NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Ministry of Business, Innovation and Employment

on the

Report No. 2: Voidable transactions, Ponzi schemes and other corporate insolvency matters

30 June 2017

NEW ZEALAND BANKERS ASSOCIATION
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About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following sixteen registered banks in New Zealand are members of NZBA:
   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of China (NZ) Limited
   - Bank of New Zealand
   - Bank of Tokyo-Mitsubishi, UFJ
   - Citibank, N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - Industrial and Commercial Bank of China (New Zealand) Limited
   - JPMorgan Chase Bank, N.A.
   - Kiwibank Limited
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited.

Background

3. NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on Report No. 2: Voidable transactions, Ponzi schemes and other corporate insolvency matters (**Consultation Document**).

4. If you would like to discuss any aspect of the submission further, please contact:

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Recommendations 1 and 2

5. Recommendations 1 and 2 relate to balancing the interests of the body of creditors and individual creditors in respect of voidable transactions.

6. NZBA supports recommendation 2, particularly insofar as it adds balance to recommendation 1. However, NZBA notes its concern that recommendation 1 will make it significantly more difficult for trade creditors who acted in good faith to defend voidable transaction claims.

Recommendation 7

7. NZBA supports recommendation 7, which reduces the deadline for liquidators to file in the High Court claims under sections 292 to 299 from six to three years, as we consider that it increases commercial certainty.

Recommendation 8

8. NZBA supports recommendation 8, which provides the High Court with the discretion to extend the filing period under sections 292 to 299 if it would be just and equitable to do so However, NZBA notes that there is a need for parameters around what would be considered "just and equitable".

Recommendation 9

9. NZBA supports recommendation 9, which creates a defence for a creditor with a valid security interest who can demonstrate that there was no preference at the time they received payment, particularly as it addresses a lacuna which has previously led to unfair outcomes for secured creditors.

Recommendations 12 and 13

10. Recommendations 12 and 13 relate to the content and form of a liquidator's notice.

11. NZBA notes that the working group considered recommending the introduction of a statutory requirement that liquidators explain, by way of a formal notice to a creditor, the exact basis on which the transaction or charge specified in the notice is claimed to be void (discussed at paragraph [128] of the Consultation Document). NZBA supports that approach and suggests that the working group re-consider it.

12. In NZBA's view the onus initially should be on the liquidator to explain why a transaction or charge is claimed to be void, rather than requiring that the creditor query or object to the notice (or complain to a licensing body, as appears to be contemplated) in order to receive this explanation.

13. Additionally, NZBA considers the Insolvency Practitioners Bill (and revised Code of Conduct) is not the appropriate place to include such a requirement; it would be better introduced by way of the Companies Act 1993 (**Companies Act**).

Recommendation 16

14. Recommendation 16 relates to the Supreme Court's decision in *McIntosh v Fisk* (that case was released after the publication of the Consultation Document). NZBA does not consider that recommendation 16 is required in light of the Supreme Court's decision.

Recommendation 18

15. Recommendation 18 provides that recoveries from reckless trading claims are not available to secured creditors but instead are distributed only to unsecured creditors.

16. NZBA does not support this recommendation as it currently stands. NZBA considers that there is no good policy justification for preventing unrelated, secured creditors from benefiting from the recoveries of reckless trading claims. Indeed, NZBA considers that the opposite is true:

a. First, secured creditors, like other creditors, are impacted by losses in value resulting from reckless trading. In particular, reckless trading claims tend to affect the value of the whole business, including going concern value (which is often the basis for lending by a secured creditor with a General Security Agreement). In those circumstances, a secured creditor will potentially be more exposed to losses in going concern value (as well as physical asset value) arising from reckless trading activities (particularly when additional secured funding may have been required urgently to give the company any realistic prospect of survival, which would be in the best interest of all creditors).
b. Secondly, the information which banks receive from companies does not necessarily place them in a better position to detect reckless trading (in fact, other creditors with more direct and personal relationships with the company may be better placed to detect reckless trading).
c. Finally, to the extent that this recommendation is driven by the assumption that banks, as secured creditors, often have the benefit of personal guarantees from directors, NZBA notes that is not always the case. In fact, in most instances banks do not have directors' personal guarantees for medium to large companies, therefore the option of pursuing directors via that route is not always available.

17. Additionally, NZBA considers that this recommendation would create unfair outcomes in circumstances where the bank is funding the liquidator (eg where the liquidator arbitrarily determines that they are going to hold funds and use them to pursue a reckless trading claim, where they might have otherwise distributed them to creditors); despite funding the claim, the bank, as a secured creditor, would not receive any of the money that is recovered.

Recommendation 20

18. Recommendation 20 proposes to amend section 261 of the Companies Act to provide powers to liquidators to obtain certain information regarding the company's affairs from third parties without needing to apply to the courts.

19. Generally, NZBA supports the clarification of liquidators' powers under the Act to obtain information from third parties, however, we note that this should be done in a way which preserves third parties' rights to confidentiality in respect of their banking records. Additionally, the scope of such powers should be limited to documents that the company would ordinarily have in its possession. This power should not be allowed to operate as a substitute for non-party discovery orders where those are more appropriate.

20. Commonly, liquidators will rely on sections 261(2)(e) and 261(3) of the Act to seek information from banks relating to bank customers, other than the company in liquidation. Requests may include the names of third-party account owners, or third parties' account statements. These third parties might be, for instance, suppliers to, or creditors of, the company in liquidation. In our view, the current wording of sections 261(2)(e) and 261(3) does not allow for such information to be provided by a bank because either:

a. the bank has no knowledge of the affairs of the company in terms of s 261(2)(e) (it might not bank the liquidated company, for instance); and/or
b. the identity and banking records of third parties are not "information about the business, accounts or affairs of the company in liquidation", in terms of section 261(3)(b).

21. NZBA agrees that the scope of the information that must be provided under the Act should be restricted to that which is clearly related to the banking records of the company in liquidation, and not widened to include information and records relating to any other third-party bank customer, and, accordingly, NZBA suggests that the wording of the section could be clarified to make this clearer to liquidators.

22. Additionally, NZBA considers that banks should be able to recover the costs of providing information from the liquidator (eg tracing, copying and providing the information supplied), otherwise the section may be open to abuse from liquidators who use the banks to research and supply information at no cost.

Recommendation 23

23. NZBA supports recommendation 23, which allows communication by electronic means between the liquidator and creditors, so long as it is possible to be sure that the communications will be received.

Recommendation 26

24. Recommendation 26 places a six-month limit on the preferential claims for amounts unpaid to the Commissioner of the Inland Revenue Department and Collector of Customs.

25. NZBA supports the introduction of this limit and agrees this will make the process more efficient. It would enable banks to contact customers earlier and potentially mean more claims are resolved.

Recommendation 28

26. NZBA supports recommendation 28, which clarifies that the priority of administrators' fees and expenses continues to apply when a company is both in receivership and administration.

Recommendation 30

27. NZBA supports recommendation 30, which directs the Registrar of Companies to collate and publish information from reports lodged by insolvency practitioners.