BANKING WHILE INSOLVENT: ISSUES FACED BY INSOLVENT BANKING CUSTOMERS AROUND ACCOUNT CLOSURE OR SUSPENSION

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This article presents evidence that suggests the major banks in New Zealand have had a practice of using their discretionary 'terms and conditions' powers to close or suspend the bank accounts of customers who enter into an insolvency procedure. This can have a significant detrimental impact on the insolvent person and a blanket policy of this nature does not appear to be justified. This article suggests that an effective way to influence the banks' practices in this area could be through the conduct of financial institutions (CoFI) regime, expected to take effect in 2025.

I INTRODUCTION

Largely considered a last resort, entering an insolvency procedure – while 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 policies of the "Big Four"[1] banks in New Zealand in recent years have commonly subjected insolvent persons to the closure or suspension of their bank account. This article argues that closing or suspending the bank account of a customer who has gone into an insolvency procedure is an unfair policy that creates additional stress for insolvent persons and is not commercially justifiable for banks. The authors suggest that the law should incentivise a change in bank policy and that this could be achieved through the "fair conduct

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1 The "Big Four" banks in NZ are ASB, ANZ, BNZ and Westpac. See further Reserve Bank of New Zealand "The banking sector" (18 May 2022) <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>.

programme" requirements that will be imposed on banks under the recently enacted changes to the Financial Markets Conduct Act 2013, known as the conduct of financial institutions (CoFI) regime.[2]

This article first discusses the societal prevalence of personal insolvency and details the processes involved. It then analyses the Big Four banks' rights in relation to the provision of bank accounts to insolvent customers and presents evidence that banks have been consistently choosing to exercise their discretionary powers to close or suspend accounts.

The article then discusses the efforts undertaken by consumer advocate groups to encourage banks to change their policies, concluding that further action is likely required.

This article also considers various routes to effect change. After considering legal and policy factors, the article argues that the solution must balance the rights and interests of insolvent persons with the rights, interests and responsibilities of the banking sector. We propose that banks' fair conduct programmes – which will be required by s 446G of the Financial Markets Conduct Act (not yet in force)[3] – should include a policy that banks will not close or suspend the account of an insolvent person if that would cause significant hardship. This could be achieved by "soft" law measures (specifically, guidance from the regulator), or, if necessary, "hard" law (such as regulations).

II THE CONTEXT

A 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).[4] While these three procedures can all be voluntarily entered, bankruptcy can also be imposed by a court order after an application is made by a creditor.[5]

First, a person is able to enter a debt repayment order (DRO), assuming they satisfy the eligibility criteria.[6] The relevant application can be submitted to the Official Assignee by the debtor, or by a creditor with the debtor's consent.[7] 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

2 See Financial Markets (Conduct of Institutions) Amendment Act 2022, s 12, which inserts subpart 6A into the Financial Markets Conduct Act 2013.

3 Subpart 6A (which includes s 446G) is expected to come into force on 31 March 2025: Financial Markets (Conduct of Institutions) Amendment Act 2022 Commencement Order 2023, cl 2.

4 Insolvency Act 2006, ss 7–8.

5 Section 10(2)(a).

6 Section 8(1)(b).

7 Section 341.

period to make repayments.[8] During this period, creditors are unable to add further interest or charges to the debt or take further action against the debtor.[9] 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.[10]

Secondly, a person can enter a no asset procedure (NAP), again assuming they satisfy the eligibility criteria.[11] This involves the debtor making an application to the Official Assignee.[12] The procedure lasts 12 months.[13] At the end of the NAP, the individual is released from the debts included in the NAP.[14] During the procedure, creditors are largely unable to enforce debts against the debtor.[15] 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 been adjudicated bankrupt before, and have total debts of more than $1,000 and less than $50,000.[16] The $50,000 excludes student loans, fines and reparations.[17]

Thirdly, a person can enter a bankruptcy procedure.[18] This requires owing more than $1,000.[19] 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.[20] 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

8 Section 340; and New Zealand Insolvency and Trustee Service *Personal Insolvency Information* (Ministry of Business, Innovation and Employment, July 2023) at 5–6.

9 At 5.

10 At 5.

11 Insolvency Act, s 8(1)(c).

12 Section 362.

13 Section 377(1).

14 Section 377A.

15 Section 369.

16 Section 363; and Insolvency and Trustee Service, above n 8, at 6.

17 At 6–8.

18 Insolvency Act, s 7.

19 Sections 13 and 45.

20 Section 10.

income.[21] It is a three-year procedure and at the end of the term, the debtor is released from all of the debts included in the bankruptcy.[22]

B Personal Insolvency Statistics

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

The authors had access to unreleased survey information held by the New Zealand Insolvency and Trustee Service (ITS). Also known as the Official Assignee's Office, the ITS is part of the Ministry of Business, Innovation and Employment (MBIE) and administers all insolvency procedures in New Zealand.[23] These procedures – as discussed above – include DROs, NAPs and bankruptcies.[24] The ITS surveyed their clients who entered into an insolvency procedure in the years 2020 to 2021.[25] The responses revealed a number of trends.

First, COVID-19 had an impact on personal insolvency.[26] Of the 550 people surveyed, 42 per cent (232 people) were financially impacted by COVID.[27] Of those 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 immunocompromised and two per cent had recently returned from overseas.[28]

Secondly, the number of individuals entering insolvency procedures who subsequently face banking restrictions appears to be increasing.[29] In 2019, 42 per cent experienced some form of banking restriction.[30] Comparatively, in 2021, 64 per cent of respondents (353 people) experienced

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21 Section 50.

22 Section 290.

23 New Zealand Insolvency and Trustee Service "About Insolvency and Trustee Service" (24 April 2023) <www.insolvency.govt.nz>.

24 Insolvency and Trustee Service, above n 23.

25 Email from New Zealand Insolvency and Trustee Service to Carys Robson (author) regarding survey information (17 August 2021) [ITS survey].

26 ITS survey, above n 25.

27 ITS survey, above n 25.

28 ITS survey, above n 25.

29 ITS survey, above n 25.

30 ITS survey, above n 25.

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).[31]

The ITS Insolvency Statistics and Debtor Profile Report (ITS Report) shows the demographics of those entering insolvency procedures.[32] Although it reveals that personal insolvency affects people from a broad range of groups, more vulnerable members of society appear to be 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.[33] Younger people are more affected by insolvency, with the 25 to 29-year-old age group being the most common to enter NAP and DRO procedures.[34] Additionally, the most common age group for bankruptcy reduced from 40 to 44-year-olds in 2017 to 2018, to 35 to 39-year-olds in 2019 to 2020.[35] Māori are disproportionately represented in both NAPs and DROs. 28 per cent of those entering NAPs[36] and 25 per cent of those entering DROs[37] identified as Māori, whilst accounting for 17 per cent of the New Zealand population at the time.[38] 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;[39] for those entering a NAP, the number was approximately 59 per cent;[40] and for bankruptcies, approximately 28 per cent.[41] Lastly, "ill health" and "lack of health insurance" were key drivers of insolvency for over 10 per cent of NAP and DRO applicants and just under 10 per cent of bankruptcies.[42]

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31 ITS survey, above n 25.

32 New Zealand Insolvency and Trustee Service *Insolvency Statistics and Debtor Profile Report* (Ministry of Business, Innovation and Employment, 30 June 2020).

33 At 12.

34 At 12.

35 At 12.

36 At 21.

37 At 14.

38 At 14 and 21; and Statistics New Zealand "2018 Census ethnic group summaries" <www.stats.govt.nz>.

39 Insolvency and Trustee Service, above n 32, at 16.

40 At 23.

41 At 28.

42 At 15, 22 and 27.

As discussed below, the debtor's bank will often close or suspend the debtor's bank account. This is not a legal requirement of the insolvency procedures but rather appears to be a policy of the major banks in New Zealand.

C 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 ANZ Bank New Zealand Ltd (ANZ), ASB Bank Ltd (ASB), the Bank of New Zealand (BNZ) and Westpac New Zealand Ltd (Westpac).[43] Our focus on these banks is driven by their substantial share of the banking market[44] and thus the broader impact of their policies on insolvent individuals compared to the smaller banks. According to the Reserve Bank of New Zealand, these four banks are "responsible for 85% of bank lending" in New Zealand.[45]

1 ANZ

As outlined in its General Terms and Conditions, ANZ has the right to refuse a person's use of their account if the individual is "bankrupt or in liquidation, or something similar happens to [them]".[46] ANZ is also able to close the account for the same reason.[47] "Bankrupt" is a clear reference to the bankruptcy procedure, whilst "something similar" would likely 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.[48] ANZ will – if there is any money left – pay this to the individual and wind up the banking relationship.[49]

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 the bank:[50]

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43 Reserve Bank, above n 1.

44 Reserve Bank, above n 1.

45 Reserve Bank, above n 1.

46 ANZ "General Terms and Conditions" (14 March 2024) <www.anz.co.nz> at 29.

47 At 30.

48 At 31. If there was money owed to the bank, that would be a provable debt in the insolvency procedure.

49 At 31.

50 ASB "Personal Banking Terms and Conditions" (8 February 2024) <www.asb.co.nz> at cl 13.1.

> … 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 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.[51] If the account is closed, the account holder must repay any money owing and return any cards or devices, and ASB will transfer any remaining money to the account holder.[52] 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 is able to 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".[53] It defines a "Bankruptcy Event" as any of the following events under the IA:[54]

- 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, a DRO – formerly described as a Summary Instalment Order[55] – and bankruptcy. If the account is closed, the person must repay any funds owing to BNZ and destroy any cards,[56] and BNZ will pay or transfer the funds from the account to the individual.[57]

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51 See cls 29–30.

52 At cl 30.1.

53 Bank of New Zealand "Standard Terms and Conditions" (22 February 2024) <www.bnz.co.nz> at cl 8.2(b).

54 At cl 25.

55 New Zealand Insolvency and Trustee Service "Debt Repayment Order (DRO)" (28 May 2021) <www.insolvency.govt.nz>.

56 BNZ, above n 53, at cl 8.7.

57 At cl 8.8.

4 *Westpac*

The General Terms and Conditions of Westpac uses similar language to BNZ of a "Bankruptcy Event".[58] If a person suffers a Bankruptcy Event, Westpac is entitled to close or suspend any accounts.[59]

5 *Evidence of banks using their contractual rights*

It is important to note the distinction between the banks' contractual rights, and how the banks have been acting in practice. As seen above, the contractual terms are phrased in such a manner that provides the banks with broad discretion. Evidence, however, suggests that the Big Four have in fact consistently been 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.[60] 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.[61] This strongly suggests that banks have been choosing to act on the powers they have through their terms and conditions and closing accounts of persons entering insolvency procedures. The subsequent difficulties this produces, 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 to close an insolvent person's bank account, this 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 while organising this change.

1 *Bank account closure*

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

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58 Westpac "General Terms and Conditions and Customer Commitment" (28 September 2023) <www.westpac.co.nz> at cl 3.2.

59 At cl 3.2. Kiwibank – New Zealand's state-owned bank – also has the right to close the account of an insolvent person as per its General Terms & Conditions. Other smaller banks with this contractual right include The Co-operative Bank, Heartland Bank, Southland Building Society Bank (SBS Bank) and Rabobank.

60 ITS survey, above n 25.

61 Email from Michael Ward (External Engagement and Social Policy Advisor, Christians Against Poverty) to Carys Robson (author) regarding insolvent clients (17 August 2021).

First, 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 in 2019 by (then) Assistant Governor of the Reserve Bank, Christian Hawkesby, "[a]t the moment there is no legal obligation for a retailer to accept cash".[62] This is an increasing occurrence as some push for a cashless society, particularly in light of COVID-19,[63] and is amplified by the shift towards online payment which requires a bank account and often a credit or debit card. Many companies offer discounts for paying online – for example, the New Zealand Transport Agency discounts online payment for vehicle registration.[64] Power companies also incentivise online payment through discounts and often add additional administrative fees to in-person cash payment.[65] Establishing automatic payments for regular bills, such as rent, also requires a bank account – and such bills are increasingly difficult to pay using cash.[66] According to Ward, these factors means that the loss of a bank account "compounds financial hardship for those in insolvency".[67]

Secondly, a person needs a bank account to collect a tax rebate[68] and to receive a benefit.[69] From the statistics outlined previously, we can assume that approximately 40 per cent of insolvent persons are beneficiaries.[70] 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".[71]

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 on their property or on their person.

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62 1 News "Do you want the right to pay in cash?" (29 August 2019) <www.1news.co.nz>.

63 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>.

64 New Zealand Transport Agency "Administration fees" <www.nzta.govt.nz>.

65 Contact "Flexible Billing Options" <www.contact.co.nz>; Genesis "Billing and payments" <www.genesisenergy.co.nz>; and Mercury "Paying your bill" <www.mercury.co.nz>.

66 Ward, above n 61.

67 Ward, above n 61.

68 New Zealand Government "Getting a tax refund" (18 March 2022) <www.govt.nz>.

69 New Zealand Government "Applying for a benefit" (10 August 2021) <www.govt.nz>.

70 Insolvency and Trustee Service, above n 32.

71 Ward, above n 61.

2 *Changing bank accounts*

Moving from one bank to another can cause 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.

First, the process of opening a new account can be complex. With insolvency, it is even more protracted.[72]

Secondly, accessibility is an issue. An individual may have to travel a substantial distance to their new bank. This effect is particularly pronounced with smaller banks – those more likely to accept an insolvent client – as branches are often scarce.[73] 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".[74]

Thirdly, as Ward stated, it is "not only the operational exercise of changing bank accounts"; there is also the creation of additional stress, shame and stigma.[75] It is the:[76]

> … 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 authors with details of the experience of three CAP clients as representative examples – showing the extent of the problem.

The first example was an 80-year-old woman who was forced to change bank accounts because her current major bank had frozen her account due to insolvency.[77] Ward described that:[78]

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72 Ward, above n 61.

73 See generally ANZ "All ANZ branches" <www.anz.co.nz>; ASB "Find a branch or ATM" <www.asb.co.nz>; and Ward, above n 61.

74 Ward, above n 61.

75 Ward, above n 61.

76 Ward, above n 61.

77 Ward, above n 61.

78 Ward, above n 61.

> 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.

The second example was a mother of four children who had no option but to change bank accounts after becoming insolvent.[79] Ward continued:[80]

> 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.

The third example was a couple living in a small rural town who became insolvent.[81] There were only two banks close to them – neither of which provided an appropriate banking product for an insolvent person.[82] Ward stated:[83]

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

III 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 … so that 'people and whānau are thriving and able to meet their needs and achieve their aspirations, free from problem debt'".[84] In

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79 Ward, above n 61.

80 Ward, above n 61.

81 Ward, above n 61.

82 Ward, above n 61.

83 Ward, above n 61.

84 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. See also Ministry of Social Development "The Safer Credit and Financial Inclusion Strategy" <www.msd.govt.nz>.

2020, a SCAFI workshop considered issues of access to bank accounts and CAP was invited to attend the forum.[85] However, the New Zealand Bankers Association (NZBA) was unable to broker an agreement between the banks.[86] Instead, 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".[87]

IV LEGAL AND POLICY CONSIDERATIONS

Although 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 part 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. It would be inappropriate to move forward with a policy change without having regard to the impact on banks.

A 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 would appear to be no commercial justification for what appears to be 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 wages.[88] The banks may have a justifiable concern about providing credit to insolvent persons, but this does not require bank account closure.[89] However, an insolvent person, for the aforementioned reason, is unlikely to be treated as a potential borrower (and therefore will not be a source of significant interest income for the bank), at least while in an insolvency procedure. Furthermore, by holding only a limited amount of money in their account, banks are largely unable to generate a return from any money deposited by an insolvent person. These latter considerations may well be driving the current policy. Given that insolvent customers would represent a small fraction of a bank's customer base and that

85 Ward, above n 61.

86 Ward, above n 61.

87 Ward, above n 61.

88 Insolvency and Trustee Service, above n 32, at 16, 23 and 28.

89 In this context note the Insolvency Act, ss 360, 371 and 433A. These sections make it an offence for the debtor to obtain credit over a certain threshold. The threshold at which the prohibition applies is credit of or above $1000. In addition, defences are available if the debtor informs the creditor of the debtor being in an insolvency procedure.

insolvency is a temporary state, combined with the very strong argument that banking is an essential service in today's society, these considerations do not justify account closure on the grounds of commercial expediency.

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.[90] This theory is based on insolvency law creating "'as few dislocations as possible' from pre-bankruptcy market allocations".[91] 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".[92] 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. As will be discussed below, the bank has an equal – if not greater – interest in providing insolvent persons with bank accounts.

B Relevant Responsibilities of Banks Under Current Law

As acknowledged above, banks have commercial interests that must be considered. However, in pursuit of these interests, the banks must not breach their responsibilities. These responsibilities include following the law, as well as aligning their actions with any voluntary mechanisms to which they are party. Banks are subject to numerous legal obligations in relation to the provision of banking services. These include obligations under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. They also have obligations under consumer credit law when providing credit. If circumstances suggested that provision of a bank account might cause a bank to breach a legal obligation (for example, the bank had reason to believe a bank account was being used for fraudulent purposes or money laundering activities), the bank would be justified in using its discretionary power to close an account. The focus of this article is on what appears to be a blanket policy to close or suspend a customer's account outside of these types of situations.

The following section considers if there are ways that current bank policy can be challenged under existing and proposed law.

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90 Joseph Spooner "Seeking Shelter in Personal Insolvency Law: Recession, Eviction and Bankruptcy's Social Safety Net" (2017) 44 Journal of Law and Society 374, at 375 and 380.

91 At 375.

92 At 381.

1 Fair Trading Act 1986

(a) Unfair contract terms

As explained above, the notion that banks are entitled to close the account of insolvent persons 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.[93] 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.[94] In order to make a declaration, a number of statutory requirements must be met.

First, the contract must be a consumer contract.[95] 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.[96] A contract for personal banking services satisfies this requirement.

Secondly, the contract must be a standard form contract.[97] 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.[98]

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.[99] 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: first, the term must "cause a significant imbalance in the parties' rights and obligations"; second, the term

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93 Fair Trading Act 1986, s 46H.

94 Section 26A(1)(b).

95 Section 46I(2)(a).

96 Section 2.

97 Section 46I(2)(b).

98 Section 46J.

99 Sections 46I(2)(c) and 46K.

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.[100] 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.[101]

A leading case on this provision is the 2019 New Zealand High Court decision in *Commerce Commission v Home Direct Ltd*.[102] This was the first declaration made by the High Court under that provision.[103] 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 "did not provide any corresponding benefit to consumers".[104] Home Direct received "guaranteed future income", whilst the customers were neither entitled to interest on their money, nor discounts on future purchases.[105] It was held to be 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.[106] 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.[107]

Determining 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.

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 – namely, 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[108] – essentially showing that 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

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100 Section 46L(1).

101 Section 46L(2).

102 *Commerce Commission v Home Direct Ltd* [2019] NZHC 2943, [2019] 3 NZLR 904.

103 At [1].

104 At [39] and [42].

105 At [39] and [42].

106 At [45]–[47].

107 At [55] and [57].

108 See for example BNZ, above n 53, at cl 8.1.

becomes insolvent, it does not guarantee the repayment of money in current accounts, savings accounts or term deposits, as the money is an unsecured and unsubordinated debt.[109] 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 above, 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. Also as discussed above, consumers face serious issues if their bank accounts are closed, thus leading to detriment to consumers caused by 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[110] – in all the banks' terms and conditions reviewed by the authors, the relevant provision was in the middle of a lengthy document and was not prominent. However, transparency is not decisive, so this would not solely lead the term to be classed as unfair.[111]

In summary, the power of banks to close the accounts of insolvent persons could potentially be challenged as an unfair contract term. However, this is not the best solution. Only the Commerce Commission is able to make a claim,[112] and it would be an expensive and time-consuming procedure with no guarantee of success.

(b) Unconscionable conduct

The Fair Trading Amendment Act 2021 – which commenced on 16 August 2022 – introduced a prohibition on "unconscionable conduct".[113] Under the new s 7 of the Fair Trading Act, 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".[114] As such, although the power to close the accounts is a contractual right, the bank's conduct is not prevented from being categorised as unconscionable. In its consideration of unconscionability, the court must look to a number of factors under the new s 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

109 ANZ, above n 46, at 10.

110 *Home Direct*, above n 102, at [55].

111 At [57].

112 Fair Trading Act, s 46H.

113 Fair Trading Amendment Act 2021, s 6.

114 Fair Trading Act, s 7.

protect their interests.[115] The court is also able to consider the terms of the contract, the extent to which 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.[116] These factors are comparable to the analysis the court is required to undertake when determining whether a contractual term is unfair, and the comments made above that suggest the relevant terms would not be found to be unfair because of the difficulties in finding an imbalance in bargaining power are relevant here, counting against a finding of unconscionability. 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 in the Fair Trading Act is modelled on a corresponding provision in the Australian Competition and Consumer Act 2010 (CCA).[117] The CCA seeks "to prevent trading practices that are so harsh or oppressive that they go against good conscience, and are clearly unfair and unreasonable".[118] The Australian courts have emphasised that unconscionable conduct must be considered "by reference to the norms of society" including notions of honesty and fairness.[119] Courts are likely to interpret unconscionable conduct in New Zealand, in part, by reference to this Australian standard.[120] This is however a relatively high bar and has been characterised "as a 'safety net' to target relatively rare cases of particularly egregious conduct".[121] The banks' conduct would likely fall short of this.

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

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

115 Section 8(1).

116 Section 8(2).

117 Ministry of Business, Innovation and Employment *Discussion paper: Protecting businesses and consumers from unfair commercial practices* (December 2018) at 38.

118 At 38–39.

119 At 39.

120 At 41.

121 At 7.

122 New Zealand Bankers Association "Our Members" <www.nzba.org.nz>.

of Banking Practice (the 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, it is enforceable by lodging a complaint under the Banking Ombudsman Scheme.[124] 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".[125] 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".[126] The other principles concern clear and effective communication, privacy and confidentiality, responsible provision of credit and effective dealing with concerns and complaints.[127] 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".[128] 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".[129] The Code also states banks will "do [their] best to meet the needs of *all* [of their] customers" – which should include insolvent customers.[130] Both of these notions seem contrary to the policy of the Big Four to close or suspend the account of insolvent customers.

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.[131] However, this is not the ideal solution. The Banking Ombudsman may be reluctant to intervene in bank policy to this extent.

C Responsibilities of Banks under Conduct of Financial Institutions Law (not yet in force)

The Financial Markets (Conduct of Institutions) Amendment Act 2022 amended the Financial Markets Conduct Act 2013 (FMCA). The amendments, which come into effect in 2025, subject the

123 New Zealand Bankers Association *What you can expect from your bank: The Code of Banking Practice* (April 2021) at 2.

124 At 2.

125 At 2.

126 At 3.

127 At 3.

128 At 3.

129 At 3.

130 At 3 (emphasis added).

131 At 2.

banks to a "fair conduct principle".[132] It is possible that closing or suspending the bank account of an insolvent person without good reason might breach this principle. The aim of the amendments is to ensure that financial institutions – which term includes banks – treat consumers fairly.[133] Under the new section 446C of the FMCA, 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".[134] The banks must adhere to this principle when designing, offering or providing any services or products to their customers, as well as when having any dealings with consumers in relation to a service or product.[135]

As a part of this broader fair conduct principle, banks are required to create and comply with a "fair conduct programme".[136] New section 446J 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 managing the provision of services to consumers. Banks are specifically required, when setting policies under the fair conduct programme, to have regard to the types of consumers they deal with, including consumers in vulnerable circumstances.[137]

New section 546(1)(oa) (which came into force in 2022) enables 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. Such regulations could require banks' fair conduct programmes to include detailed rules and policies on how banks will act when a customer enters an insolvency procedure. Specifically, the regulations could forbid banks from closing or suspending customer accounts if this would cause significant hardship. Given the essential nature of banks and their offered services, including in the fair conduct programme, a requirement in regulations about how banks will treat insolvent customers would align with the purpose of the CoFI regime.

Including such a requirement in regulations is a hard law approach. We suggest that the same result could be achieved by a soft law approach. A soft law approach could be that the Financial Markets Authority (FMA) includes, in the guidance it provides to banks as to what must go into banks' fair conduct programme, specific provisions that address how to deal with customers who go into an

132 Financial Markets Conduct Act, ss 446C and 446D (as at 31 March 2025), as amended by Financial Markets (Conduct of Institutions) Amendment Act, s 12.

133 Section 446A.

134 Section 446C.

135 Section 446D.

136 Section 446G.

137 Section 446J(2)(d).

insolvency procedure. In particular, regulator guidance could include that a fair conduct programme must state that an account of a customer who has gone into an insolvency procedure must not be closed or suspended if that would cause the customer significant hardship.[138]

D Rights and Interests of Insolvent Persons

The rights and interests of insolvent persons should also be considered independently of the banks' responsibilities. This section addresses considerations relevant to ensuring the provision of essential services to vulnerable people, as well as considering the important social insurance function of insolvency procedures.[139]

1 Companies Act 1993

Under s 275 of the Companies Act 1993 (CA), Parliament recognises that certain services are essential. As such, suppliers are prohibited from refusing to supply these essential services to the liquidator of a company by reason of non-payment.[140] Crucially, however, this provision only relates to corporate insolvencies – where a company, rather than a natural person, is unable to pay its debts. With that noted, under s 275(1), essential services include gas, electricity, water and telecommunication services. It can be (and has been) argued that banking is also an essential service.[141] 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 CoFI amendments. 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.

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138 The FMA periodically issues guidance to financial market participants on how to comply with various aspects of financial markets law administered by the FMA. Guidance notes explain how the FMA interprets the law, describes the principles underlying the FMA's approach, can give practical examples about how to meet obligations, and explain when and how the FMA will exercise specific powers under legislation.

139 Spooner, above n 90, at 375.

140 Companies Act 1993, s 275(3)(a).

141 See Thomas Wilhelmsson "Services of general interest and European private law" in Charles EF Rickett and Thomas GW Telfer (eds) *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003) 149 at 154–155.

2 Human Rights Act 1993

The Human Rights Act 1993 (HRA) prohibits suppliers to the public from refusing to provide goods, services and facilities to an individual on the grounds listed in s 21.[142] Notably, s 44(2) includes banking within the meaning of "facilities". Closing or suspending a bank account on any prohibited ground 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 a recipient of a benefit under the Social Security Act 2018 or the Accident Compensation Act 2001.[143] This indicates that Parliament could be open to including insolvency status as a ground on which individuals should not be discriminated against.

In 2017, Lisa Cowe lobbied for such an amendment to the HRA – seeking to add "personal insolvency" to s 21 after becoming insolvent herself.[144] She additionally requested that the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry investigate the Australian-owned banks in New Zealand.[145] Unfortunately, nothing seems to have transpired from this attempt.

Due to the lack of traction gained in the past, an HRA amendment is unlikely to be the best solution.

3 Social insurance theory

In the context of 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.[146] The aim is to "provide relief and a 'fresh start' to over-indebted [individuals] who fall through gaps in the social safety net".[147] This theory rests on the "negative economic consequences" of excessive debt in terms of "triggering" or "prolonging" economic recession.[148]

This theory supports insolvent persons' access to bank accounts for two reasons. First, if an underlying purpose of insolvency is to give insolvent individuals a "fresh start", closing or suspending their bank accounts is counterproductive. As mentioned above, this causes a number of flow-on effects

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142 Human Rights Act 1993, s 44.

143 Section 21(1)(k).

144 Rob Stock "Christchurch woman lobbies to make it a human right to have a bank account" (22 October 2018) Stuff <www.stuff.co.nz>.

145 Stock, above n 144.

146 Spooner, above n 90, at 375.

147 At 374.

148 At 376.

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

Australia provides a natural comparison of the law in this area. This is in part due to the close economic ties between the countries, but more 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.[149]

In contrast to the NZBA's Code of Banking Practice, the Australian Banking Association's Banking Code of Practice is markedly more developed and comprehensive. In particular, there are detailed provisions regarding inclusive and accessible banking.[150] Chapters 15 and 16 state that banks should have accounts suitable for low-income earners, including no- or low-fee accounts, and promote them, albeit there is no legal obligation to provide an account.[151] These accounts would be suitable for an insolvent person in many ways. Banks also agree under this Code that they will take "extra care" with customers who are experiencing vulnerability, including by reason of financial circumstances.[152] While not forced upon banks – as there does not appear to be any hard law on this in Australia – the culture and expectations for banks' standard of conduct seems fairer and more equitable in this regard than in New Zealand.

The authors 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.[153] 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".[154] This is significant when contrasted with New Zealand-based Michael Ward of CAP who, as noted above, said that CAP had to assist 72 per cent of their clients with changing bank accounts.[155]

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149 Reserve Bank, above n 1.

150 Australian Banking Association *Banking Code of Practice* (1 March 2020) at 21.

151 At 22–23.

152 At 22.

153 Email from Jake Lilley (Senior Policy Advisor, FinCap) to Carys Robson (author) regarding community legal work in Melbourne, Victoria (8 July 2021).

154 Lilley, above n 153.

155 Ward, above n 61.

This suggests that insolvent persons' access to bank accounts would appear to be less of an issue in Australia. Given the fact that the four major banks in New Zealand are Australian-owned,[156] it is potentially open to New Zealand to follow Australia's 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 Zealand to behave in a similar manner, so as not to treat New Zealand customers differently.

VI RECOMMENDATION

Having reviewed various routes to encouraging policy change on the part of banks, our recommendation is to ensure the access of insolvent persons to bank accounts and banking services through the CoFI amendments.

This is for a number of reasons. First, the issue is ultimately about the conduct of banks, and therefore the law around the conduct of financial institutions 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, guided by clear formal guidance from the regulator, a certain and fair approach is provided. Thirdly, it provides a greater likelihood of successful policy change in comparison to the more litigative routes, which would require the Commerce Commission to bring an action under the FTA, or for someone to register a complaint with the Banking Ombudsman regarding a breach of the Code.

We suggest that the change in bank policy could be achieved as follows.

As stated previously, new subpart 6A of the FMCA will introduce the requirement of a fair conduct programme that the banks must create and uphold, and s 546(oa) of the FMCA gives the Governor-General, on the advice of the Minister, the ability to prescribe what must be included through regulations.

The FMCA could issue a formal guidance note to banks on the content of fair conduct programmes that requires a specific policy around treatment of customers who go into an insolvency procedure. The guidance could require banks to have a policy of not exercising their power to close or suspend an account of such a customer if that would cause significant hardship to the customer, unless the bank had good reason to do so. Examples of what might constitute significant hardship could be provided – for example, if the customer is unable to easily obtain a bank account at another bank. Examples of "good reason" might include the risk of breach of a legal obligation against the bank or having grounds to suspect that the customer might use their account for fraudulent purposes.

An alternative would be to promulgate a regulation that specifically addresses the conduct of banks in this context. For example, a regulation could state:

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156 Reserve Bank, above n 1.

> 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.
>
> This prohibition does not apply if the bank has reasonable grounds to believe that the customer is using, or will use, their account for illegal purposes.

VII CONCLUSION

This article addresses the treatment of persons entering insolvency procedures by banks who, when closing or suspending those persons' bank accounts, are facilitating the financial exclusion of an already statistically vulnerable group.

We have appraised a number of legislative and litigative routes, considering various legal and policy arguments, and discerning how to best strike a balance between interests.

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 unfair and would appear not to be commercially justified. There is a compelling case for the incorporation of specific provision in banks' fair conduct programmes that restricts the ability of banks to exercise their discretion to close or suspend an account without good reason.

POSTSCRIPT

Since this article was written, there has been some movement by at least one of the major banks to change their practices in relation to insolvent customers. In January 2024, Westpac New Zealand's Chief Financial Officer announced that Westpac had recently updated its policies so that people going through bankruptcy could keep their transactional accounts open, as well as retain their debit cards.[157] This suggests that banks are starting to recognise the hardship that can be caused by closing or suspending accounts of persons going through insolvency procedures. This evidence of a change in practice suggests that a soft law approach, as outlined above, may at least initially be the best way forward to encourage other banks to modify their practices.

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157 See Interest.co.nz "CEO Catherine McGrath explains why Westpac NZ now allows people going through bankruptcy to keep transactional bank accounts open" (31 January 2024) <www.interest.co.nz>. People in bankruptcy were one of the marginalised groups identified at high risk of having their accounts closed by banks, or being refused a new account, once they were declared bankrupt, in a report released by Westpac in April 2023: see Ben Harris-Finnigan, Mondy Jera and Afnan Kayed *Westpac NZ Access to Banking in Aotearoa Report* (ThinkPlace, April 2023).