

# Insolvency law reform — voidable transactions, reckless trading claims, and preferential claims

November 6, 2019

Cabinet has agreed to a number of insolvency law reforms, most of which were recommended by the Insolvency Working Group (IWG) in its second report in May 2017. The key proposals are as follows.

## Voidable transactions and other recoveries

- The clawback period for voidable transactions with unrelated parties will be reduced from two years to six months from the date of liquidation or the date of a liquidation application to the High Court.
- The clawback period will be increased to four years for related party transactions.
- The period for setting aside voidable charges for unrelated parties will be reduced from two years to six months. Where an insolvent company has given a charge in favour of a related party, the period of vulnerability will also be four years.
- The two year window for challenging transactions at undervalue will be retained for transactions with unrelated parties, although the timeframe will be increased to four years for related parties.
- The three year window for challenging transactions for inadequate or excessive consideration will be increased to four years.
- The defence under s296(3) of the Companies Act 1993 will be retained in its current form. Cabinet has rejected the IWG's proposal to repeal the 'gave value' element of the defence.
- The limitation period for bringing voidable transaction claims will be reduced from six years to three years from the date of liquidation. The High Court will have the discretion to extend the limitation period in cases where it is just and equitable to do so.

## Preferential claims

- The scope of employee preferential claims will be expanded to include long service leave and payments in lieu of notice.
- Insolvency practitioners will be required to honour at least 50% of the value of gift cards and vouchers, if a company continues to trade after being placed into receivership or liquidation.
- Cabinet has rejected imposing a time limit on Inland Revenue Department and New Zealand Customs Service preferential claims relating to unpaid taxes and duties.

# Reckless trading claims

The law will be amended so that any recoveries from reckless trading claims shall be for the benefit of unsecured creditors only. Currently, there is a disincentive for liquidators to bring reckless trading claims as the costs are borne by unsecured creditors but secured creditors with a security over all of the company's assets have priority in the proceeds of such claims.

# Personal insolvency law

Similar changes will be made to bankruptcy law around periods of vulnerability and preferential claims.

# Ponzi schemes

Work on a possible regulation solution for sharing losses among Ponzi scheme investors has been put on hold for the time being to avoid delaying progress on the above reforms.

# Our comments

The proposed changes will simplify (and we think improve) the voidable transactions regime. Trade creditors will welcome the reforms as they will reduce the clawback period of transactions to six months before liquidation. Reducing the time for liquidators to bring voidable claims in the High Court to three years from commencement of liquidation will diminish concerns that some liquidators sit on voidable transaction claims for too long. Increasing the clawback period to four years for related party transactions and charges is sensible, given the mischief often associated with such transactions (particularly as some company directors and shareholders manage the time when liquidation commences to avoid clawbacks).

We are concerned with the proposal that insolvency practitioners will be required to honour at least 50% of the value of gift cards and vouchers if they continue to trade a company. While the proposal will be popular with consumers, it is contrary to the pari passu principle that all unsecured creditor claims are treated equally and gives gift card and voucher holders a preference over other unsecured creditors.

We are disappointed that Cabinet has not adopted the IWG's sensible proposal to limit preferential claims for taxes and duties to six months from the date these debts fall due. Imposing a time limit for unpaid taxes and duties would incentivise the IRD and Customs to be more proactive in taking action against companies who fall into arrears and would ensure that ordinary creditors are not disadvantaged by any complacency in pursuing these debts.

# When are these changes likely to take effect?

The Government will prepare an Insolvency Law Reform Bill for public comment. There is no indication, at this stage, when the Bill will be available, but we expect that, even if a draft Bill is available before the end of the year, it is likely to be late 2020 or 2021 before the changes take effect.

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