Submissions on the Review of Corporate Insolvency Law Report No 2

23 June 2017

To whom it may concern we have been invited to submit in response to the Insolvency Working Group Report No 2.

This submission is related in general to matters pertaining to Ponzi Schemes as it is this area mainly that the writer has some knowledge.

The writer has no legal training and is not in a position to make legal reference to suggested law reform but rather to raise matters that appear to be inappropriate and/or incorrect insofar as legal counsel are applying current inappropriate laws.

There is currently a major Ponzi action (Ross Asset Management) being dealt with by The Supreme Court of New Zealand Hamish McIntosh Appellant and John Howard Ross Fisk and David John Bridgman.

Judgement was released 26th May 2017 after a period of some 9 months which may suggest the difficulty the 5 judges were having in reaching a conclusion.

As may be witnessed the Corporate Insolvency Review refers to this case on numerous occasions due to the lack of existing legal consideration and the importance placed on it.

It's understood this hearing is considered by legal fraternity to be extremely important as it addresses numerous matters that have previously had little consideration and the utilisation of commercial company laws were never intended for this purpose.

To assist with this submission the following is presented as pertinent.

Ross Asset Management (RAM) group of companies was placed in liquidation December 2012 at the order of the High Court and Price Waterhouse Coopers John Fisk and David Bridgman were elected Receivers and Liquidators.

It's understood the RAM records were untidy, inaccurate and incomplete and the liquidators set about endeavouring to rebuild a case book of historical individual investors records. Where the liquidator established an Investor had withdrawn from their portfolio a value greater than the capital invested notices of intention to "Clawback" were issued.

The liquidators sought recovery utilising section s292 of the Companies Act or s348 of the Property Law Act however it's understood, and formally recognised, these acts are not intended or designed to deal with financial ponzi matters.

At the Supreme Court hearing the appellant submitted the Property Law Act does not apply as it's concerned only with business creditors and a Ponzi does not meet these provisions. The court did not consider this as overriding and dismissed this claim.

The liquidators sought Clawback of the original capital invested as well as the so called factious profits. All court hearings dismissed this.

We note the Insolvency Working Group is a panel of experts set up November 2015 to examine aspects of corporate insolvency law.

This was suggested due to ongoing difficulties with insolvency practitioner's actions. The Government recognised this and instigated the above action.

Concern has been expressed previously at the panel make up due to the majority deriving their extensive incomes from insolvency practice and this alone suggesting a possible conflict of interest for members to arrive at an unbiased opinion. It appears no consideration was given to employing panel members of knowledgeable persons not involved in insolvency matters to level the playing field.

Question and Answers notes "what is a voidable transaction and then goes on to report

"it is one where a liquidator can compel a creditor who has received a payment to pay it back if the company was insolvent at the time and the creditor received more than they would have in a liquidation".

In the case of a commercial company this is understood and considered appropriate and is exactly why the law was enacted however it is intended to deal with a creditor within a commercial company being liquidated and is considered by many to be wholly inappropriate in a Financial Ponzi where the investor is not in any way a creditor but has invested tax paid capital normally in a Trust structure or similar for a considered return.

It therefor appears this current law is being abused to enable it to be fitted into clawback claims against innocent financial investors who have done nothing wrong in withdrawing their own returns from original capital invested.

Voidable Transactions regime must establish when the company involved became insolvent and under commercial operations this is normally not a major difficulty. However, in the current RAM Ponzi case establishing factually when the finance house became insolvent is virtually impossible due to numerous matters and it's believed the SFO investigation confirmed this.

The current laws being employed in the RAM Ponzi case appear completely silent in relation to Ponzi or anything to do with same.

As noted above, under the current law the need to establish insolvency is a vital and critical matter to ensure the current law may be applied correctly and profits accrued prior to insolvency legally remain the investors.

In the RAM case the liquidator is endeavouring to utilise RAM Portfolio financial movements from pre-year 2000 and this appears completely incorrect and irrelevant as it's understood impossible to establish a factual date RAM became insolvent with records available.

We submit the review should address this matter and recommend clawback action in relation to financial houses clearly establish a defined instigation date the operation became insolvent.

Question and Answers notes under "What are the interests that need to be balanced in regard to voidable transactions?" Ans: It is necessary to provide the business community with certainty that they can rely on the validity of payments.

In the case of the RAM Ponzi accepting validity of payment is in fact a withdrawal of the investors earnings and this exact position applies insofar as each investor made their capital investment with RAM in good faith and withdrew from their portfolios under same.

The liquidator's actions taken to date and comments to investors, many of whom have lost their life's savings has at the very least been draconian and threatening and the majority are extremely concerned and/or ill due to these actions.

This is nothing like a commercial company involving debtors and creditors that the current laws were written for and should not be recognised as a position to effect legal redress against innocent investors.

They certainly were never under any circumstances concerned they were not withdrawing their own funds and that they could completely rely on this and their confidence in what appeared to be normal, everyday banking type transactions.

Many are now fearful they may lose their family homes their only remaining possession after already losing their hard-earned retirement funds in the ponzi. These concerns are extremely serious in the current RAM case and it's astonishing the courts have not recognised this and are allowing current inappropriate laws to continue.

The Question and Answer notes Ponzi operators entice investors by offering returns on investment that are much higher than market rates of returns. We suggest, certainly in the RAM case, this statement may be inaccurate and incorrect and several other well recognised financial houses offer returns equal to or in advance of those offered by RAM. we are able to confirm the records show RAM financial quarterly returns often showed negative returns within Portfolios.

It's of considerable importance to note the Insolvency Working Group commented insolvency law was never intended or designed to address investment fraud and this alone is a critical matter that requires further addressing. It appears totally incorrect and grossly inefficient and expensive to be utilising and twisting existing commercial laws to suit a position they were not written for or intended for. This alone is considered a major reason for the current law to be repealed and/or corrected to ensure non-commercial liquidations are catered for.

The Review does not recommend new laws designed specifically to cover ponzi be created which suggests they are content with the existing status .

Under Chapter 1 Voidable Transactions the suggested Questions for submitters notes a Supreme Court's decision in Allied Concrete v Meltzer and asks if the submitter agrees with the Insolvency groups assessment of the impact of this.

As has been noted previously Allied Concrete is a commercial company with debtors and creditors and would have had a in-depth well maintained records of trading that could be applied.

A ponzi is very different, does not have debtors or creditor's and in the RAM case has very poor records to enable historical detail. In other words, it is completely at odds with the law being utilised.

The review comments on increasing administration costs and refers to the Allied Concrete case in this regard.

In the RAM ponzi case the liquidator and legal counsel have consumed considerably amounts of investors' funds. However, of greater importance, the funds that have been clawed back to date from innocent investors have been deposited in the liquidators operational account ensuring these also may be accessed and consumed by ongoing legal and accounting fees.

We believe this is a major untenable position as all sums clawed back from innocent investors are intended for distribution to those who have lost everything by the Ponzi and believe this matter should be corrected by the Insolvency Review.

The Review notes in their view "the collective interests of creditors are not adequately protected". In a ponzi creditors are investors whose capital has been completely eroded and this is certainly a matter that requires far greater consideration.

The Insolvency Review is completely silent on this front.

The Review also notes "the period of vulnerability for voidable transaction clawbacks should be reduced from 2 years to 6 months. We totally agree with this finding.

In the current RAM ponzi case the liquidator has issued formal documents ignoring the Acts legal time periods and has utilised financial movements within an Investor's portfolio back as far as possible, sometime 15 to 20 years establishing a financial position which is considered completely wrong and incorrect. Correction of the clawback timing constraints would have a major effect on many investors positions.

We believe the review should address this specific position and clearly detail financial parameters Insolvency Practitioners may threaten clawback from innocent Investors.

Under clause E 15 the report recommends "adding a defence for a creditor with a valid security interest who can demonstrate that there was no preference at the time they received payment.

In the RAM ponzi there is definitely no doubt whatsoever investors were totally innocent of any prior knowledge of any fraudulent actions however this has been completely overlooked. We would support the report's conclusions in this regard.

E17. Although insolvency law was never intended or designed for financial fraud, and nor should it be, liquidators currently are applying the current laws in this regard and do have means to recover funds theoretically on behalf of investors, however as noted previously funds recovered are being applied to liquidators current account allowing fees to be taken from same thus Investors in may be unlikely to see much return from these actions.

It's understood the above is accurate yet currently the courts allow financial fraudulent clawback utilising the obviously incorrect and misused laws. It's considered this is a complete miscarriage of true justice. The Review further states "whether there is any need for change cannot be adequately addressed until after the Supreme Court releases its decision in McIntosh v Fisk".

This statement alone clearly nominates the importance of this Supreme Court ponzi case ruling and how much is resting on its results. But it's silent on what should be done to correct the inadequate current law in regard to fraud or ponzi.

We suggest this matter be addressed and Insolvency Law Practitioners be managed by a sensible and effective law designed to deal with this area and resolve the numerous unacceptable matters that currently exist.

Under clause E20 the report notes the need to clarify debating or litigating points insofar as they are poor in efficiency and effectiveness creating costly litigation which in the case of ponzi consumes vast sums of legitimate funds owned by investors.

It appears obvious this requires addressing and liquidators be apportioned a defined sum to process financial fraud cases.

Insolvency Lawyers that appear to have an open cheque book structure should equally be controlled in a manner to manage eroding investors remaining funds.

Clause R7 notes a suggested change for liquidators to reduce the deadline to file in the High Court claims under section 292 to 299 from six years to three years.

We would wholeheartedly support this action as it's practical and sensible.

<u>Recommendations Chapter 4 Ponzi Schemes.</u>

R16. We note the report yet again refers to the Supreme Court pending decision of McIntosh v Fisk and how important this case is in relation to ponzi schemes. As this is so critically important it strongly suggests the Government should be reviewing completely the necessity to address law in regard to ponzi matters as a separate action and removing it from entanglement with non-fraudulent commercial company liquidation cases.

The need to establish a compensation scheme in regard to ponzi is equally painfully obvious. It appears sensible to link funding this in some manner to liquidators and liquidators legal counsel who collect vast sums for their involvement in such schemes however the difficulty of country size is recognised.

The comment "allow liquidators to obtain certain information from third parties without the need to apply to the courts" may have logic however caution is strongly recommended as liquidators are currently so powerful it's critical they are not provided with additional uncontrolled powers.

Chapter 4: Ponzi schemes

Whilst the Terms of Reference for the Corporate Insolvency Law Review do not include any reference to liquidators funding or fees as may be witnessed in the current RAM case it's virtually impossible to manage a liquidator's or a liquidator's legal representative fees under the current regime.
In addition, liquidator's may currently apply draconian clawback procedures from innocent investors, issuing threatening letters that can be extremely upsetting and frightening especially where older persons are involved and they may endeavour to settle at an early stage to ensure threats of prosecution are dispensed with.

It is suggested there are recent instances that highlight unfair and bullying actions against less able investors resulting in considerable stress to those involved.

It must be recognised and understood these investors have done nothing whatsoever wrong and have been caught in fraudulent actions by crafty and clever operators and in many cases, have lost their entire life's savings.

The review is completely silent in these areas and it's considered this is a vital and important area that urgently requires attention.

137. "whatever the initial situation, a Ponzi scheme requires an ever-increasing flow of money from new investments to sustain the scheme and pay high returns to earlier investors".

We take issue with this statement as it's incorrect insofar as RAM Ponzi, on many occasions did not pay so called high returns in fact it often returned losses in 3 monthly reports and it's factual to confirm there are highly regarded financial houses that are paying greater returns than RAM did. The suggested intention of that all Ponzi Schemes return excessive rates is not necessarily accurate.

141. "it is essential, under insolvency law and other legislation, to provide a fair and efficient procedure for liquidating Ponzi schemes, recover whatever funds might remain and distribute among investors".

How true this statement is and in particularly is important for investors who have retired from the work force and have invested most or all of their retirement savings into schemes which, unknown to them was a Ponzi.

The above statement recognised by the Review Committee is of critical importance in Ponzi actions and is certainly of serious concern in the current RAM case.

The difficulty that the Review Committee does not address relates to the vast differences of Ponzi investors positions. This may cover a multitude of very critical areas such as time invested, current ability of investor to repay, number of portfolio investments made, number of portfolio withdrawals made, etc and the current Supreme Court case is not at all representative in the majority of investors positions.

The Supreme Court case, McIntosh portfolio, was in operation only for a 5-year period. There was only one invested sum. There was only one withdrawal (although RAM paid out in several steps) and this created what the liquidator termed "low hanging fruit" in other words a very clean, decisive and tidy case to prosecute.

However, the majority of RAM investors currently under threat of prosecution to recover funds they legitimately withdrew from their portfolios are in most cases nowhere close to this very defined position and as such there are numerous matters that appear to be unclear, inefficient and/or unfair. Due to lack of current legal precedence in this area testing unclear matters to establish rulings is an extremely expensive procedure and frightens many older investors into unwise settling under clawback with liquidator's.

One matter that is perplexing many is the liquidator's insistence to revert back in time within a portfolio to a period 15 or 20 year prior to liquidation as a starting figure for clawback claims. The Acts clearly state defined prior periods that may be addressed however this is currently being disregarded by liquidator's.

It is considered this should be reviewed and be made very clear and concise in any updated ponzi law submissions.

Recommendations R16 are extremely minor in regard to Ponzi and it's considered this does not do due justice to this vital and important area of liquidation that currently appears out of control and open slather with associated fees.

142. nominates "there are a number of avenues to recover lost investor funds".

In the matter of Ponzi this area is again critical that appears to be uncontrolled and being abused. The Company Act and Property Law Act noted within the Review of Corporate Insolvency Law No 2 as stated on numerous occasions have not been intended or designed to be utilised in relation to Ponzi recovery action and legal counsel are twisting the position to endeavour to make cases fit the inappropriate laws. Unfortunately, the Courts appear to be in concert with them and are ruling on these inappropriate actions which is considered by senior legal counsel as most unfortunate.

The report does not dwell on this to any degree which is also indeed rather unfortunate however we believe the make-up of the committee and their commercial positions may well account for this.

In the current RAM case the ability to prove exactly when a Ponzi position instigated is in many investors positions critical and the SFO investigation was unable to establish this.

It follows that any period prior to the Ponzi should be recognised as legitimate financial asset management and profits returned be legally allowed to the investor.

These are but a minor number of positions that we believe have been established to date in regard to the current RAM ponzi scheme but as may be witnessed amount to serious inadequacies in the current Insolvency laws.

We strongly believe these should be addressed to ensure fair and responsible treatment for all involved.

144. Under Voidable Transactions regime the report states "Although it may be convenient for a liquidator to use the voidable transaction regime to claim back payments made to investor, the regime was never intended nor designed to address fraudulent behaviour".

Very unfortunately the Review Committee does not make any suggestion regarding this accurate statement for correction of the position which is probably a reflection of the difficulty due to the corporate positions of the members. The statement is of course completely accurate as noted above and liquidators legal counsel are abusing the position by attempting to utilise it. As stated just why Courts are allowing prosecution actions under this appears extremely difficult to understand and we strongly consider action should be taken to have this position corrected as soon as possible.

152. covers a very unfortunate position that once again highlights the inappropriate situation of laws in regard to Ponzi clawback.

In this case Priest had a special personal arrangement with RAM to purchase certain shares and hold them as directed. He was completely outside the RAM normal investor position however the liquidator proceeded to consume considerable sums of investor funds prosecuting him. It's understood the liquidator finally conceded there was little case to answer and settled out of court.

153. Under Possible Reforms the report states "We consider it would not be appropriate to recommend changes before the Supreme Court releases its decision".

As the decision is now released it is hopefully appropriate the committee reconsider this position and in fact release recommended changes after reviewing and thinking seriously about their responses submitted to the Minister.

The suggested recommendations are not discussed herein as the writer is not blessed with legal training however they do seem rather simplistic in response to what we hope we have established is an extremely complex and difficult position. The committee appear to be very one-sided insofar as clawback of funds from completely innocent investors is concerned many of whom have lost their lives savings

Where investors acted in good faith and withdrew sums from their portfolio also in good faith it appears totally inappropriate, and incorrect to have a liquidator threaten legal proceedings for clawback of their withdrawals in excess of their original capital investments.

At the very most any clawback should be closely limited to a short period effective from the instigation of liquidation and not be allowed to transgress back dozens of years prior to that date.

At the moment in the RAM case the liquidator is not recognising the limitations of time nominated in the Company Law Act.

164. We consider it completely appropriate a compensation fund be established as noted earlier in this submission.

Ross Asset Management Investors Group:

165. We wish to advise the above group is one person Mr B Tichbon who it's understood is self-appointed. We understand the comments reported within the Corporate Review documents are completely his alone and have no standing.

There is a Liquidation Committee elected to position managed by the Liquidator Mr Fisk and this is understood to be the only representative group for RAM investors

167. We believe the recommendations suggested herein have considerable benefits and should be incorporated in this review as recommended actions.

169 Conclusions on Ponzi Schemes appears inconsistent after the comments made herein are considered. We do not believe there is little if anything that may be changed and hopefully this paper has shown this.

Whilst we agree funds should be recovered where possible and under controlled conditions liquidators should not have uncontrolled rights of recovery.

We trust the enclosed comments may be helpful and assist in arriving at a useful and meaningful position in what appears to be a very complex and difficult area that is being misused.