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Ministry of Business, Innovation and Employment

To be emailed: corporate.law@mbie.govt.nz

Registered office

Grant Thornton New Zealand Ltd
L15 Grant Thornton House
215 Lambton Quay
PO Box 10712
Wellington 6143

T +64 (0)4 474 8500
F +64 (0)4 474 8509
www.grantthornton.co.nz

7 October 2016

Report No 1 by the Insolvency Working Group

We enclose our submission on the above.

If you have any questions please do not hesitate to contact.us.

Yours faithfully

Richard Simpson
Partner

David Ruscoe
Partner

Report No.1 by the Insolvency Working Group

Submission by Grant Thornton New Zealand Ltd

7 October 2016

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.

Question 1: The problems with the status quo

We agree with the Working Group's assessment of the problems with the status quo, which it summarises in paragraph 77 of the report..

We think it is impossible to measure the scale of harm caused by the problems the Working Group has identified because, as it opines, much of the poor practice by insolvency practitioners goes without challenge by affected parties, because of the cost of taking action.

Question 2: Do we agree with the listed objectives?

We agree with the objectives listed by the Working Group in paragraphs 78-81 of the report.

Question 3: Other provisions of the Bill

In Annex 3 to the report, the Group reviews a number of changes to the Companies Act and the Receiverships Act. We generally agree with these and we comment on two matters.

Handover requirements

The Group has reviewed the proposed changes to the legislation concerning the measures designed to achieve an efficient transfer of information from an administrator to a liquidator and to a replacement liquidator or receiver.

The three amended sections require the replaced person to provide the accounts and records of their administration to their successor.

While we support the tenor of the amendments, we believe the term "records" requires definition. Otherwise, we anticipate the courts will be required to determine what the term means in different situations. For example, does "records" include the replaced person's working papers, file notes, emails and other correspondence? Or does it mean records that might explain the items in the administration's accounts?

Reporting requirements

The Group recommends further information to be provided by practitioners in their reports. We agree with the recommendations, except with an aspect relating to liquidation and receivership reports.

Section 4E of the Bill amends the information to be reported by a liquidator under section 255 of the Companies Act 1993. A new subsection 3A means a liquidator will be required to include in each six-monthly report *"a statement of realisation and distribution that lists all amounts received and paid, including payer and payee details."*

This matter is addressed in item 27 of Table 3 of the report. The amendment is tacitly agreed to by the Group, except it recommends the payer and payee details need not be reported.

In item 29 of Table 3 to its report, the Group recommends receivership reports also provide details of each amount received and paid in respect of the receivership since the receiver's previous report, but without the payer and payee details.

We question what real benefit a creditor will gain from seeing this detail without understanding the context of the transactions. Consequently, we propose reports should include a summary of receipts and payments in sufficient detail to enable readers to be informed as to the nature of transactions undertaken by the receiver or liquidator.

For a very small liquidation or receivership, the requirements to provide this additional information will not be onerous and the reports will not be much longer than at present. However, for a large case, the volume of transactions will be significant and the disclosures will mean reports will be very long.

Subject to the comments above, we agree the proposals included in Annex 3 to the report should be proceeded with.

Question 4: Court supervision of liquidators

We agree with the proposed changes and with the reasoning the Group provides for its conclusions in paragraphs 154-156 of the report..

Question 5: Registration and regulation of insolvency practitioners

We strongly agree with the Group's conclusion that insolvency practitioners should be registered and we agree with its criticism of the registration regime contained in the Insolvency Practitioners Bill ('the Bill"). As the Group recommends, we submit the regime proposed in the Bill should not be proceeded with.

Of the four options for occupational regulation it reviewed, we agree with the Group's preference for option C (Co-regulation). We agree with the Group a government regulator will provide an important check against any self-interest by an accredited professional body.

Similarly, we agree with the Group that option D (government licensing) would also work, however we have the same reservations as expressed by the Group.

In particular, option A, which is proposed in the Bill, means insolvency practitioners may be registered without having to meet any test of their experience and competence and without meeting any test of good character. This means, even persons with a criminal record for dishonesty offences will still be able to practice insolvency. This is the currently the case for at least two Auckland insolvency practitioners previously convicted of fraud.

The voluntary nature of registration under option B means it is likely only experienced insolvency practitioners of good character will be able to register. However, non-registered practitioners will still be able to take insolvency appointments.

Creditors and others alleging unsatisfactory conduct of unregistered insolvency practitioners will continue to have to apply to the court for assistance.

Question 6: Co-regulation

We agree with the details of the co-regulation system recommended by the Group.

Question 7: Are there other feasible options to address problems?

We have no further suggestions.

Question 8: Regulation by reason of membership of a professional body

This option is likely to provide a cheaper means of regulation. However, it would mean there would be no independent review of:

- The risk of a professional body acting in favour of its members
- The effectiveness of a professional body's management of the accreditation process.

Further, we think there is an important need, as a matter of public policy, for a regulator to have the powers of investigation and prosecution of alleged contraventions of the law relating to insolvency registration and practice. Otherwise, the members of the professional bodies could be funding the investigations of complaints relating to persons who are not members of the professional body.

Question 9: Services provided by only some members of a professional body?

We assume this question is based on the assumption that the option chosen for regulating insolvency practice would be to only require the practitioner to be a member of an appropriate professional body.

If so, we think insolvency services should be restricted to only certain members of an accredited professional body. For example, only certain members of CAANZ who practice as auditors may be the auditors of certain FMC entities, as they must be licensed to do so under the Auditor Regulation Act 2011. Other members of CAANZ may not audit FMC entities.

Members of CAANZ who are considering their appointment to an insolvency case must consider the terms of CAANZ's Insolvency Engagement Standard before accepting an insolvency appointment. They may not accept an appointment unless they consider they have the right experience and skills for the work and they are free of conflicts. The standard also prescribes how members who are appointed to insolvency cases must manage their work.

The difference between FMC auditors and insolvency practitioner members of CAANZ is that auditors are licenced, whereas any member can make a personal decision as whether or not to take on an insolvency case.

We think the ability for one to undertake insolvency work should be more than just based on the judgement of the person who will be remunerated from being appointed to a case. We say the suitability to be appointed should be based on a careful review of the experience and suitability of a practitioner, as would be the case following the introduction of an impartial registration regime.

Question 10: The impact on competition and services outside of the main centres.

These questions ask submitters for their view on the impact on competition and on the availability of insolvency services outside of the main centres under a licensing regime.

We see the issue as to the effect on the competition for ***quality*** practitioners rather than competition itself. Having said that, we consider there will be sufficient practitioners to provide choice around the country.

Many insolvency practitioners already take appointments away from their home town. We think there will be still be adequate choice for those wishing to appoint an insolvency practitioner outside of the main centres.

Question 11: Reduced harm for voluntary liquidations?

We agree the introduction of a licensing regime for insolvency practitioners will reduce much of the harm raised by the Group in its report.

Question 12: Defects in the construction sector

We agree with the reasoning and conclusions contained in the Group's report. The issues are best solved by building sector law.

Question 13: The effect of the three measures

Measures 1 and 3

We agree measures 1and 3 will be useful.

Measure 2: Disposal of assets after service of a liquidation application

In paragraphs 192 to 198 of the report, the Group discusses the possible prohibition on the transfer of a company's assets once a liquidation application has been filed in court. It recommends the transfer of assets should be voided once a liquidation application has been filed, except either where a transfer is in the ordinary course of business or it is conducted by a receiver or an administrator.

We agree with the Group's recommendation. However, in case it is contemplated, we would not agree with a complete prohibition on the ability of a company which is the subject of a liquidation application to dispose of its assets without court approval. The filing of a liquidation application does not necessarily mean it will be granted. In such cases, companies' rights to deal in their assets would have been unnecessarily restricted by the prohibition.

Question 14: a unique identification number for directors

We agree with this proposal.

Question 15: further comment

We have no further comments

Conclusion

We would be pleased to discuss our submission if requested.

Richard Simpson
Partner
E. Richard.simpson@nz.gt.com
T. (04) 495 3772
M. 021 428 026

David Ruscoe
Partner
E. david.ruscoe@nz.gt.com
T. (04) 495 3763
M. 021 289 3737