Submission

by

Business NZ

to the

Ministry of Economic Development

on the

Draft Insolvency Law Reform Bill Discussion Document

11 June 2004

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1. INTRODUCTION

1.1. Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body. Together with its 56-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

1.2. In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

1.3. Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services).

1.4. It is widely acknowledged that consistent, sustainable economic growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.

1.5. Business success and growth is fundamental in achieving the aims of higher economic growth for the country. We agree that a strong insolvency system should act as an important pillar of support for commerce and that it has a critical role to play in fostering economic growth and competitiveness. It is vital that the insolvency law system should have the trust and confidence of all participants (shareholders, creditors and employees).

1.6. It is recognised that business activity involves some element of risk taking and that there is a fine balance between encouraging sustainable business growth and favouring or discouraging inappropriate risk taking. There is a need to limit the opportunity for past mistakes to be repeated but also a need to recognise the wide variety of circumstances that may contribute to insolvency.

1.7. The potential costs involved from insolvency to shareholders, creditors and employees can be significant so we are strongly in favour of changes that may make it easier for a business to work through a financial crisis and avoid insolvency. Similarly, there is a need to encourage a high level of competency among "insolvency practitioners" in view of their role in helping to minimise the impacts of insolvency. However measuring or determining competence is not straightforward and the skills required will vary greatly between each business.

2. Summary of Recommendations

2.1. Business New Zealand recommends that:

(a) A majority of creditors should be able to appoint a person with previous involvement with the company as a liquidator for that company.

(b) A mandatory licensing regime for insolvency practitioners not proceed.

(c) That funding for the Companies Office be increased to allow it to take a more active role in responding to creditor and shareholder concerns with the actions of insolvency practitioners.

(d) That a voluntary accreditation scheme for insolvency practitioners be encouraged.

(e) The mandatory reporting requirements for liquidators and administrators not be extended.

(f) That there be no further changes to the wages and salary priority

(g) That the Ministry of Economic Development inform insolvency practitioners of their requirement to disclose the list of creditors on request by individual creditors

3. Regulation of "Insolvency Practitioners"

3.1. Business New Zealand recognises there are valid concerns over the competence of some insolvency practitioners but considers that some of this may be due to inadequate supervision and enforcement by the Companies Office. Regulation of insolvency practitioners has been proposed as a result of concerns expressed over people acting as liquidators without the necessary skills or expertise to undertake that work or lack appropriate standards of ethics. However, while these are very valid concerns, there are also doubts about the extent to which a regulator can ensure the competency of a liquidator through a mandatory licensing scheme. The Companies Act (Section 280) already sets extensive restrictions on who can be appointed a liquidator:

- a person under age 18; ·
- a creditor;
- a person who has been a shareholder, director, auditor or receiver of the company in the last two years;
- an undischarged bankrupt;

- a person who is subject to a compulsory treatment order made under Part II of the Mental Health (Compulsory Assessment and Treatment) Act 1992;

- a person in respect of whom an order has been made under sections 30 or 31 of the protection of Personal and Property Rights Act 1988;

- a liquidator or administrator who has been prohibited under section 286 of the Companies Act;

- a receiver who has been prohibited under section 37(6) Receiverships Act;

- a person who has been prohibited under sections 383, 383 or 385 of the Companies Act from being a director, promoter or manager of a company; and

- a person who has been prohibited under section 111(1)(c) of the Insolvency Act 1967 from acting as a director or taking part in the management of a company.

3.2 Additional restrictions are proposed in the discussion document and include restricting the appointment of any person who, within the previous two years:

- has or whose firm has provided accounting services to the company; or

- has had a continuing relationship with the company, its majority shareholders or secured creditors

Since shareholders are primarily responsible for the appointment of a liquidator it is understandable there are concerns about the opportunity for them to appoint a liquidator who has been previously providing accounting services (including audit) to the firm or acting in an advisory role. However, while we accept there may be valid reasons for excluding these people from acting as a liquidator for a company we do not believe this is a valid reason for a blanket exclusion. Where the majority of creditors would be happy with the appointment of a liquidator because of their prior knowledge of the business it would make sense to allow creditors to vote on whether to accept their appointment.

Recommendation: A majority of creditors should be able to appoint a person with previous involvement with the company as a liquidator for that company.

3.3 The Companies Act already provides powers for the Court to confirm, reverse, or modify an act or decision of a liquidator, to order the liquidator to comply with a duty, remove a liquidator from office and even make an order prohibiting a person from acting as a liquidator for up to five years. However, currently instances of misconduct can only be addressed through the Court and the costs of any action may be too high for concerned creditors. Options considered in the discussion document were:

1. Strengthening existing statutory measures:

(a) Increasing the Registrar of Companies' power of oversight and enforcement.
(b) Introducing new remedies.
(c) Expanding liquidator's duties to report suspect offences.

2. Introducing a mandatory licensing regime.

3. Introducing a voluntary accreditation regime.

3.4 There already appears to be debate on the effectiveness of the mandatory licensing regime operating in Australia, as the key issue of concern is whether licensing regimes can be effective in establishing competence rather than credentials. Requiring minimum qualifications and experience, ethical standards or ongoing education or training are all unlikely to guarantee competence.

3.5 However, licensing regimes can be useful as they usually establish procedures for the investigation and hearing of complaints against licensed practitioners and procedures for supervision of or banning of practitioners who do not meet the statutory requirements. In the absence of a licensing regime, the proposals for the strengthening of the powers of the Registrar of Companies could create the additional regulation of insolvency practitioners sought, without necessarily creating unnecessary entry barriers to someone wanting to act as a liquidator or administrator. Expanding the powers of the Registrar of Companies does not rule out a professional body introducing its own voluntary accreditation regime. It should not be left to unsatisfied creditors to apply for action against incompetent insolvency practitioners, since the benefit from any action taken by them would not apply to the current insolvency but to future insolvencies. Action against incompetent insolvency practitioners therefore has a significant element of public good and should be primarily financed by and undertaken by the Companies Office.

Recommendations:

A mandatory licensing regime for insolvency practitioners not proceed.

That funding for the Companies Office be increased to allow it to take a more active role in responding to creditor and shareholder concerns with the actions of insolvency practitioners.

That a voluntary accreditation scheme for insolvency practitioners be encouraged

4. Mandatory Reporting Requirements

4.1 The discussion document seeks feedback on a proposed expansion in the reporting requirements for liquidators and administrators. The draft Insolvency Law Reform Bill requires administrators to report to the Registrar if they suspect that:

- a past or present officer or shareholder of the company has been guilty of an offence in relation to the company; or

- a person who has taken part in the formation, promotion, administration, management or winding up of the company may have misapplied, retained or become liable or accountable for money or property of the company, or may have been guilty of negligence, default, breach of duty or breach of trust in relation to the company.

4.2 The discussion document suggests expanding the reporting requirements of liquidators to align with those proposed for administrators and possibly going even further, extending the list of legislation for which reporting of offences is required. However, significant drawbacks with this proposal are the additional costs likely to be borne by creditors and whether a liquidator may find access to company information more difficult if their reporting requirements are extended. Increasing the reporting requirements for liquidators and administrators provides no direct benefits to the creditors, which are primarily funding the work of the liquidator or administrator.

Recommendation: The mandatory reporting requirements for liquidators and administrators not be extended.

5. Payments in Lieu of Notice

5.1 Business New Zealand has opposed earlier changes to the legislation to give greater priority to wages and salaries over other unsecured creditors. The Companies Act and Insolvency Act current limit the priority to wages and salaries during the four months preceding the commencement of the liquidation or bankruptcy. This priority, which was established in earlier legislative change, has now created an anomaly that payment for work done after the commencement of the liquidation or bankruptcy is not subject to a priority. Payment for wages and salary are only given priority when an employee does not work through a notice period, appearing unfair for employees who continued working through the notice period. However changing the wages and salary priority creates potentially significant flow-on effects for other creditors and we oppose any further changes to the priority for wages and salaries.

5.2 We recognise the financial impacts of a company liquidation on employees can be significant but the arguments for a priority for salaries and wages over other creditors are not strong. Giving priority to wages and salaries over other unsecured creditors has a flow on impact on the other unsecured creditor, which are either businesses that employ staff or the self-employed.

Recommendation: That there be no further changes to the wages and salary priority

6. Actions of Liquidators

6.1 Concerns have been raised over the refusal of liquidators to supply creditors with the list of the other creditors that have an interest in a company in liquidation. We have been advised that in the Ansett New Zealand liquidation, the liquidator refused to disclose the list of creditors and that some other liquidators have now followed this precedence.

6.2 We believe an unsecured creditor is able to request this information under the provisions of section 131 of the 1967 Act, since a creditor who has lodged a proof of debt is entitled to ask for a copy of all proofs of debt. We would like to confirm this is also the Ministry's understanding of the right of creditors to this information. It would also be helpful if the Ministry could inform existing insolvency practitioners of their obligations to provide this information to creditors.

Recommendation: That the Ministry of Economic Development inform insolvency practitioners of their requirement to disclose the list of creditors on request by individual creditors