

29 May 2018

Director-General
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Dear U Aung Naing Oo

Submission on the Draft Myanmar Insolvency Law (2018)

The Myanmar Centre for Responsible Business (MCRB) welcomes the opportunity to respond to DICA's consultation on the Draft Myanmar Insolvency Law. As ever, MCRB would like to thank DICA for offering the possibility for stakeholders to provide input into the draft law. We welcome DICA's continued practice of open consultation with stakeholders on draft laws and regulations and express our encouragement to other ministries and agencies to adopt a similar open approach to seeking and incorporating stakeholder comments.

MCRB's mandate is to promote responsible business in Myanmar. As you know, MCRB has been actively involved in DICA's consultations on the Myanmar Company Law and Companies Regulations as well as the Myanmar Investment Law and Rules, in line with our mission to promote responsible business in Myanmar. We believe that a core part of that mission is to support more effective laws and regulations governing the establishment and conduct of companies. We also seek to provide comments which 'join up' draft laws with other existing Myanmar laws, and Myanmar and international initiatives, based on our extensive research of the legal framework and context for business in Myanmar, and international standards.

The closure of businesses and insolvency is not an issue on which MCRB has significant expertise. We will not therefore comment on detailed provisions of the law. Instead our comments focus on raising issues related to our mission:

- the fair treatment of employees, other workers and vulnerable persons
- ensuring funds are available for the public purpose of protecting the environment
- ensuring due process in line with international standards on human rights and the rule of law.

We also welcome the idea of a law scaled to deal with different sized enterprises, including micro-enterprises.

These comments are mostly NOT in the form of textual amendments, but are intended to prompt reflections on the incorporation of broader public purposes – protection of human rights and the environment – as a core part of developing Myanmar's evolving legal framework to support responsible investment.

DICA has demonstrated leadership in building responsible business considerations into modern business legislation. MCRB wishes to continue to support DICA in understanding these linkages and building them into the regulatory fabric for the benefit of the country's sustainable development.

Comments on the Draft Insolvency Law

1. Rights of Employees: the order of priority of payments & lack of protection for other workers

We note that **Division 7, Section 196 on the payment of priority claims** includes payment of employees for wages, salary or other remuneration; then leave entitlements; then retrenchment entitlements; then compensation owed for any injury suffered in the course of the employee's employment.

Comment 1: While we are pleased to see that payments to employees are given priority in distribution during winding up, we question the choice of giving compensation for injuries a lower priority than leave or retrenchment entitlements.

We suggest that this should be reconsidered unless it is in line with standard international practice on insolvency. As of January 2015, only 1.5% of the population was covered by the social security scheme¹ under the Social Security Law (2012) that provides for workplace injuries. In addition, Myanmar does not yet have a modern Occupational Health and Safety Law (a draft is under consideration) that would improve workplace injury prevention practices in the workplace.² As such, there may be many employees who are injured who would not have access to other forms of compensation. That may be quite a different situation than others jurisdiction on which the draft Law is modelled.

We suggest DICA has a discussion with the Ministry of Labour, Immigration and Population on this point to understand which issues should be given the highest priority from the workers' perspective, given the current state of the social security system.

Comment 2: We note that the provision applies only to employees. It is a common trend, particularly in some industries, to engage contract labour who would not be covered by these priority provisions. International insolvency practice may not yet have caught up with these shifting employment trends but it is something to consider in determining whether the scope of the priority claims should be expanded to cover workers contracted via workforce brokers/recruitment agencies who may have performed work similar to employees. If the claims of these workers are treated as other creditors, they could end up without payment for work performed, unlike direct employees. In addition, many such workers are unlikely to have the capacity to bring such claims in insolvency proceedings.

2. Protection of the household

We note that Definition 18 of "**excluded property**", does not cover a person's actual home or residence.

Comment: Myanmar has recently ratified the International Covenant on Economic, Social and Cultural Rights that includes the right to housing and the right to protection of family life. Our concern that 'excluded property' has limited scope which does not cover a home/residence relates to the impact this would have on vulnerable groups who may be involved in or affected by insolvency proceedings. This would include widowed women and the disabled who could be made even more vulnerable if their home/residence is sold to pay off creditors.

¹ MCRB Briefing Paper, "Combatting Discrimination by Business and in the Workplace in Myanmar, (September 2017), p. 12

² See MCRB – Australian Chamber of Commerce [submission](#) on the Draft OSH law

We urge the drafters to consider whether there is international practice from other jurisdictions to draw on that provides for the protection of the household that could be included in the Law.

3. Payment for other public purposes – protection of the environment

We wish to highlight that there are two types of legally mandated funds for protection of the environment that could be affected by the Insolvency Law which should be considered.

*Comment: The 2015 Mining Law requires mining companies to contribute to a **Mine Closure Fund** for environmental rehabilitation and reforestation (Art. 13e (2)).*

*The 2012 Environmental Conservation Law provides for the establishment of an **Environmental Management Fund** (Art. 8) based on contributions from companies, though the Fund has not yet been established.*

Both funds are to be used to protect and rehabilitate the environment. We recognize that there are other priority claims (including for workers) provided for in the current draft Law that should take precedence in distribution over paying any unpaid amounts owed to either the Mine Closure Fund or any eventual Environmental Management Fund.

*Rather than suggest a change in priority, we suggest **adding a provision in the Law to require the insolvency practitioner or liquidator (as appropriate) to alert the relevant Ministry (currently MONREC) if unpaid amounts are owed to the Fund, so that the ministry can file a claim to be considered alongside other creditors? This extra step would be justified based on the importance of the public purpose of protecting funds to restore the environment.***

4. Due Process

We assume that the Law has been drafted with due regard for due process in administrative and judicial proceedings and protections set out in international human rights law.

5. Realistic for the Myanmar Situation

We also encourage that the drafters/ADB and DICA to consider the appropriateness to the Myanmar context of what is a long and complicated law, and that a capacity building programme is planned for both the public and private sector to accompany effective implementation.

Yours sincerely,

Vicky Bowman

Director