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BANKING ON FAIR CONDUCT

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Abstract

Access to a bank account and associated banking services are increasingly fundamental in order to participate in society. Without a bank account, a person is practically financially excluded. This paper examines the treatment of persons entering insolvency procedures by the Big Four banks in New Zealand. It argues that current bank policies – to close or suspend the bank account and banking services of an insolvent person – are unfair. Statistics reveal that vulnerable individuals are already over-represented in insolvency procedures, making the banks' policies ethically indefensible. Further, the author argues there is no valid commercial justification for the banks' conduct in this regard. Following a thorough review of potential routes to policy change, including a comparative analysis with Australia, the author determines that the Financial Markets (Conduct of Institutions) Amendment Bill 2019 provides the best legal mechanism to address this social issue. The Financial Markets (Conduct of Institutions) Amendment Bill requires financial institutions, such as banks, to establish and comply with "fair conduct programmes". Clause 446M of the Bill allows regulations to prescribe what must be included in these fair conduct programmes. This provides the opportunity to prohibit banks from closing or suspending the accounts of insolvent persons if this would them cause significant hardship.

Keywords**:** *"Insolvency", "Bankruptcy", "Financial Markets (Conduct of Institutions) Amendment Bill 2019", "Bank account closure", "Bank conduct".*

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I INTRODUCTION

Largely considered a last-resort, entering an insolvency procedure – whilst in theory creating the opportunity to start-over – has drawbacks. There is often personal shame and public stigma attached to the process, as well as a substantial loss of financial autonomy. The current policy of the "Big Four" in New Zealand banking[1] subjects insolvent persons to the closure or suspension of their bank account and associated banking services. This paper argues that this is an unfair policy that creates additional stress for insolvent persons and is not commercially justifiable for banks. The author suggests that the law should require a change in bank policy – most effectively achieved through the "fair conduct programme" that banks will be required to establish under cl 446M of the Financial Markets (Conduct of Institutions) Amendment Bill 2019 (FMAB).

In Part II, this paper discusses the societal prevalence of personal insolvency and details the processes involved. This paper subsequently analyses the Big Four banks' rights in relation to the provision of services to insolvent customers and how banks are choosing to exercise their discretionary powers. The author concludes that the current approach raises serious ethical issues – creating a clear case for legal intervention.

Part III addresses the efforts undertaken by consumer advocate groups to date to encourage banks to change their policies, concluding that further action is required.

Various routes to effect change are considered in Part IV. The author contemplates legal and policy considerations – arguing that the solution must balance the rights and interests of insolvent persons with the rights, interests and responsibilities of the banking sector.

In Part V, consideration is given to one of New Zealand's comparable jurisdictions – Australia. The author's research found that, whilst there are some "soft-law" measures in place, there is no "hard-law" directed at the issue of the closure or suspension of insolvent persons' bank accounts in Australia. The author concludes that Australia does not provide a suitable model for New Zealand to adopt.

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[1] Reserve Bank of New Zealand "The banking system" (28 February 2021) <www.rbnz.govt.nz>; and Susan Edmunds "Making bank: Big four banks cashing in on New Zealanders" (31 October 2019) Stuff <www.stuff.co.nz>.

Lastly, Part VI outlines the author's recommendation. It is proposed that the law should require the banks' fair conduct programmes – to be established by cl 446M of the FMAB – to include that banks will not close or suspend the account of an insolvent person if that would cause significant hardship.

II THE CONTEXT

A Personal Insolvency Statistics

To understand the scope of the issue and to give context, Part II A provides quantitative information regarding personal insolvency and bank account closure and suspension in New Zealand.

The author had access to unreleased survey information held by the New Zealand Insolvency and Trustee Service (ITS). Also known as the Official Assignee's Office, ITS is a part of the Ministry of Business, Innovation and Employment (MBIE) and administers all insolvency procedures in New Zealand.[2] These procedures – which will be discussed in more depth in Part II B – include Debt Repayment Orders (DRO), No Asset Procedures (NAP) and bankruptcies.[3] The ITS surveyed all their clients (550 people) who entered into an insolvency procedure in the last two years – 2020 to 2021.[4] The responses revealed a number of trends.

Firstly, COVID-19 had an impact on personal insolvency.[5] Of those surveyed, 42.18 per cent or 232 people lost their job or main source of income as a result of COVID-19-related issues.[6] Of these 232 people, 48 per cent lost their job, 35 per cent experienced a reduction in working hours and income, 10 per cent suffered business failure, five per cent were sick or immuno-compromised, and two per cent had recently returned from overseas.[7]

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[2] New Zealand Insolvency and Trustee Service "About Insolvency and Trustee Service" (8 June 2021) <www.insolvency.govt.nz>.
[3] Insolvency and Trustee Service, above n 2.
[4] Email from Frankie Favero (New Zealand Insolvency and Trustee Service) to the author (17 August 2021).
[5] Favero, above n 4.
[6] Favero, above n 4.
[7] Favero, above n 4.

Secondly, the number of individuals entering insolvency procedures who subsequently face banking restrictions appears to be increasing.[8] In 2019, 42 per cent experienced banking restrictions.[9] Comparatively, in 2021, 64 per cent of respondents (353 people) experienced banking restrictions, with 49 per cent having their bank accounts closed (271 people) and 44 per cent losing their debit and internet banking facilities (241 people).[10]

The ITS Insolvency Statistics and Debtor Profile Report (ITS Report) additionally shows the demographics of those entering insolvency procedures.[11] Whilst revealing that personal insolvency affects those from a broad range of groups, vulnerable members of society are heavily and often disproportionately impacted.

Women constituted 60 per cent of those entering a DRO and 56 per cent of those entering a NAP in the 2019 to 2020 period.[12] Younger people are more affected by insolvency – with the 25 to 29 year-old age group being the most common entering NAP and DRO procedures;[13] and the most common age group for bankruptcy reducing from 40 to 44 year-olds in 2017 to 2018, to 35 to 39 year-olds in 2019 to 2020.[14] Māori are disproportionately represented in both NAPs and DROs. 25 per cent of those entering NAPs[15] and 28 per cent of those entering DROs[16] identified as Māori, whilst accounting for 17 per cent of the New Zealand population at the time.[17] There is also a substantial overlap between individuals in receipt of a benefit and those who enter insolvency procedures. For those entering a DRO, approximately 35 per cent were receiving some form of benefit;[18] for those entering a NAP, the number was approximately 59 per cent;[19]

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[8] Favero, above n 4.
[9] Favero, above n 4.
[10] Favero, above n 4.
[11] New Zealand Insolvency and Trustee Service *Insolvency Statistics and Debtor Profile Report* (Ministry of Business, Innovation and Employment, 30 June 2020).
[12] At 12.
[13] At 12.
[14] At 12.
[15] At 21.
[16] At 14.
[17] At 14 and 21; and Statistics New Zealand "2018 Census ethnic group summaries" <www.stats.govt.nz>.
[18] Insolvency and Trustee Service, above n 11, at 16.
[19] At 23.

and for bankruptcies, approximately 28 per cent.[20] Lastly, "ill health" and "lack of health insurance" was a key driver of insolvency for over 10 per cent of NAP and DRO applicants, and just under 10 per cent of bankruptcies[21] – adding to the evidence that vulnerable individuals are disproportionately represented in insolvency procedures.

It would appear that personal insolvency – whilst affecting a broad demographic, and thus being a widespread issue – often affects the vulnerable. This shows the inequality at the centre of the issue that is exacerbated when an individual's bank account is closed. The alarming increase in loss of access to bank accounts and the impact of COVID-19 both show that action is best taken immediately. The impact of COVID-19, moreover, demonstrates that insolvency is topical and that there is presently an appropriate political climate to instigate policy change.

The personal insolvency statistics stated above relate to a number of personal insolvency procedures. These will now be discussed.

B Personal Insolvency Procedures

A person unable to pay debt may enter into an insolvency procedure. There are three procedures available under the Insolvency Act 2006 (IA).[22]

Firstly, the person is able to enter a DRO.[23] The relevant application can be submitted to the Official Assignee by the debtor or by a creditor with the debtor's consent.[24] This is a "supervised repayment plan" – over a three year term – suited to individuals who are able to repay a portion of their debts by allowing them a reasonable period to make repayments.[25] During this period, creditors are unable to add further interest or charges to the debt or take further action against the debtor.[26] To be eligible for a DRO, a person must owe less than $50,000 not including secured debts, student loans, fines, reparations or child support.[27]

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[20] At 28.
[21] At 15, 22 and 27.
[22] Insolvency Act 2006, ss 7–8.
[23] Section 8(1)(b).
[24] Section 341.
[25] Section 340; and New Zealand Insolvency and Trustee Service *Personal Insolvency Information* (Ministry of Business, Innovation and Employment, January 2020) at 5–6.
[26] At 5.
[27] At 5.

Secondly, the person can enter a NAP.[28] This involves the debtor making an application to the Official Assignee.[29] The procedure lasts 12 months and at the end of the NAP, the individual is released from the debts included in the NAP.[30] During the procedure, creditors are largely unable to enforce debts against the debtor.[31] To be eligible, the person must have no available income to repay creditors, no assets of value, not sold or transferred any assets before applying, not been in a NAP or bankrupt before, and have total debts of more than $1,000 and less than $50,000.[32] The $50,000 excludes student loans, fines and reparations, but includes guarantees and debts owed as a trustee.[33]

Thirdly, the person can enter a bankruptcy procedure.[34] This requires owing more than $1,000.[35] A person can become bankrupt if either a creditor of the debtor applies to the court for an order of adjudication and the court makes the order or if the debtor files an application with the Official Assignee for adjudication.[36] Both a more public and socially stigmatised procedure, this involves the debtor's assets being transferred to the Official Assignee who administers all the debtor's assets and income.[37] It is a three year procedure and at the end of the term, the debtor is released from all the debts included in the bankruptcy.[38]

Regardless of the procedure, the debtor must notify their bank of their insolvent status.[39] Consequently, as will be discussed, the bank will often close or suspend the debtor's bank account. This is not a legal requirement of the insolvency procedures[40] but rather a policy of the major banks in New Zealand.

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[28] Insolvency Act, s 8(1)(c).
[29] Section 362.
[30] Sections 377(1) and 377A.
[31] Section 369.
[32] Section 363; and Insolvency and Trustee Service, above n 25, at 6.
[33] At 6–8.
[34] Insolvency Act, s 7.
[35] Sections 13 and 45.
[36] Section 10.
[37] Section 50.
[38] Section 290.
[39] New Zealand Insolvency and Trustee Service "How insolvency affects you" (14 January 2020) <www.insolvency.govt.nz>.
[40] Insolvency and Trustee Service, above n 39.

C Current Policy of Banks in New Zealand

It is fundamental to consider the policies of the four largest banks operating in New Zealand, in terms of their position on closing or suspending the bank account of an insolvent person. The Big Four in New Zealand banking are the Australia and New Zealand Banking Group Ltd (ANZ), the Auckland Savings Bank (ASB), the Bank of New Zealand (BNZ) and Westpac.[41] The focus on these banks is driven by their substantial share of the banking market[42] and thus the broader impact of their policies on insolvent individuals than smaller banks. According to the Reserve Bank of New Zealand, these four banks are "responsible for 85 per cent of bank lending" in New Zealand – describing the banking market as "highly concentrated".[43]

1 ANZ

As outlined in its General Terms and Conditions, ANZ has the right to refuse a person use of their account if the individual is "bankrupt or in liquidation, or something similar happens to [them]".[44] ANZ is also able to close the account for the same reason.[45] "Bankrupt" is a clear reference to the bankruptcy procedure, whilst "something similar" seems to encapsulate the other insolvency procedures – NAP and DRO. If the account is closed, the individual must return any EFTPOS, Visa Debit or credit cards, cheque or deposit books, and repay any money owed to ANZ.[46] ANZ will – if there is any money left – pay this to the individual and wind up the banking relationship.[47]

2 ASB

Under its Personal Banking Terms and Conditions, ASB can refuse to allow a customer to make a payment or to withdraw cash from their account – and may suspend the customer's account – if it:[48]

> … learn[s] of [the individual's] bankruptcy … [that the individual has] committed an act of bankruptcy, or that a petition has been presented for [the individual's] bankruptcy, or

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[41] Reserve Bank, above n 1.
[42] Reserve Bank, above n 1.
[43] Reserve Bank, above n 1.
[44] Australia and New Zealand Banking Group Ltd "General Terms and Conditions" (15 June 2021) <www.anz.co.nz> at 29.
[45] At 30.
[46] At 31.
[47] At 31.
[48] Auckland Savings Bank "Personal Banking Terms and Conditions" (23 June 2021) <www.asb.co.nz> at 5.

> that [the individual] has applied for or are subject to any personal insolvency procedures or proceedings.

Compared to ANZ, ASB is more explicit that entrance into any of the personal insolvency procedures may result in the suspension of one's account. ASB is less clear, however, as to whether insolvency will lead to account closure.[49] If the account is closed, the account holder must repay any money owing and return any cards, devices or cheques and ASB will transfer any remaining money to the account holder.[50] Assuming it aligns its position with the other major banks, it is likely insolvency can also lead to closure, though suspension still has the same practical effect on the insolvent person.

3 BNZ

As per its Standard Terms and Conditions, BNZ details that it can close or suspend a person's account or suspend any other product or service if it learns that the person has suffered a "Bankruptcy Event".[51] It defines Bankruptcy Event as the following events under the IA:[52]

> … any act of bankruptcy; an application being made to declare a person bankrupt or a person being declared bankrupt; a compromise with, or any proposal to, creditors; an application or order being made for a person's estate to be administered as an insolvent estate; a summary instalment order being made against a person; becoming subject to the no asset procedure … or any event similar to any of these or any step taken towards any of these.

This explicitly includes a NAP, DRO – described as a summary instalment order[53] – and bankruptcy. If the account is closed, the person must repay any funds owing to BNZ, and destroy any cards or unused cheques and BNZ will pay or transfer the funds from the account to the individual.[54]

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[49] At 7.
[50] At 8.
[51] Bank of New Zealand "Standard Terms and Conditions" (28 July 2021) <www.bnz.co.nz> at 10.
[52] At 26.
[53] New Zealand Insolvency and Trustee Service "Debt Repayment Order (DRO)" (28 May 2021) <www.insolvency.govt.nz>.
[54] BNZ, above n 51, at 11.

4 Westpac

The General Terms and Conditions of Westpac uses similar language to BNZ of a "Bankruptcy Event" and a virtually analogous definition, unnecessary to repeat.[55] If a person suffers a Bankruptcy Event, Westpac is entitled to close or suspend any accounts.[56] If an account is closed, the individual must return all unused cheques, credit cards and ATM/EFTPOS cards relating to the account.[57]

5 Smaller Banks

Kiwibank – New Zealand's state-owned bank[58] – has the right to close the account of an insolvent person as per its General Terms and Conditions.[59] Other smaller banks with this contractual right include the Co-operative Bank,[60] Heartland Bank,[61] Hongkong and Shanghai Banking Corporation Ltd Bank (HSBC),[62] Southland Building Society Bank (SBS)[63] and Rabobank.[64]

Notably, some smaller banks – for example, credit unions or building societies – have different contractual terms and are not empowered to close or suspend an account on the sole basis of insolvency.[65] For example, the Trustee Savings Bank (TSB) requires that it be advised "if any account holder … is or becomes an undischarged bankrupt or is liable under any proceedings pursuant to the Insolvency Act 2006" but does not list personal insolvency as a grounds for account closure or suspension.[66] As stated prior, however, these smaller banks are not the focus of this paper due to their limited market share.

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[55] Westpac "General Terms and Conditions" (26 June 2021) <www.westpac.co.nz> at 22.
[56] At 5–6.
[57] At 6.
[58] Kiwibank "Meet the parents" <www.kiwibank.co.nz>.
[59] Kiwibank "General Terms and Conditions" (1 December 2020) <www.kiwibank.co.nz> at 4.
[60] The Co-operative Bank "Terms and Conditions" <www.co-operativebank.co.nz> at 11.
[61] Heartland Bank "Account and service general terms and conditions" (December 2020) <www.heartland.co.nz> at 7.
[62] Hongkong and Shanghai Banking Corporation Ltd Bank "Wealth and Personal Banking Terms and Conditions" (28 June 2021) <www.hsbc.co.nz> at 16–17.
[63] Southland Building Society Bank "General Terms and Conditions" (1 December 2020) <www.sbsbank.co.nz> at 2.
[64] Rabobank "General Terms and Conditions" (June 2021) <www.rabobank.co.nz> at 4.
[65] Insolvency and Trustee Service, above n 39.
[66] Trustee Savings Bank "General Banking Terms and Conditions" (26 June 2021) <www.tsb.co.nz> at [30].

6 Evidence of Banks Using their Contractual Rights

It is important to note the distinction between the banks' contractual rights – and how the banks act in practice. As seen above, the contractual terms are phrased in such a manner that provides the banks with broad discretion. Evidence, however, shows that the Big Four are in fact closing the accounts of insolvent persons. This can be seen through the ITS statistics highlighted earlier – with 49 per cent of insolvent persons facing bank account closure in 2020 and 2021.[67] This is reinforced by evidence to which the author had access through consumer advocate group Christians Against Poverty (CAP). According to Michael Ward of CAP, 72 per cent of clients CAP assessed for insolvency were required to change bank accounts after their former account was closed or suspended.[68] This shows that banks are choosing to act on the powers they have through their terms and conditions and are in fact closing accounts of persons entering insolvency procedures. The subsequent difficulties of this, as well as qualitative details and case studies provided by Ward, are considered below.

D Challenges of Bank Account Closure or Changing Bank Accounts

When a bank chooses to exercise its discretion under its terms and conditions, bank account closure has significant implications for the insolvent person. The person must choose to either have no bank account or find an alternative bank. If the person chooses the latter, there is still a substantial period in which they are left without an account whilst organising this change.

1 Bank Account Closure

Without access to a bank account, a person is heavily restricted in terms of participation in financial activities.

Firstly, it is difficult for the insolvent person to pay for expenses. Without a bank account, a person has little choice but to use cash. As stated by the Assistant Governor of the Reserve Bank, Christian Hawkesby, "[a]t the moment there is no legal obligation for a retailer to accept cash".[69] This is an increasing occurrence as some push for a cashless society, particularly in light of COVID-19,[70] and is amplified by the shift towards online payment which requires a

[67] Favero, above n 4.
[68] Email from Michael Ward (Christians Against Poverty) to the author (17 August 2021).
[69] "Do you want the right to pay in cash?" (29 August 2019) One News <https://www.tvnz.co.nz/one-news>.
[70] Anuja Nadkarni "Is New Zealand destined to become a cashless society?" (1 August 2020) Stuff <www.stuff.co.nz>; and John Whitehead "COVID-19 And The War On Cash: What Is Behind The Push For A Cashless Society?" (15 April 2020) Scoop <www.scoop.co.nz>.

bank account or credit or debit card. Many companies offer discounts for paying online – for example, the New Zealand Transport Agency discounts online payment for vehicle registration.[71] Power companies also incentivise online payment through discounts and often add additional administrative fees to in-person cash payment.[72] Establishing automatic payments for regular bills, such as rent, also requires a bank account – and such bills are increasingly difficult to pay using cash.[73] According to Ward, these factors means that the loss of a bank account "compounds financial hardship for those in insolvency".[74]

Secondly, a person needs a bank account to collect a tax rebate[75] and to receive a benefit.[76] As seen through the statistics outlined previously, approximately 40 per cent of insolvent persons are beneficiaries.[77] Closing the account of an insolvent person therefore acts as an obstacle and makes it harder for the person to improve their financial position. Ward notes that beneficiaries without a bank account will often "rely on someone else to receive their benefit for them", highlighting the potential this has to cause "all kinds of issues, such as theft and coercion".[78]

There is also, notably, a further security concern. The person will be unable to use their bank account to store any cash, forcing them to keep any money at their property or on their person.

2 Changing Bank Accounts

Moving from one bank to another can provide substantial difficulties. The primary obstacle is finding a bank that will allow an insolvent person to open an account. However, there are a number of other ramifications.

Firstly, the process of opening a new account can be complex – with insolvency, it is even more protracted.[79]

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[71] New Zealand Transport Agency "Administration fees" <https://nzta.govt.nz>.
[72] Contact "Flexible Billing Options" <https://contact.co.nz>; Genesis "Ways to Pay Your Power Bill" <www.genesisenergy.co.nz>; Mercury "How to pay my bill" <www.mercury.co.nz>; and Meridian "Pay your bill in person" <www.meridianenergy.co.nz>.
[73] Ward, above n 68.
[74] Ward, above n 68.
[75] New Zealand Government "Getting a tax refund" (27 August 2021) <www.govt.nz>.
[76] New Zealand Government "Applying for a benefit" (10 August 2021) <www.govt.nz>.
[77] Insolvency and Trustee Service, above n 11.
[78] Ward, above n 68.
[79] Ward, above n 68.

Secondly, accessibility is an issue. Specifically, an individual may have to travel a substantial distance to the new bank as, particularly for smaller banks – those more likely to accept an insolvent client – locations are often infrequent.[80] Ward notes that "with more branches closing and face-to-face banking becoming harder, the limited options to engage with banks to open an account are becoming more complicated".[81]

Thirdly, as Ward states, it is "not only the operational exercise of changing bank accounts", there is the creation of additional stress, shame and stigma.[82] It is the:[83]

> … stress of re-organising APs and DDs; the anxiety of going to a different, unknown bank; the shame of joining a bank not because you want to but because they're the only ones that will take you; and the disappointment of having to leave a bank whom you may have been with for years, for whom you have been a very profitable customer.

Ward detailed a number of case studies showing these difficulties and provided the author with details of the experience of three CAP clients as representative examples – showing the extent of the problem.

Firstly, an 80 year-old woman was forced to change bank accounts because her current major bank froze her account due to insolvency.[84] Ward describes that:[85]

> She is very unhappy having been a customer of this bank "for decades" in her own words. Changing bank accounts will be incredibly difficult at her life stage. She will not be able to proceed with her insolvency until she has changed bank accounts. This process may take several months.

[80] See generally Australia and New Zealand Banking Group Ltd "All branches" <www.anz.co.nz>; Auckland Savings Bank "Find a branch or ATM" <www.asb.co.nz>; Trustee Savings Bank "Find a branch" <www.tsb.co.nz>; and Ward, above n 68.
[81] Ward, above n 68.
[82] Ward, above n 68.
[83] Ward, above n 68.
[84] Ward, above n 68.
[85] Ward, above n 68.

Secondly, a mother of four children had no option but to change bank accounts after becoming insolvent.[86] Ward continues:[87]

> It has taken her 10 months to change bank accounts – her old bank would freeze her account; one major bank rejected her application because it had a record of an old $180 debt from 2012; one bank kept promising to call her back but didn't only to then reject her application due to a bad credit rating. It has been incredibly stressful for this busy mum to spend countless hours on the phone with new, unfamiliar banks just to be turned away. She has managed to open a bank account with a smaller NZ bank but her closest branch isn't even in Auckland where she lives.

Thirdly, a couple living in a small rural town became insolvent.[88] There were only two banks close to them – neither of which provided an appropriate banking product for an insolvent person.[89] As Ward states:[90]

> One of them lives with a significant physical disability and it took over six months for this couple to be able to set up an account with a smaller bank. Their closest branch is over six hours away.

These examples highlight the issues with current bank policy – revealing the effects of banking restrictions on vulnerable people.

III CURRENT EFFORTS TO CHANGE BANK POLICY

Evidently, there is a problem. As such, many consumer advocate groups – including CAP – have been campaigning to change bank policy.

The Safer Credit and Financial Inclusion Strategy (SCAFI) is a cross-government partnership between the Ministry of Social Development (MSD), MBIE, and Te Puni Kōkiri (TPK) who work with the "financial services industry and community partners to provide collective solutions that support people and whānau facing financial hardship

[86] Ward, above n 68.
[87] Ward, above n 68.
[88] Ward, above n 68.
[89] Ward, above n 68.
[90] Ward, above n 68.

or with problem debt".[91] In 2020, the SCAFI workshop considered issues of access to bank accounts and CAP was invited to attend the forum.[92] However, the New Zealand Bankers Association (NZBA) was unable to broker an agreement between the banks.[93] As such, it was determined that each member bank would assess clients on a case by case basis which – according to Ward – "essentially meant nothing substantial changed".[94]

Whilst there has been significant work to date to encourage a shift in bank policy, it has been unsuccessful. Therefore, further consideration must be given to the issue.

IV LEGAL AND POLICY CONSIDERATIONS

Whilst it is clear there is an ethical issue at the heart of the problem – any solution must be grounded in reasoned legal and policy analysis. This section of the paper will discuss various routes to changing bank policy. Both the rights, interests and responsibilities of banks, as well as the rights and interests of insolvent persons, will be considered.

A Rights and Interests of Banks

The rights and interests of banks must be addressed. This is because it is incorrect to move forward with a policy change without having regard to the impact on banks.

The primary interest of banks is to generate profit. This is because, although providing an essential service, banks are companies. Therefore, consideration must be given to whether it is commercially viable for banks to provide accounts to insolvent persons. For the reasons that will follow, there is no commercial justification for current bank policy.

The banks could be concerned that an insolvent person will be unable to pay the fees associated with a bank account. However, this argument is untenable. An insolvent person is likely to still have some income either through the benefit, which is receivable by having a bank account, or

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[91] Ministry of Social Development, Ministry of Business, Innovation and Employment and Te Puni Kōkiri *The Safer Credit and Financial Inclusion Strategy* (September 2019) at 4; and Ministry of Social Development "The Safer Credit and Financial Inclusion Strategy" <www.msd.govt.nz>.
[92] Ward, above n 68.
[93] Ward, above n 68.
[94] Ward, above n 68.

wages.[95] It is also worth noting that account fees for insolvent customers would constitute an extremely small part of the banks' income. The banks have a valid interest in not – and in fact are prohibited from – providing credit to insolvent persons but this does not require bank account closure.[96] Rather, an insolvent person for the aforementioned reason, is not a potential borrower. Furthermore, by holding only a limited amount of money in their account, banks are largely unable to borrow from the insolvent person and lend this money to other customers. These two latter reasons for closing insolvent persons' bank accounts seem more accurate and both raise questions as to the justifiability of the banks' position.

1 Debt Collection Theory

It is worth noting at this stage one of the two main justifications for the existence of personal insolvency procedures. A key justification is "to serve the objective of debt collection" and to maximise returns to creditors.[97] This theory is based on insolvency law creating "'as 'few dislocations as possible' from pre-bankruptcy market allocations".[98] Spooner details that "[b]ankruptcy law becomes an extension of contract law in its fundamental objective of upholding market bargains to the greatest extent possible".[99] This theory supports a more restrictive approach to insolvent persons' access to bank accounts. The bank is often a creditor of the insolvent person, and by potentially losing fees, or at least by easing the ability with which an insolvent person can purchase goods and services, and therefore spend more, the debt collection objective is arguably compromised. However, this argument lacks weight. Furthermore, as will be discussed in Part IV D 3, the bank has an equal – if not greater – interest in providing insolvent persons with bank accounts.

B Responsibilities of Banks Under Current Law

As acknowledged above, banks have commercial interests that must be given weight. However, in pursuit of these interests, the banks must not breach their responsibilities. These responsibilities include following the law – both current and, if enacted, proposed law as will be discussed in Part IV C – as well as aligning their actions with any voluntary mechanisms to

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[95] Insolvency and Trustee Service, above n 11, at 16, 23 and 28.
[96] Insolvency Act, ss 360, 371 and 433A.
[97] Joseph Spooner "Seeking shelter in personal insolvency law: recession, eviction and bankruptcy's social safety net" (2017) 44 British Journal of Law and Society 374 at 375 and 380.
[98] At 380.
[99] At 380.

which they are party. It is possible that the closure or suspension of the accounts of insolvent persons breaches the banks' responsibilities.

1 Fair Trading Act 1986

As surveyed in Part II C, the notion that banks are entitled to close the account of an insolvent person forms part of the terms and conditions of most major banks. These terms and conditions are a contract between the bank and the account holder. Thus, the bank appears to be within its right to cancel the insolvent person's account as it is merely exercising its contractual rights. However, this is not necessarily the case. The term at play may in fact be an "unfair contract term" under the Fair Trading Act 1986 (FTA).

The court is able to declare a contractual term unfair upon an application by the Commerce Commission – either on its own initiative or on the request of a person party to the contract – to either the District Court or High Court.[100] If such a declaration is made, the party benefitting from the provision – the bank – is unable to apply, enforce, or rely on the term and would be unable to close the account of an insolvent person solely on this basis.[101] In order to make a declaration, a number of statutory requirements must be met.[102]

Firstly, the contract must be a consumer contract.[103] As defined in the FTA, such contracts relate to goods and services between a supplier and a customer, acquired for personal, rather than business, use.[104] A contract for personal banking services satisfies this requirement.

Secondly, the contract must be a standard form contract.[105] A bank's terms and conditions are readily considered standard form – there is substantial inequality of bargaining power, the contract is pre-prepared by the bank and used in relation to multiple customers, and a customer would have no practical scope to negotiate the terms on an individual basis.[106]

[100] Fair Trading Act 1986, s 46H.
[101] Section 26A(1)(b).
[102] Section 46I(2).
[103] Section 46I(2)(a).
[104] Section 2.
[105] Section 46I(2)(b).
[106] Section 46J.

Thirdly, the term is excluded from characterisation as unfair if it defines the subject matter of the contract, sets the price payable or is expressly permitted through an enactment.[107] The bank's term is not excluded on these grounds.

Fourthly, the term must be "unfair" under s 46L of the FTA. There are three limbs to this unfairness: first, the term must cause a significant imbalance in the parties' rights and obligations; second, the term must not be reasonably necessary to protect the interests of the party advantaged by the term; and third, the term must cause detriment to the other party if applied, enforced or relied on.[108] Additionally, the court must consider the extent to which the term is transparent, the fairness of the contract as a whole, and any other relevant matters.[109]

The leading case on this provision is the 2019 New Zealand High Court decision of the *Commerce Commission v Home Direct Ltd* (*Home Direct*).[110] This is the first – and only – declaration made by the High Court under this provision.[111] In *Home Direct*, the Court held that two contractual terms creating non-refundable "voucher entitlements" that "expired after 12 months" – with proceeds from default returning to Home Direct – conferred "significant benefits" on Home Direct and "no corresponding benefit to consumers".[112] Home Direct received "guaranteed future income", whilst the customers were neither entitled to interest on their money, nor discounts on future purchases.[113] It was held unarguable that Home Direct needed this term for protection – the onus of which was on Home Direct to prove – and there was evidently detriment caused to consumers.[114] The Court also noted the lack of transparency of the terms – being on "the ninth page of a 12 page document" – but held that unfairness may have arisen even if the term was made clear.[115]

Whether a contractual term that empowers a bank to close an insolvent person's bank account meets the unfairness indicia under s 46L like *Home Direct* requires careful analysis.

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[107] Sections 46I(2)(c) and 46K.
[108] Section 46L(1).
[109] Section 46L(2).
[110] *Commerce Commission v Home Direct Ltd* [2019] NZHC 2943, [2019] 3 NZLR 904.
[111] At [1].
[112] At [4], [5], [6] and [39].
[113] At [39] and [42].
[114] At [45], [46] and [47].
[115] At [55] and [57].

It is unlikely that the term causes a significant imbalance in the parties' respective rights and obligations under the first limb. The inclusion of the provision effectively gives the bank the right to cancel the contract and end or at least suspend the banking relationship if a certain condition is met – as in, if the customer enters an insolvency procedure. Although there is no benefit to the customer in this provision, the customer is equally entitled to dissolve the banking relationship at any point they elect[116] – essentially showing there is a reciprocal right in the contract. As such, in comparison to *Home Direct*, the parties' rights seem more broadly even. However, it is notable that according to the terms and conditions of ANZ - the largest bank operating in New Zealand – if the bank itself becomes insolvent, it does not guarantee the repayment of money in current accounts, saving accounts or term deposits, as the money is an unsecured and unsubordinated debt.[117] This could be seen as unbalanced but rather sits outside the scope of the problem and relates to broader banking matters. Thus, the first limb would likely fail and a court may be reluctant to see the bank's term as contractually unfair.

The second limb may be more easily met. As discussed in Part IV A, it is difficult to argue that the banks are truly protecting their commercial interests by closing or suspending the account of an insolvent person.

The third limb is also clearly satisfied. As discussed in Part II D, there are serious issues with the closure of bank accounts, thus leading to detriment to consumers in the term's application. The arguable lack of transparency of the term could also be relevant. Similarly to *Home Direct* – where the unfair term was on the ninth page[118] – in all the banks' terms and conditions, the relevant provision is in the middle and is not prominent.[119] However, transparency is not decisive so would not solely lead the term to be classed as unfair.[120]

In summary, the power of banks to close the accounts of insolvent persons could be challenged as an unfair contract term. However, it is not the best solution. Only the Commerce Commission is able to make a claim,[121] it would be an expensive and time-consuming procedure and there is no guarantee of success.

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[116] See for example BNZ, above n 51, at 4.
[117] ANZ, above n 44, at 9.
[118] *Home Direct*, above n 110, at [55].
[119] See generally Part II C.
[120] *Home Direct*, above n 110, at [57].
[121] Fair Trading Act, s 46H.

2 Code of Banking Practice and the Banking Ombudsman Scheme

Many of the banks operating in New Zealand – including all of the Big Four – are members of the NZBA.[122] As such, these banks are subject to the standard of conduct imposed by the NZBA's Code of Banking Practice (Code).[123] Although the Code is not a legal enactment, and does not form part of, override or replace the banks' respective terms and conditions,[124] it is enforceable by lodging a complaint under the Banking Ombudsman Scheme.[125] As stated in the Code: "[w]hen looking into a complaint, the Banking Ombudsman refers to this Code's principles, the law, and the contracts you've entered".[126] It is possible that the banks' policies regarding insolvent persons constitute breaches of the Code.

The Code features five main principles – the most relevant of which is that the customer must be treated fairly and reasonably.[127] The other principles concern clear and effective communication, privacy and confidentiality, responsible provision of credit, and effective dealing with concerns and complaints.[128] In terms of the fairness and reasonableness considerations, the Code states that banks will "act fairly, reasonably, and in good faith, in a consistent and ethical way".[129] Reasonableness and fairness is said to depend on the circumstances, including the conduct of the bank and the customer, the "terms and conditions, the law, and good banking practice".[130] The Code also states banks will "do [their] best to meet the needs of all [their] customers" – which should include insolvent customers.[131] Both of these notions seem contrary to the policy of the Big Four to close or suspend the account of an insolvent customer.

As such, the act of closing an insolvent person's bank account could constitute a breach of the Code which could in turn be enforced through a complaint to the Banking Ombudsman.[132] However, this is not the ideal solution. The Banking Ombudsman may be reluctant to intervene

[122] New Zealand Bankers Association "Our Members" <www.nzba.org.nz>.
[123] New Zealand Bankers Association "Code of Banking Practice" (April 2021) <www.nzba.org.nz>.
at 2.
[124] At 2.
[125] At 2.
[126] At 2.
[127] At 3.
[128] At 3.
[129] At 3.
[130] At 3.
[131] At 3.
[132] At 2.

in bank policy to this extent, will also consider the contracts entered into with the banks[133] and there is no guarantee of success.

C Responsibilities of Banks Under Proposed Law

1 Fair Trading Amendment Bill 2019

The FTA is under the process of amendment. The Fair Trading Amendment Bill 2019 (FTAB) – which gained Royal assent on 16 August 2021 – introduces a prohibition on "unconscionable conduct".[134] Under cl 7, those in trade must not engage in conduct that is unconscionable and this applies regardless of whether there is "a system or pattern of unconscionable conduct" and regardless of whether "a contract is entered into". As such, although the banks' policies arguably constitute patterns of unconscionable conduct and the power to close the accounts is a contractual right, the banks' conduct is not prevented from categorisation as unconscionable. In its consideration of unconscionability, the court must look to a number of factors under cl 8. These include: the relative bargaining power of the parties, whether the parties acted in good faith, and whether the "affected person" was able to protect their interests.[135] The court is also able to consider the terms of the contract, the extent the term is transparent, whether the terms are needed to protect the trader's interests, and the length of time the affected person has to remedy any breach.[136] These factors are highly comparable to the court's analysis when determining whether a contractual term is unfair and thus for the aforementioned reasons, could well count against a claim that the policy is unconscionable. The fact the court will consider the length of time the affected person has to remedy any breach raises an interesting question as to whether banks should at least be temporarily prohibited from closing or suspending the person's account, but given the length of most insolvency procedures is at least one to three years, this is potentially unhelpful.

The relevant provision under the FTAB is modelled on a corresponding provision in the Australian Competition and Consumer Act 2010 (CCA).[137] The CCA "seeks to prevent trading practices that are so harsh and oppressive that they go against good conscience", and are

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[133] At 2.
[134] Fair Trading Amendment Bill 2019 (213-2), cl 7.
[135] Clause 8.
[136] Clause 8.
[137] Ministry of Business, Innovation and Employment *Discussion Paper: Protecting businesses and consumers from unfair commercial practices* (December 2018) at 38.

"clearly unfair and unreasonable".[138] The Australian courts have emphasised that unconscionable conduct must be considered "by reference to the norms of society" including notions of honesty and fairness.[139] Courts are likely to interpret unconscionable conduct in New Zealand, in part, by reference to this Australian standard.[140] This is a relatively high bar however and has been characterised "as a 'safety net' to target relatively rare cases of particularly egregious conduct."[141] The banks' conduct would likely fall short of this. Moreover, there have only been two cases in which unconscionable conduct was established in the Australian courts under the corresponding statute.[142] This led to the Australian Standing Committee on Economics expressing concern with the courts' "narrow" approach and stating that s 51AC has "fallen short of its legislative intent".[143]

Therefore, this new prohibition on unconscionable conduct is unlikely to be of significant use. It also requires legal action, making it costly and time-consuming.

2 Financial Markets (Conduct of Institutions) Amendment Bill 2019

The Financial Markets (Conduct of Institutions) Amendment Bill 2019 (FMAB) is in the process of amending the Financial Markets Conduct Act 2013 (FMCA). The FMAB – in its second reading – would, if passed, subject the banks to a "fair conduct principle".[144] It is possible that closing or suspending the bank account of an insolvent person would then breach this principle. The aim of the Bill is to ensure that financial institutions – of which the banks are one – comply with a principle of fair conduct towards consumers.[145] Under cl 446B, a financial institution "must treat consumers fairly, including by paying due regard to their interests" as well as "acting ethically, transparently, and in good faith". The banks must adhere to this principle when designing, offering or providing any services or products to their customers.[146]

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[138] At 38–39.
[139] At 39.
[140] At 41.
[141] At 7.
[142] *Australian Competition and Consumer Commission v Simply No-Knead Pty Ltd* [2000] FCA 1365, (2000) 104 FCR 253; and *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2006] FCA 1427, (2006) 236 ALR 665.
[143] Standing Committee on Economics *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (December 2008) at 43.
[144] Financial Markets (Conduct of Institutions) Amendment Bill 2019 (203-2), cl 446B.
[145] Clauses 446C and 446D.
[146] Financial Markets (Conduct of Institutions) Amendment Bill, cl 446C.

As a part of this broader fair conduct principle, banks are required to create and comply with a "fair conduct programme".[147] Clause 446M sets out the minimum requirements for the fair conduct programme. The programme must be "in writing and include effective policies, processes, systems and controls for" various outlined purposes including the requirements and objectives of consumers.[148] Clause 546(1)(oa) allows regulations to prescribe further requirements for the fair conduct programme – expanding the existing power of the Governor-General, on advice of the Minister, to make regulations through s 546(1) of the FMCA. These regulations could require the banks' fair conduct programmes to include detailed rules and policies on how the bank will act when a customer enters an insolvency procedure. Specifically, the regulations could forbid the bank from closing or suspending the customer's account if this would cause significant hardship. Clause 446M(1A) details that in considering which policies are suitable to include in the fair conduct programme, the financial institution must have regard to the nature of its business and the relevant services and associated products it offers. Given the essential nature of banks and their offered services, including in the fair conduct programme – through the regulations – a requirement about how banks will treat insolvent customers aligns with the purpose of the Bill.

If the FMAB passes, this would provide a highly plausible path forward for addressing the issue in this paper.

D Rights and Interests of Insolvent Persons

The rights and interests of insolvent persons should also be considered independently of the banks' responsibilities. This sub-part addresses concerns relating to the issues discussed in Part II and broader human rights issues with regard to ensuring the provision of essential services to vulnerable people, as well as considering the important social insurance function of insolvency procedures.[149]

1 Companies Act 1993

Under s 275 of the Companies Act 1993 (CA), Parliament recognises that certain services are essential. As such, companies are prohibited from refusing to supply these essential services to

[147] Clauses 446G and 446I.
[148] Clause 446M.
[149] Spooner, above n 97, at 375.

the liquidator of a company by reason of non-payment.[150] Crucially, however, this provision only relates to corporate insolvencies – where a company rather than a natural person, is unable to pay its debts.[151] With that noted, under s 275(1) essential services include gas, electricity, water and telecommunication services. On this basis – it could be argued that banking is an essential service. By including telecommunication services, it appears that Parliament is open to broadening the definition of essential services to more closely reflect the realities of modern life, which by extension, could include bank accounts. On the point that this provision only relates to corporate insolvencies, this matter can be resolved by analogy. There appears little reason why if considered essential for companies, these services would not be considered equally – if not more – essential for insolvent natural persons.

The CA could therefore provide a solution but this is not as favourable as utilising the FMAB. This is because it would require either legislative amendment or litigation and the CA is, arguably, not the natural place to address the conduct of banks regarding natural insolvent persons.

2 New Zealand Bill of Rights Act 1990 and Human Rights Act 1993

Section 19 of the New Zealand Bill of Rights Act 1990 (BORA) provides that "[e]veryone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". The Human Rights Act 1993 (HRA) additionally prohibits suppliers to the public from refusing to provide goods, services and facilities to an individual on the grounds listed in s 21. Notably, s 44(2) includes banking within the meaning of facilities. Closing or suspending a bank account on the prohibited grounds would therefore breach the HRA. The prohibited grounds of discrimination in the HRA, whilst not mentioning insolvency, include employment status, such as being unemployed or being the recipient of a benefit under the Social Security Act 2018 (SSA) or the Accident Compensation Act 2001 (ACA).[152] This indicates that Parliament could be open to including insolvency status as a ground on which individuals should not be discriminated against.

[150] Companies Act 1993, s 275.
[151] Section 240.
[152] Human Rights Act 1993, s 21.

In 2017, Lisa Cowe lobbied for such an amendment to the HRA – seeking to add "personal insolvency" to s 21 after becoming insolvent herself.[153] She additionally requested that the Australian Royal Commission on Banking investigate the Australian-owned banks in New Zealand.[154] Unfortunately, nothing seems to have transpired from this attempt.

Due to the lack of traction gained in the past, an HRA amendment is potentially not the best solution.

3 Social Insurance Theory

Whilst considering the rights and interests of insolvent persons, it is also worth noting the other key justification for insolvency law. Balanced with the objective detailed above of debt collection, this theory builds on the idea of social insurance.[155] The aim is to "provide relief and a 'fresh start' to over-indebted [individuals] who fall through gaps in the social safety net".[156] This theory rests on the "negative economic consequences" of excessive debt in terms of "triggering" or "prolonging" economic recession.[157]

This theory supports insolvent persons' access to bank accounts for two reasons. Firstly, if an underlying purpose of insolvency is to give insolvent individuals a "fresh start", closing or suspending their bank accounts is counterproductive. As discussed in Part II D, this causes a number of flow on effects that limit the individual's ability to participate in the economy and makes it difficult for them to financially recover. Secondly, the negative effect on the economy of over-indebted individuals suggests it is in the banks' interests to help insolvent individuals recover by not closing or suspending their bank accounts.

V COMPARATIVE LAW

Whilst New Zealand has a number of comparable jurisdictions, Australia is the most natural country for comparison. This is in part due to the close ties between the countries, but more

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[153] Rob Stock "Christchurch woman lobbies to make it a human right to have a bank account" (22 October 2018) Stuff <www.stuff.co.nz>.
[154] Stock, above n 153.
[155] Spooner, above n 97, at 375.
[156] At 374.
[157] At 375, 376 and 382.

crucially, the substantial Australian role in the New Zealand banking sector – given the fact that New Zealand's four largest banks are all subsidiaries of Australian-owned companies.[158]

A Australia

In contrast to the rather bare Code in New Zealand, the Australian Code of Banking Practice – created by the Australian Banking Association (ABA) is markedly more developed and comprehensive. In particular, there are detailed provisions regarding inclusive and accessible banking.[159] Chapters 15 and 16 describe that banks should have accounts suitable for low-income earners, including no or low fee accounts, and promote them, albeit there is no obligation to serve.[160] These accounts would be suitable in many ways for an insolvent person. In this sense, whilst not forced upon banks – as there does not appear to be any hard-law in Australia – the culture and expectations for banks' standard of conduct seems more fair and equitable than in New Zealand.

The author had access to Jake Lilley of FinCap – a non-governmental organisation focused on financial mentoring – who was able to share his experiences working in a Melbourne-based community legal centre.[161] Lilley detailed that in his five years working there, he had "never heard of this issue [of insolvent persons having their bank accounts closed or suspended] arising".[162] This is substantial when contrasted with New Zealand-based CAP who, as noted above, have had to assist 72 per cent of their clients with changing bank accounts.[163]

As such, the issue of insolvent persons' access to bank accounts would appear to be a much less common issue in Australia. Given the fact that the major four banks in New Zealand are Australian-owned,[164] it is potentially open to New Zealand to follow Australia's soft-law path. This could be achieved by developing New Zealand's Code further or requiring the parent banks in Australia to encourage their subsidiaries in New

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158 Reserve Bank, above n 1.
159 Australian Banking Association "Banking Code of Practice" (1 March 2020) <www.ausbanking.org.au> at 21.
160 At 22–23.
161 Email from Jake Lilley (FinCap) to the author (8 July 2021).
162 Lilley, above n 161.
163 Ward, above n 68.
164 Reserve Bank, above n 1.

Zealand to behave in a similar manner, so as to not treat New Zealand customers differently. However, given that substantial lobbying to date and attempts at a soft-law approach of gentle persuasion in New Zealand have been unsuccessful, a hard-law approach is preferable.

VI RECOMMENDATION

Having reviewed various routes to policy change in Part IV and considered the path of Australia in Part V, the author's recommendation is to ensure the access of insolvent persons' to bank accounts and banking services through the FMAB.

This is for a number of reasons. Firstly, the issue is ultimately about the conduct of banks and therefore this Bill seems a natural fit - especially in contrast to the CA or the HRA. Secondly, this route allows a nuanced approach to be taken. By requiring banks to outline the approach they will take to insolvent persons, but with firm guidelines, a certain and fair approach is provided. Thirdly, it provides a greater likelihood of successful policy change in comparison to the more litigious routes – which would require the Commerce Commission to bring an action under the FTA – or the FTAB when enacted – or for someone to register a complaint with the Banking Ombudsman for a breach of the Code.

As such, the best path is the FMAB. The change in bank policy can be achieved as follows.

As stated previously, cl 446M introduces the requirement of a fair conduct programme that the banks must create and uphold and cl 546(oa) gives the Governor-General, on the advice of the Minister, the ability to prescribe what must be included through regulations. The author recommends that the regulations include a provision that states the following:

> When a customer enters an insolvency procedure under the Insolvency Act 2006, the financial institution (bank) must not close or suspend the bank account of the customer if this would cause significant hardship to the customer.
>
> Significant hardship is deemed to arise (without limitation) where insolvency is the sole basis on which the account is closed or suspended and

the customer does not have reasonable access to a bank account through another bank.

VII CONCLUSION

This paper addresses the unfair treatment of persons entering insolvency procedures by banks who – by closing or suspending those persons' bank accounts – are promoting the financial exclusion of an already statistically vulnerable group.

Part II of the paper sought to outline both the scope and extent of the problem. This solidified the case for legal intervention. In Part IV, the author subsequently appraised a number of both legislative and litigious routes, considering various legal and policy arguments, and discerning how to best strike a balance between interests moving forward. Part V considered the Australian soft-law approach – whilst concluding that a more hard-law approach was needed in New Zealand, to shift the problem that consumer advocate groups had so far unsuccessfully campaigned to solve, as discussed in Part III. In Part VI, the author recommended using the FMAB and the banks' fair conduct programmes to ensure a change in bank policy towards insolvent persons. The author concluded that, should this Bill be passed, it provides the most appropriate path forward.

In conclusion, access to a bank account is increasingly fundamental in order to participate in society. The financial exclusion of insolvent persons – at the hands of the major banks operating in New Zealand – is plainly unfair and not commercially justified. With high prospects of the FMAB being enacted and a compelling argument to incorporate the stated provisions into the banks' fair conduct programmes, New Zealanders should soon be able to bank on fair conduct.

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