Office of Hon Paul Goldsmith

Minister of Commerce and Consumer Affairs
Associate Minister for ACC

Mr Bruce Tichbon
For Ross Asset Management Investors Group
bruce@rosssupport.co.nz

Dear Mr Tichbon

Thank you for your letter dated 24 September 2014. You have raised the issues of investor confidence in our financial markets having been tarnished by incidents of fraud, in particular the actions of Ross Asset Management, and the current New Zealand settings for dealing with this kind of criminal activity.

You have asked me to address some specific questions in regards to these issues, and I would like to deal with each of your questions in turn, as outlined below.

1. **Are you satisfied that NZ has appropriate legislation to recover a realistic amount of investor's stolen money following a Ponzi scheme such as RAM, and provide a fair and just outcome? What is a reasonable claw-back period (say 6 years)?**

The law that is being applied to Ross Asset Management is insolvency law as the company is insolvent and cannot pay its debts. The company is in this situation due to the fraud of its director. The key task of the liquidator is to realise the assets of the company and distribute them to creditors (including potential creditors such as investors).

One of the actions of the liquidator is to attempt to use the voidable transaction provisions in the Companies Act 1993 to claw-back money paid by RAM to certain investors in the two years prior to the liquidation. I understand claims under the Property Law Act 2007 – this Act is able to look at transactions made up to six years ago – have also been filed.

I understand that there are significant legal questions to be settled and that any outcome of these actions is both uncertain and some time away.

However, any money recovered would be used to pay creditors in order of priority, although it seems unlikely it will meet the full claims of creditors who are investors.

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There is no specific legislation that will force investors who received a return on their investment prior to a company's liquidation to pay it back to other investors who have received no such return. The question I think you have raised is whether there should be legislation that allows that outcome and whether the 'clawback' period prior to liquidation should be six years rather than two years.

This raises a number of issues, including:

- What is the problem?
- What would be the impact if investors had special laws that apply only to them in an insolvency situation?
- What is 'fair' and 'just' – to the investor who has been paid, to the investors who have missed out, to creditors and to insolvency law and society in general?
- How 'risk free' should investments be?
- Are there gaps in the current law?

I will await the outcome of the voidable transaction case with interest. I have asked my officials to provide me with further advice in this area.

2. **Can you please tell us what you consider a fair and just unwinding mechanism is for a Ponzi in NZ, particularly in terms of what should happen to money stolen from one investor and given to another by the fraudster? Do you consider it fair and just that those investors who have made money may be able to keep their identity and the stolen amounts they have gained secret from the public?**

I am content to await the outcome of the current insolvency law processes. These will determine, amongst other things, whether investors are creditors and, if so, whether a creditor investor should or should not be required to give money back to be redistributed.

I have full confidence in the court system preserving privacy of interested parties in proceedings in a manner appropriate to each situation.

3. **Can you please explain why the government has apparently destroyed the property rights of investors, leaving them potentially unable to recover their stolen money?**

If I understand you, this question refers to the inability under insolvency law for a court to make a global declaration that money transferred to former investors should be deemed to be stolen property and is then able to be recovered by liquidators. The liquidators instead are working on a case-by-case basis as allowed by the current law.

Your question raises the same issues as I have outlined in my answer to Question 1. It would be a significant shift in the law to legislate to achieve the type of outcomes you are suggesting. The government has no plans to amend the current policy settings in this area.

4. **Do you consider the proportions of money recovered from the many collapses is adequate, and that the recovery fees charged to investors is appropriate for the recoveries achieved?**

Unfortunately, the 'collapse' of a company generally means the company is unable to pay its debts and that there is very little money left. Finance companies and other investment vehicles have fewer assets than other types of companies, which means even less money can be recovered under insolvency law.

As to your point on fees, I am presuming you mean the fees charged by the liquidators. Insolvency practitioners do an important job in realising assets and redistributing capital and there is benefit in having professionals carry out these appointments. Insolvency practitioners are entitled to charge reasonable remuneration for carrying out their duties and functions.

Having said that, these practitioners are subject to ethical and professional standards and complaints about fees can be made to the relevant Professional Conduct Committee or Complaints Service. The level is also reviewable by the Courts. Creditors and other persons have the ability to make an application to the Courts to enforce the duties of practitioners including orders to review or fix levels of remuneration or requiring a practitioner to refund any unreasonable remuneration.

If you have specific concerns regarding the conduct of an insolvency practitioner, you can also contact the Registries Integrity and Enforcement Team within the Ministry of Business, Innovation and Employment.

You can contact them by, post, phone or by the online complaint form:

Registries Integrity and Enforcement Team (RIET)
PO Box 5004
Wellesley Street
Auckland 1141
New Zealand

Freephone within New Zealand: 0508 446 834

https://www.business.govt.nz/companies/about-us/enforcement/complaint-form

5. **Can you please explain why NZ does not have legislation similar to what has been in place in USA for 44 years, to protect 'widows, retired couples and small investors'? Why does NZ still dump the problems of financial collapses onto victimised investors and let the finance industry for the most part walk away?**

Government mandated fidelity funds to protect against financial loss for commercial activity is not a model that is generally applied in New Zealand. The Financial Markets Conduct Regulations allow an insurance model for financial loss to be applied on a case-by-case basis through the Financial Markets Authority's ability to require all market service providers licensed under the Financial Markets Conduct Act (including DIMS providers) to hold professional indemnity insurance. FMA does not currently require licensees to hold professional indemnity insurance, but the FMC Regulations allow FMA to require it of licensees in the future should they deem it a requirement.

A fidelity fund for financial markets may sound like an appealing solution to combat losses. However there are some issues that would need to be carefully weighed-up if New Zealand were to consider introducing a fidelity fund. These issues include matters such as if the scheme is funded via a levy on financial markets professionals it may increase costs for all financial markets participants, as increased costs may be passed on to investors through higher management fees. Also, a fidelity fund to guard against financial loss may incentivise investors and providers to take greater investment risks with less caution.

6. **Do you appreciate the crisis for investors in NZ that is caused by the instability of the financial markets, and the poor recovery and weak protection regime for the large number of NZ investors who are impacted by financial failures and fraud?**

I acknowledge the terrible impact that this criminal activity has had on the investors involved. Restoring investor confidence through smart and efficient regulation is a priority for this Government.

As you know, Ross Asset Management held out to be providing Discretionary Investment Management Services, or DIMS. A number of additional steps have recently been taken to bolster the regulation of DIMS. As of 1 December 2014 most DIMS providers will need to be licensed by FMA as having the systems and safeguards necessary to adequately provide this service. These licensing requirements should provide New Zealanders with an increased level of confidence in the capability of these providers, and will support FMA's ability to monitor DIMS providers.

The investigation and enforcement activity FMA undertakes in our financial markets has also recently been revised. The Financial Markets Conduct Act gives FMA access to a new set of regulatory powers. FMA has undertaken to utilise these powers in a way that ensures the enforcement activity matches the breach (or potential breach) of the law. This can span a range of actions, from issuing warnings, guidance and imposing bans to full criminal proceedings.

Given that inadequate and fraudulent custody of assets were key factors in Ross Asset Management's fraudulent activities, the Government has introduced a number

of new requirements for the custody of DIMS. New requirements will mean that DIMS providers will no longer be able to hold a client's money or property themselves. This provides a separation of duties between the safeguarding of client assets and the investment management decisions made by DIMS providers.

Custodians themselves are now also required to report directly to investors on their holdings. This will provide investors with an authoritative record of their holdings, which will make it much harder for intermediaries to get away with falsely reporting on these assets to their clients. Independent assessments by auditors will assess the accuracy of this reporting and the controls that the custodian has in place to protect client assets.

I consider that these measures, when taken together, represent an appropriate response to the issues raised by Ross Asset Management. It is not possible, however, to completely remove the threat of fraudulent behaviour from financial markets. The Government's reforms are aimed at making this type of behaviour harder to undertake and easier to detect.

7. **Why have RAM investors been made to wait nearly 2 years to discover they have no property rights, and there is no proper Ponzi law in NZ? We are forced to pay millions for professionals and agencies who should have told us this information on day one.**

I have no knowledge of the advice you have either sought or received and therefore can make no comment on this issue.

8. **Can we ask that you initiate an immediate independent investigation of the issues raised.**

These issues are still being worked through the Courts, which I consider to be the appropriate forum for dealing with the issues raised by this matter.

Yours sincerely

Hon Paul Goldsmith
Minister of Commerce and Consumer Affairs