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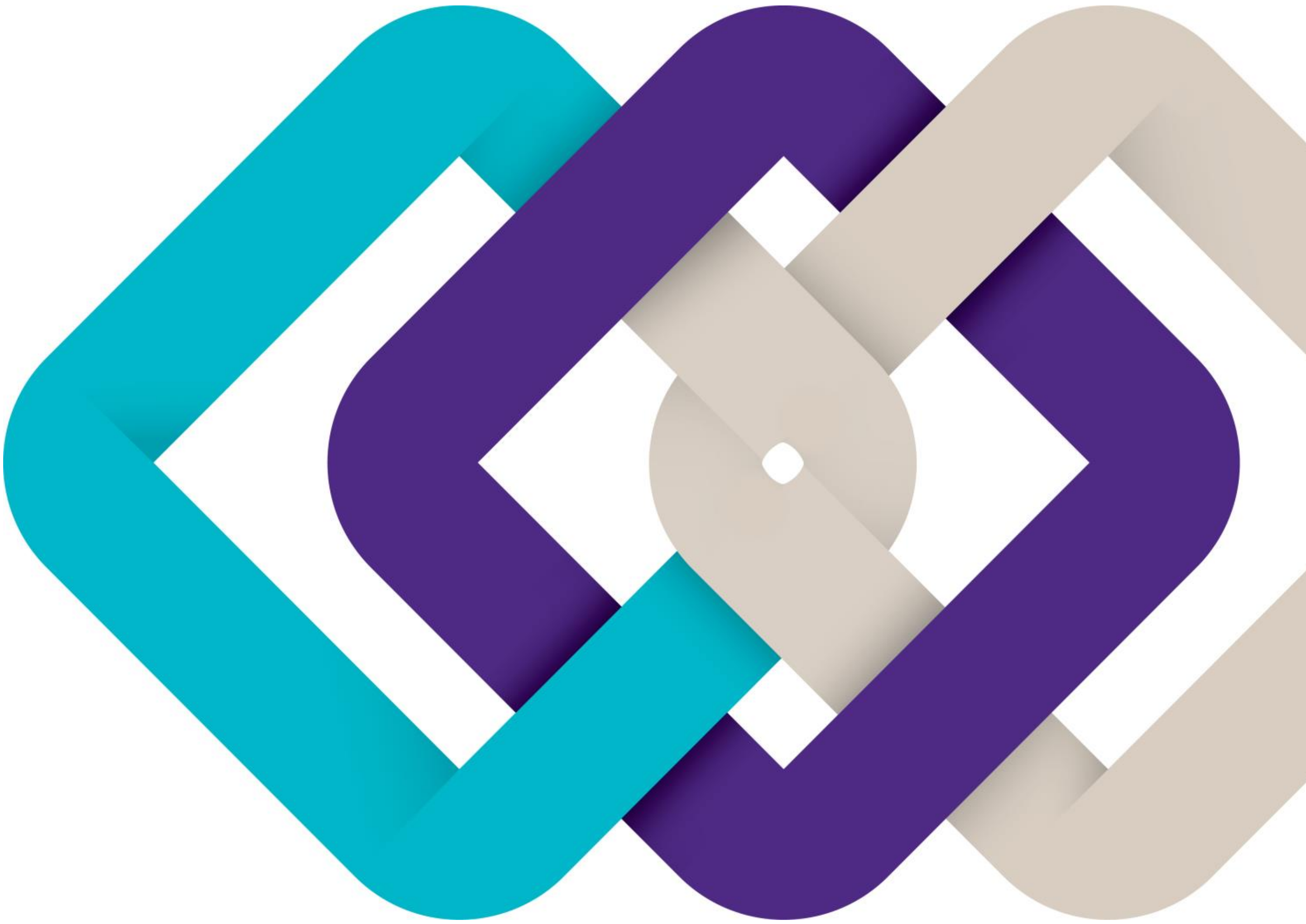
Submissions on the Review of Corporate Insolvency Law

Report No.2 of the Insolvency Working Group



Contents

Chapter 1 - Voidable Transactions

1. (a) We agree with the Group's assessment.

2. (a)-(c) We agree with the Group's listed objectives and the weighting it has arrived at.

3. (a) We agree with the Group's analysis.

4. (a) We are in support with the Group's recommendation to reduce the period of vulnerability for insolvent transactions for unrelated parties.

However, we do not accept the policy aims of the voidable preference regime are necessarily being achieved. Indeed there is evidence the results of voidable preference litigation by liquidators, even prior to the decision in Allied Concrete v Meltzer in 2015, did not achieve the goal of returning significant funds to the general body of creditors.

A study by Greg Sherriff, formerly an Associate at Grant Thornton, on behalf of RITANZ in 2014, indicated the primary beneficiaries of voidable preference actions were the liquidators and their advisers.

Mr Sherriff surveyed 30 Court-appointed liquidations involving an insolvent transaction claim from 2008 to 2014. He found that for eleven of the liquidations, where the sole assets of the company were insolvent transaction claims:

- 32% of the value of the realisations were applied to liquidators' fees
- 28% were applied to legal fees
- Only 0.2% were paid to unsecured creditors
- the value of the remainder of the assets were being held by the liquidators at the time of the study. It is possible further funds were subsequently paid to creditors.

Although Mr Sherriff's survey did not include all liquidations conducted over the period, the sample was considered to be sufficiently large to enable trends to be measured. Based on this information it is tempting to conclude there is little benefit to be had by creditors from an insolvent transaction regime. However, there are likely to be some meritorious claims against preferred creditors where there may be a meaningful return to creditors as a whole, which means a regime should be maintained

We agree with the Group's view the current period of vulnerability of 2 years is too heavily weighted in favour of the general body of creditors. Further, we think the longer the period of vulnerability is, the more the effective management of credit risk by individual creditors (which manage overdue debts well) is devalued in favour of the costs of the liquidation.

For these reasons we agree the vulnerable period should be 6 months for unrelated parties.

Chapter 2 - Other Issues

6 We agree with the Group's recommendations 3-11

7. We agree with the Group's view.

Chapter 3 - Procedural issues

8(a) We agree with the Group's recommendations.

8(b) The additional information suggested by the group appears sensible and it should not be difficult or costly to present.

9. We have no further issues with the voidable transaction and other recoveries regime.

Chapter 4 – Ponzi Scheme

We think the Group's suggestions concerning Ponzi schemes are generally supportable. However, as the Group opines, there needs to be review of the position now the Supreme Court has given its decision in *McIntosh v Fisk*.

Chapter 5 – Other Corporate Insolvency Issues

11(a) We agree with the Group's recommendations 17-30, except for recommendations 18, 25 and 28.

Recommendation 18: Misfeasance claims against directors

The Group provides limited detail to support its conclusion a creditor, which is unrelated to the directors and which is secured by a GSA, should not have the benefit of successful misfeasance claims against directors. It is therefore difficult to understand the Group's reasoning.

As the Group notes, such claims are assets of the company and form part of the security given to the GSA holder. A GSA holder, such as a bank, may have no collateral security with which to cover a shortfall in its recovery from the realisation of the company's assets. In addition, a bank is likely to be a significant creditor of the insolvent company. It may well have suffered significantly from the actions of the directors. We do not see why, in those circumstances, an unrelated GSA holder should not benefit from litigation against the directors.

The harm the Group is concerned about appears to relate where a party related to the directors has a security interest. This could be dealt with by providing that debts to secured parties related to the directors secured by a GSA may not benefit from claims against the directors.

Recommendation 25: Preferential claim for gift cards and vouchers

While we agree with the concept of providing a preferential claim for gift cards and vouchers we are concerned the time and cost for determining and administering these claims could be large and outweigh the returns to the holders of these.

Recommendation 28: Priority of administrator's fees

The Group recommends the Receiverships Act be amended to provide that administrators have priority for their fees and expenses when a company is both in receivership and administration.

This recommendation is to allow administrators to be indemnified for their fees and expenses in priority to secured creditors and to the fees and expenses of receivers.

We agree an administrator should have priority in cases where an administrator is appointed prior to a receiver being appointed. That is because the administrator may well be continuing to carry on the company's business and incurring substantial costs in the process, most likely for the benefit of creditors, including secured creditors. It is unreasonable, in our opinion, to deny priority in cases when a receiver is subsequently appointed.

However, we think the priority should not extend for the administrator’s costs and expenses which are incurred after the appointment of receivers. That is because once a receiver is appointed all decisions concerning the company’s trading are the responsibility of the receiver and the administrator will no longer be exposed to personal liability for trading costs.

Chapter 6 – Implications for Personal Insolvency Law

We agree with the Group’s recommendations, as modified by our comments relating to companies, as noted above.

Appendix 1

About Grant Thornton

Grant Thornton New Zealand is a member firm of Grant Thornton International - one of the world's leading organisations of independent assurance, tax and advisory firms. The New Zealand firm is fully integrated with offices in Auckland, Wellington and Christchurch. Our business brings together over 250 staff, including 32 partners.

We understand the challenges of corporate insolvency, gained over many years of experience. Our teams have extensive experience in managing all types and sizes of corporate insolvency appointments, including:

- administrations
- court and voluntary liquidations
- deed of company arrangements
- statutory managements
- receiverships
- investigations
- viability reviews.