to Ponzi schemes is relevant and agree that options for action are limited. A Ponzi scheme is a fraud, and as such should be dealt with as a violation of law. It is not appropriate to change insolvency or corporate law to cater for these situations. We recommend strengthening enforcement and penalties as a more appropriate mechanism.

We would have concerns about a potential change to the Property Law Act 2007 to establish that investors are creditors as this could have other unintended consequences.

In considering other options we suggest it may be appropriate to look at the role of pre-insolvency advisors and whether matters such as introducing means of enforcement, including criminal action against such agents, would be relevant.

Chapter 5 – Other corporate insolvency law issues

Recommendations 17 to 30 all appear reasonable. We have no further comments to add in relation to these recommendations.

Appendix B: About Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand is a professional body comprised of over 120,000 diverse, talented and financially astute members who utilise their skills every day to make a difference for businesses the world over.

Members are known for their professional integrity, principled judgment, financial discipline and a forward-looking approach to business which contributes to the prosperity of our nations. We focus on the education and lifelong learning of our members, and engage in advocacy and thought leadership in areas of public interest that impact the economy and domestic and international markets.

We are a member of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance and Chartered Accountants Worldwide which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents 788,000 current and next generation accounting professionals across 181 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications to students and business.

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Dear Corporate Law team,

Submission on discussion paper: Consultation on whether to introduce a director identification number

Chartered Accountants Australia and New Zealand (CA ANZ) welcomes the opportunity to comment on the discussion paper ("the paper"). We continue to support the introduction of a Director Identification Number (DIN) in New Zealand. A DIN would make it easier for stakeholders to identify the directors of a company, and to identify other directorships an individual may have.

Against this backdrop of support, we have the following general comments:

- We consider that identity verification processes would be the cornerstone of a DIN as it would protect against 'phoenixing'.
- It would also be important to ensure that compliance costs are minimised. A key enabling feature of this is to require director's records to be updated in one central location each time there is a change of details.
- Introduction of a DIN is also an opportune time to consider removing director's residential addresses from the register, and adding appointers of nominee directors to the public register.

Our responses to the specific questions raised in the paper are set out in Appendix A. Appendix B includes more information about CA ANZ. Should you have any queries concerning the matters in this submission, or wish to discuss them in further detail, please contact
(Acting Reporting Leader) via email at

Yours sincerely

Head of Policy
Chartered Accountants Australia & New Zealand

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Appendix A: Responses to specific questions

1. **Are you aware of the issues identified? Please describe the extent to which you think they are a problem.**

   We are aware of the issues identified. We agree that identifying the companies an individual is a director of can be challenging, particularly when there are many.

2. **Are there any other issues that we have not identified? If so, please describe them and provide evidence if available.**

   The Companies Amendment Act 2014 requires all companies to have a director who lives in New Zealand or Australia from 28 October 2015. As a result the use of nominee directors has increased. From a legislative perspective a nominee director is subject to the same duties and responsibilities as any other director.

   Transparency of nominee directorships held, as well as the identity of the appointer, is important for determining "control" for reporting purposes or "beneficial ownership" for anti-money laundering purposes. On this basis we recommend such information also be required on the public register.

   We would also like to highlight that the current inclusion of director's residential addresses on the public register increases the risk of identity theft and may even lead to a personal security threat of a director. As such a business address, rather than a personal residential address, may be more appropriate to record on the public register.

3. **Do you think a director identification number is the best way to address the issues identified?**

   We believe the introduction of a DIN will help alleviate the issues identified in the paper.

4. **What are your views on the proposed objectives for assessing whether to introduce a director identification number?**

   We support the proposed objectives, particularly for implementation to be practical and efficient for all parties and for compliance costs to be minimised.

5. **What are your views on the benefits and costs of a director identification number? Are there any other benefits, costs or risks?**

   Based on the benefits and costs outlined in the paper, we consider that the benefits of introducing a DIN outweigh the costs of doing so. A notable benefit is directors would be able to update their details in one central place which then updates all records relating to that individual.

6. **Do you support the introduction of a director identification number?**

   We support, in principle, the introduction of a DIN.

7. **If a director identification number is introduced, what are your views on how a number could work?**

   In our view, the key design features of a DIN as set out in the paper are a good starting point. We consider that identity verification processes, to ensure the accuracy and credibility of such

details, would be central to the success of a DIN. Individuals are becoming accustomed to verifying their identity, largely due to anti-money laundering legislation.

Identity verification by way of a RealME account, passport or driver licence appears a reasonable approach. However there are some practical considerations around the expiry date of a passport or driver licence, and the implications this may have on a DIN which may or may not expire. For those that do not have a passport or driver licence, alternative accepted documents should be specified. Justice of the Peace provide their services, including certifying copies of documents, free to the public so this should not increase compliance costs.

In terms of what types of sanctions would be most effective to ensure compliance, we consider that a monetary fine - in line with section 374 of the *Companies Act 1993* - would be most appropriate.

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