CPA Australia Ltd
Level 20, 28 Freshwater Place
Southbank VIC 3006
Australia
GPO Box 2820
Melbourne VIC 3001
Australia
Phone 1300 737 373
Outside Aust +613 9606 9677
Website cpaaustralia.com.au

29 June 2017

Ministry of Business Innovation and Employment
15 Stout Street
PO Box 1473
WELLINGTON
NEW ZEALAND 6140

Email: Corporate.Law@mbie.govt.nz

Dear Sir/ Madam

Review of corporate insolvency laws – Report No. 2 of the Insolvency Working Group

CPA Australia Limited represents the diverse interests of more than 160,000 members in 118 countries. Our vision is to make CPA Australia the global accountancy designation for strategic business leaders. We make this submission on behalf of our members and in the broader public interest.

Our submission is included in the attached proforma with responses presented in *italics.*

We note that with the introduction of the Financial Reporting Act 2013 that a person is now, under S29(2), qualified for appointment as an auditor of a trust account if the person is a qualified auditor (within the meaning of section 35 of the Financial Reporting Act 2013).

As CPA Australia Limited is an accredited body under the Auditor Regulation Act 2011, then in line with the provisions of S36(1)(ab), its members who are recognised to conduct such audits can do so. We assume the same provisions will be reflected to enable CPAs to practice in insolvency.

If you have any questions regarding this submission, please do not hesitate to contact our New Zealand Country Manager, Mr Rick Jones on +64 9 913 7454 or at rick.jones@cpaaustralia.com.au, or our Policy Adviser ESG, Dr John Purcell FCPA on +61 3 9606 9826 or at john.purcell@cpaaustralia.com.au.

Yours faithfully

General Manager – Policy & Corporate Affairs

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Submissions 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

New Zealand Government

How to have your say

Submission process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the recommendations made in Report No.2 by the Insolvency Working Group by 5pm on Friday 23 June 2017. Report No. 2 is attached.

What we are asking you to comment on

Your submission may comment generally on Report No.2, respond to any of the individual recommendations or all or some of the recommendations as a package and/or make other proposals in relation to the issues addressed in the report. Where possible, please include evidence to support your views, for example references to independent research, facts and figures or relevant examples.

A list of specific questions appears on the last page of this request for submissions.

How to make a submission

You can make your submission by emailing it as a Microsoft Word (.doc) or Portable Document Format (.pdf) attachment to corporate.law@mbie.govt.nz

Please direct any questions that you have to: corporate.law@mbie.govt.nz

Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to the Minister of Commerce and Consumer Affairs on the recommendations contained in Report No.2.

We may contact submitters directly if we require clarification of any matters in submissions.

Except for material that may be defamatory, MBIE intends to upload PDF copies of submissions to MBIE's website at ***www.mbie.govt.nz***. MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

Release of information

Submissions are also subject to the Official Information Act 1982. Please set out clearly with your submission if you have any objection to the release of any information in the submission, identify which part(s) you consider should be withheld, and provide the reason(s) for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

If your submission contains any confidential information, please indicate this on the front of the submission. Any confidential information should be clearly marked within the text. If you wish to provide a submission containing confidential information, please provide a separate version excluding the relevant information for publication on our website.

Private information

The Privacy Act 1993 establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies, including MBIE. Any personal information you supply to MBIE in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to this project. Please clearly indicate in your submission if you do not wish your name to be included in any summary of submissions that MBIE may publish.

Permission to reproduce

Purpose and context of the corporate insolvency law review

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.

In November 2015, the Minister of Commerce and Consumer Affairs appointed the Insolvency Working Group to investigate these issues and recommend to the Government improvements to corporate insolvency law. The Insolvency Working Group comprised an independent chair, two insolvency practitioners, two legal experts, a credit industry expert and a representative of the Official Assignee.

The scope, objectives and deliverables for the Insolvency Working Group can be found in the terms of reference here:

http://www.mbie.govt.nz/info-services/business/business-law/documents-image-library/TOR-insolvency-review-working-group.pdf

Outcomes from Insolvency Working Group Report No.1

In August 2016, the Insolvency Working Group submitted their first report on insolvency practitioner regulation and voluntary liquidations to the Minister of Commerce and Consumer Affairs. Following a six week public consultation period and Cabinet consideration, the Minister of Commerce and Consumer Affairs announced that the Government had agreed to introduce a co-regulatory licensing regime for insolvency practitioners.

The changes will be advanced through a supplementary order paper to the Insolvency Practitioners Bill, which is currently in the House awaiting the Committee of the Whole stage. It is likely that the Supplementary Order Paper will be referred to the Commerce Committee for detailed consideration. This will provide interested parties with the opportunity to make submissions on the proposed statutory co-regulatory licensing regime and other changes that impact on insolvency practice.

More information on Report No.1 and the introduction of a co-regulatory licensing regime can be found here:

http://www.mbie.govt.nz/info-services/business/business-law/insolvency-law-working-group/inroducing-a-co-regulation-licensing-regime-for-insolvency-practitioners

Further consultation on Director Identification Numbers

One recommendation from Report No.1 that has not yet been considered by the Government is the proposal to introduce a director identification number system in New Zealand. Under the proposal, new and existing directors would be allocated an identification number after a verification process.

MBIE is currently seeking submissions on a discussion document about director identification numbers. More information about director identification numbers and the consultation process can be found here:

www.mbie.govt.nz/info-services/business/business-law/insolvency-law-working-group/report-no-2-voidable-transactions-ponzi-schemes-other-corporate-insolvency-matters

What is contained in Report No. 2?

Report No.2 is the second and final report of the Insolvency Working Group. It covers and makes recommendations on the topics of voidable transactions, Ponzi schemes and other corporate insolvency matters. In relation to these topics, the Insolvency Working Group was specifically asked to provide advice on:

Voidable transactions and Ponzi schemes

Examine the voidable transactions regime and provide advice on:

- possible areas of reform of the voidable transactions regime;
- whether there are any additional issues associated with the regime and, if so, how they could be addressed; and
- 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.

Other corporate insolvency issues

- Identify if there are any other potential improvements to corporate insolvency law.
- Identify the main priorities for reform of corporate insolvency law.

Implications for personal insolvency law

- Identify whether there would be any implications for personal insolvency law arising from any recommendations relating to voidable transactions and other identified corporate insolvency issues.

What is this request for submissions for?

The purpose of this request is to:

- improve the Government's knowledge and understanding of the issues discussed in Report No.2
- seek input and views on whether changes are needed and, if so, potential options for reform
- obtain additional information about the impacts, costs and benefits of the changes recommended by the Insolvency Working Group and any alternative options to those recommendations that you might propose.

This request for submissions contains a number of questions in order to guide submitters. We seek responses to these questions and other relevant feedback to improve our understanding of the corporate insolvency sector and to gather your feedback on the recommendations made by the Insolvency Working Group.

Questions for submitters on Report No. 2

When responding to the questions below please include your reasons and supporting evidence.

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) *The Working Group's assessment is without doubt correct pointing to an undesirable friction between the collectivised norm and a presumed certainty desirable in commercial transactions.* (b) If not, what is your assessment of the impact of the decision?
2	(a) Do you agree with the Insolvency Working Group's listed objectives of the voidable transactions regime? (paragraph 53) *The three identified objectives are sound.* (b) Should other objectives also be considered? *As a minor point, some consideration might be given to articulating deterrent aspects firstly, from the debtor perspective through actively discouraging favourable treatment of some creditors over others, and from a creditor's perspective through signalling that any gains made from seeking to 'operate' outside of the collectivised norm will be set aside.* (c) What weighting should be given to the objectives, e.g. equally or differently? *Weighting of objectives can be arbitrary in nature, nevertheless it ought to be emphasised that administrative efficiencies should never undermine, let alone override, fundamental objectives of seeking just outcomes within the context of commercial certainty.*
3	(a) Do you agree with the Insolvency Working Group's views on the problems with the status quo? (paragraphs 56-69) *CPA Australia agrees with the analysis and assessments of impacts made by the Working Group. The attribution of a particular party's knowledge is problematic in a number of areas of commercial law, and it would seem desirable, as the Working Group urges, to adopt a stronger effects-based test. This seems both more commercially certain and just and equitable.* (b) Are there other problems?
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) *CPA Australia agrees with the intent of Recommendations 1 and 2. We note, without necessarily arguing what might be best practice, that the corresponding treatment under Australia's Corporations Act 2001 s 588FA (unfair preferences), s 88FB (Uncommercial transactions) and s 588FE(2) (Voidable transactions) is more strongly oriented to compelling collectivised pari passu outcomes.* (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. *If, as the question seems to imply, that recommendation 1 and 2 might be decoupled, this should be avoided. Sound public policy and fairness would indicate that if the threshold for recovering preferences is being tightened, there should be some offsetting in the vulnerability period.*
5	Are there other feasible options?
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) ***Recommendation 3:*** *This appears consistent with the Australian treatment effected through the interaction of ss 588FB and 588FE(3), and unless there is evidence in New Zealand of a mischief or shortcoming, should be retained as is.* ***Recommendation 4:*** *Again, this is the standardised treatment achieved through s 588FE(4) of the Australian Corporations Act 2001. CPA Australia suggests that in addition, the Ministry might consider adopting a treatment along the lines of s 588FE(5) which enables a ten year clawback of insolvent transactions the purpose of which were to defeat, delay or interfere with the rights of any or all creditors in a winding up.* ***Recommendation 5:*** *CPA Australia supports this broadening of scope within the definitions as a means of ensuring comprehensive coverage of challengeable transactions and to convey an appropriate message to potentially errant directors.* ***Recommendation 6.*** *CPA Australia agrees with the Working Group's conclusion (para. 95 and 96) that there is no need for changing definitions, threshold and associated onus of proof.* ***Recommendations 7 and 8.*** *These matters appear very specific to the New Zealand context and CPA Australia defers to the Working Group's views.* ***Recommendation 9.*** *Without deeper analysis of specifics around the operation and interaction of the relevant New Zealand provisions, CPA Australia prima facie supports the Working Group's review as consistent with established understanding of property rights in the context of secured transactions, particularly where a scheme of registration is in operation.* ***Recommendations 10 and 11.****CPA Australia agrees with the Working Group's recommendations regarding potential preferences falling under the umbrella of transactions within a continuing business relationship. As with the Australian approach under s 588FA(3), the statutory wording should lead quickly to a clear focus on the 'single' potentially assailable transaction.* (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?

	CPA Australia has no particular comment based on New Zealand experience, other than to suggest that implementation of the recommendation would add valuable clarity to the law. (c) Do you agree that the limitation period for voidable transaction clawback claims should be reduced from 6 to 3 years? (recommendation 7) *CPA Australia agrees with the Working Group's rationale and recommendations outlined in paras. 97 to 100.* How often are voidable transaction claims initiated 3 years after the commencement date of the 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? *Whilst the Chapter 1 Recommendations are designed to address a specific controversy, the Chapter 2 Recommendations, though largely independent, do provide the opportunity for some desirable reforms.*
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) ***Recommendations 12 and 13.*** *Although procedural in nature, CPA Australia supports such approach as valuable to flexibility and responsiveness in the law's administration.* ***Recommendation 14.*** *CPA Australia agrees - such precision in statutory wording is highly desirable and is of the type used in the broadly corresponding provision under Australian law, s 513C (section 513C day in relation to an administration under Part 5.3A) ("relation-back day").* ***Recommendation 15.*** *Again, whilst largely procedural, CPA Australia believe it vitally important to emphasise the paramountcy of the priority ordering and distribution.* (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?
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?
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)) *CPA Australia agrees with the Working Group's observation in para. 144 concerning justifiable limitations in the design and intent of the voidable transaction regime to combat this type of fraudulent activity. Nevertheless, the yet to be fully concluded litigation points to controversy in the interaction with trust law. As alluded to in para. 153, it would seem wise to await the*

	Supreme Court decision in McIntosh v Frisk, along with possible clarification of matters left uncertain in the earlier Priest v Ross Asset Management Limited. CPA Australia would be pleased to provide further comment at this juncture.
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) ***Recommendation 17.*** *CPA Australia believes this highly desirable and is the type of effect given in Australia under Corporations Act ss 51A and 51E (Pt 1.2 - Division 6A – Security interests).* ***Recommendation 18.*** *We agree both as a matter of principle and based on Australian experience with the broadly equivalent insolvent trading regime. Such provisions serve to protect unsecured creditors and recognises the wide dichotomy between secured and unsecured creditors capacity to self-protect and monitor debtor behaviour.* ***Recommendation 19.*** *As a matter of transparency and to reduce, in some measure, risk of disputation over administration fees, this seems highly desirable.* ***Recommendation 20.*** *In the absence of clarity around the type of information sought to be obtained and the scale of impediment, we are unable to comment.* ***Recommendation 21.*** *Agree.* ***Recommendation 22.*** *CPA Australia agrees that there should be no impediment to capacity for fines and penalties to prove as debts in company liquidations. The wider issues of priority, we urge, requires deeper analysis addressing such matters as contrasting treatment in personal and corporate bankruptcy and the source of the penalty at either civil or criminal law.* ***Recommendation 23.*** *Agree.* ***Recommendation 24.*** *We believe it vital that there be certainty as to the priority treatment of LSL. Whilst preferred, however it should be treated as a class behind other forms of employee entitlement; namely outstanding wages and superannuation, though ahead of retrenchment pay.* ***Recommendation 25.*** *CPA Australia has both publically and in submissions to Government in Australia, expressed sympathy for those adversely affected by the collapse of Dick Smith Electronics. Nevertheless, we believe there are both practical and philosophical challenges to granting statutory priority. These relate to such matters as questionable justification to rank ahead of commercial suppliers of goods and services, indeterminacy around the character of the right when passed on and further depletion of the available pool of liquidated funds for the benefit of the general body of unsecured creditors. The emphasis instead should be on tracing, compelling disgorgement and regulatory oversight including consumer protection.* ***Recommendation 26.*** *Without reaching a firm conclusion, CPA Australia questions the need for what seems a 'partial' time-bound priority. We acknowledge the argument and analysis put forward by the Working Group and suggest also the protection of revenue can be complementarily advanced with mechanisms such as director penalty*

	notices. (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? *Refer above.* (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? *Refer above.* (d) What are your views on establishing a new preferential claim for gift cards and vouchers? (recommendation 25 and pages 51-52) *Refer above.* (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) *Refer above.* (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) *CPA Australia full supports the collation and public availability of such data as a critical attribute of transparency and for guiding policy reform.*
12	(a) What are your views about the Insolvency Working Group's comments on the corporate restructuring processes in New Zealand? (paragraphs 173-177)[1] *CPA Australia agrees with the cautious approach and the need for monitoring urged by the Working Group. CPA Australia has given its support to the two Australia reforms referred to. Nevertheless, it is important to note that these are an outcome of longstanding debate as to the merits of moving towards a US-style Chapter 11 debtor-in-possession regime. CPA Australia has throughout stressed the need to maintain a strong creditor protection orientation and avoidance of abuse of the privilege of limited liability. Thus any rebalancing of economic objectives and interests of affected parties requires utmost caution.* (b) Does New Zealand's insolvency regime meet the OECD's objectives outlined in paragraph 173? *CPA Australia see the New Zealand insolvency regime as fundamentally sound whilst supporting the reforms outlined in this Review.*

[1] Report No. 2 was finalised before 28 March 2017, which was the date that the Australian Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer, released the draft Treasury Laws Amendment (2017 Enterprises Incentives No. 2) Bill 2017 for public comment. The draft Bill, along with the accompanying documents, details the safe harbour and *ipso facto* clause changes discussed in paragraph 176 of Report No. 2. Submissions closed on 24 April 2017.

	(c) How important is it for New Zealand's insolvency regime to be aligned with the Australian regime? *Alignment for the sake of alignment should be avoided. Both regimes adhere to the accepted norms and apply similar conceptual and institutional characteristics of corporate insolvency. Noteworthy also is that both counties have adopted the UNCITRAL Model Law on Cross-border Insolvency. Supportive also of the idea that there should not be a deliberate drive towards harmonisation is the reality that each jurisdictions insolvency law reflects, and is cognisant of, the national economic and business environment, and the development of judge-made law. Nevertheless, CPA Australia does not believe the status quo to be any impediment to the transferability of professional insolvency skills between the two countries.*
13	Are there any other changes to corporate insolvency law not covered in Report No. 2 that should be made?
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? *CPA Australia has addressed this submission primarily from the perspective of corporate insolvency. We nevertheless support endeavours to minimise disharmony with the personal bankruptcy regime.*
Other comments	
15	Do you have any other comments on Report No.2?