QUT Law Review ISSN: Online-2201-7275
Volume 17, Issue 1, pp. 97–113 DOI: 10.5204/qutlr.v17i1.704

SHOULD PENSION SAVINGS BE A PROTECTED PROPERTY AT BANKRUPTCY?

TRISH KEEPER*

In 2015, the New Zealand Court of Appeal held, in Trustee Executors Ltd v The Official Assignee,[1] *a test case brought by the Official Assignee (OA), that the OA could not access the KiwiSaver balances of a bankrupt. In response, the Ministry of Business, Innovation and Employment released a Discussion Document in July 2016, proposing a law change to make some, or all, of a bankrupt's pension savings available to the OA for the benefit of a bankrupt's creditors. This article outlines the Court of Appeal decision and its implications within the context of both the New Zealand Insolvency Act 2006 and the KiwiSaver Act 2006. It then critically discusses the law change proposed in the Discussion Document and suggests that, given the significant difficulties with this proposal, more limited reforms be implemented to prevent bankrupts unfairly using the inalienability of pension savings to defeat the interests of creditors.*

I INTRODUCTION

The 2015 decision of the New Zealand Court of Appeal in *Trustees Executors Ltd v The Official Assignee*[2] ('*Trustees Executors*') highlighted the tension that exists in New Zealand between the government objective of promoting retirement savings and certain objectives of insolvency law. In this case, the Court of Appeal held that New Zealand insolvency law does not override the government objective of promoting retirement savings in limited circumstances. If a debtor in New Zealand is an adjudicated bankrupt, under the *Insolvency Act 2006* and subject to specified statutory exceptions, all of the debtor's property vests in the Official Assignee ('OA').[3] The OA's principal responsibility is then to realise such property and distribute its proceeds to the bankrupt's creditors in accordance with the Act. In most jurisdictions, including Canada, the United Kingdom and Australia,[4] the specified exceptions include retirement savings invested in private pension schemes.[5] In contrast, in New Zealand, only some forms of

* BA, LLB (University of Otago), LLM (Victoria University of Wellington), Senior Lecturer in Commercial Law, School of Accounting and Commercial Law, Victoria University of Wellington, New Zealand. The author thanks the two anonymous referees for their insightful feedback on the earlier draft of this article.

[1] [2015] NZCA 118.

[2] Ibid.

[3] *Insolvency Act 2006* (NZ) s 101 ('*Insolvency Act*').

[4] Donna McKenzie Skene, 'The Composition of the Debtor's Estate on Insolvency: A Comparative Study of Exemptions' (2011) 20 *International Insolvency Review* 29, 38–9.

[5] See also the US Supreme Court decision in *Patterson v Shumate* 504 US 753 (1992), where the trustee sought to recover a debtor's interest in an *Employee Retirement Income Security Act* (ERISA) plan for inclusion in the bankruptcy estate. The Supreme Court upheld the decision of the Court of Appeals for the Fourth Circuit (943 F 2d 362) that a debtor's interest in ERISA-qualified plan was excludable from estate property. In addition, to considering the wording of the relevant provisions of the Bankruptcy Code, which excluded from a debtor's estate an interest in property subject to restriction on transfer enforceable under applicable non-bankruptcy law, the Supreme Court held (at 765) this interpretation was consistent with the public policy of protecting pension benefits underlying ERISA. The Court referred to its decision in *Nachman Corporation v Pension Benefit Guaranty Corporation*, 446 US 359, 375 (1980) where that goal was described as ensuring that 'if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — he actually will receive it'.

pensions are given statutory protection in the event of bankruptcy. In situations where there is no express legislative guidance, New Zealand courts have had to determine whether specific forms of pension savings are available to the OA upon bankruptcy.

The *Trustees Executors* decision relates to KiwiSaver, a private, workplace superannuation scheme that has become the most common form of pension scheme in New Zealand. It was set up and continues to be regulated by the *KiwiSaver Act 2006*. The Court of Appeal decision in this case determined that a member's KiwiSaver interest is inalienable against the OA, but the case has highlighted the legislative lacuna with respect to the alienability of private pension schemes in New Zealand. The first part of this article outlines the legislative context in which the *Trustees Executors* case arose and then outlines the High Court and Court of Appeal decisions. The second part of the article discusses the Discussion Document published by the Ministry of Business Innovation and Employment ('MBIE') in July 2016,[6] which arose out of the decision in the Trustee Executors case. The Discussion Document proposes that all forms of private retirement savings should be subject to the same rules, namely, that all or part of a bankrupt's retirement savings should be accessible by the OA, regardless of the type of scheme in which such savings are invested. This article reviews this proposal and argues that it is ill-conceived, would be difficult to apply in practice – particularly with respect to defined benefit schemes – and fails to take into account the rehabilitative objective of New Zealand's insolvency law. In addition, it is an approach that is diametrically opposite to that taken in other advanced economies.

The article argues that the MBIE objective of consistency and certainty in this area can be achieved by an amendment to the *Insolvency Act 2006* stating that all private pension savings are inalienable and do not vest in the OA on adjudication. The article also recommends that the Act be amended by the introduction of new clawback powers under which the OA can seek the divestment of funds paid into a pension scheme made with the intention to defeat creditors.

II BANKRUPTCY UNDER NEW ZEALAND LAW — THE LEGISLATIVE CONTEXT

A *Bankruptcy and the Insolvency Act 2006*

The origin of New Zealand's insolvency law is English personal insolvency law.[7] Early New Zealand bankruptcy statutes were based on the then current statutory regimes in the United Kingdom and subsequently in Australia.[8] Although the current New Zealand statute, the *Insolvency Act 2006* ('*Insolvency Act*') did introduce a new formal insolvency procedure[9] for a debtor who has no realisable assets, the rules governing bankruptcy in the Act are largely unchanged in substance from earlier New Zealand personal insolvency statutes.[10]

Briefly, under the Act, on adjudication of bankruptcy, all property belonging to the bankrupt vests in the OA.[11] A bankrupt is entitled to retain certain assets, including tools of trade,

[6] Ministry of Business, Innovation and Employment (NZ), *Discussion Document: Accessibility of Retirement Savings in Bankruptcy for the Repayment of Creditors* (2016).
[7] For a history of New Zealand's laws of bankruptcy see Ivan A Hansen, *Bankruptcy in the Beginning: A Historical Survey of the Laws of Bankruptcy* (New Zealand Institute of Credit and Financial Management, 1980).
[8] Lynne Taylor and Grant Slevin, *The Law of Insolvency in New Zealand* (Thomson Reuters, 2016) 3–5.
[9] The no asset procedure was introduced as an alternative to bankruptcy for debtors with no realisable assets and debts of not more than NZ$40 000: *Insolvency Act* ss 361–77.
[10] Taylor and Slevin, above n 8, 5.
[11] *Insolvency Act* s 101.

household and personal effects and a motor vehicle up to a value of NZ$6000.[12] Upon adjudication of bankruptcy, creditors of the bankrupt are unable to pursue individual actions against the bankrupt. Instead, the OA acts for all unsecured creditors to realise assets on behalf of the collective interests of the unsecured creditors. A bankrupt is normally automatically discharged from bankruptcy after a three-year period.[13]

Vesting of property in the OA, occurs automatically under section 101(a) of the *Insolvency Act* without the OA having to take any steps to facilitate transfer. The section provides:

> all property … belonging to the bankrupt or vested in the bankrupt vests in the Assignee without the Assignee having to intervene or take any other step in relation to the property, and any rights of the bankrupt in the property are extinguished; and
> the powers that the bankrupt could have exercised in, over, or in respect of any property… for the bankrupt's own benefit vest in the Assignee.

The term 'property' is given a broad meaning for the purposes of the Act as 'property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal and includes rights, interests and claims of every kind in relation to property however they arise'.[14] Sections 102 to 104 also deal with the status of the bankrupt's property during bankruptcy. Section 102(a) provides that all property which the bankrupt acquires between the commencement of bankruptcy and discharge vests automatically in the Assignee. Furthermore, any rights that the bankrupt has in the property are extinguished. The focus of section 105 is the effect of sections 101 to 104 on other laws. Section 105(2) states that 'sections 101 to 104 do not affect the operation of any other law that prevents any property from vesting in the Assignee'.

1 *Statutory objectives*

The *Insolvency Act* arose out of a Ministry of Economic Development review of New Zealand's corporate and personal insolvency laws that started in 1999. As part of this review, a list of objectives for New Zealand's insolvency law which Taylor and Slevin describe as 'diverse and sometimes competing'[15] were identified.[16] In terms of relevant objectives for personal insolvency law, these included maximising returns to creditors by providing flexible and effective methods of insolvency administration and enabling persons in bankruptcy to again participate fully in the economic life of the community by discharging them from their remaining debts in appropriate circumstances.[17]

The *Insolvency Act* does not contain a statutory purpose provision and New Zealand courts, when called upon to interpret the Act, have relied upon extrinsic sources, including the Explanatory Notes to the Insolvency Law Reform Bill[18] and statements made in Parliament during the passage of the Bill. For example, this passage by the then Acting Minister of

[12] Ibid s 158.
[13] Ibid s 290.
[14] Ibid s 3.
[15] Taylor and Slevin, above n 8, 6.
[16] New Zealand, Ministry of Economic Developments, *Insolvency Law Review: Tier One Public Discussion Documents* (2001) 15.
[17] Explanatory Note, Insolvency Law Reform Bill 2005 (14-1) (NZ) 2.
[18] The Insolvency Law Reform Bill 2005 was divided into three Bills by the Insolvency Law Reform Bill 2005 Supplementary Order Paper 2006 (No 61), ie: the Insolvency Bill 2006 (NZ); the Companies Amendment Bill 2006 (NZ); and the Cross-Border Insolvency Bill 2006 (NZ).

Commerce from the Third Reading of the Bill was referred to by both the High Court[19] and the Court of Appeal[20] in the *Trustees Executors* decisions:

> These bills…are designed to promote innovation, responsible risk-taking, and entrepreneurialism by not excessively penalising business failure. They are designed to distribute the proceeds to creditors in an equitable manner and in accordance with their relative pre-insolvency entitlements. They are designed to maximise returns to creditors by providing flexible and effective methods of insolvency administration and enforcement that encourage early intervention when financial distress first becomes apparent. They are designed to enable individuals in bankruptcy to participate fully again in the economic life of the community.[21]

It should be noted that this Ministerial statement simply restates the list of Ministry of Economic Development's objectives and does not provide any guidance as to which of the 'diverse and sometime competing' objectives should take priority in the event of a conflict between them.

B *Retirement Savings and the KiwiSaver Act 2006*

The *KiwiSaver Act 2006* ('*KSAct*') substantially came into force on 1 December 2006.[22] The purpose of the Act, set out in section 3, is to:

> … encourage a long-term savings habit and asset accumulation by individuals who are not in a position to enjoy standards of living in retirement similar to those in pre-retirement. The Act aims to increase individuals' well-being and financial independence, particularly in retirement, and to provide retirement benefits.

The *KSAct* is generally focused on employees, who become enrolled automatically in a default KiwiSaver scheme at the start of new employment, although they may opt out within time limits specified in the Act.[23] Employers are required to contribute to an employee's KiwiSaver account, and make deductions from the employee member's wages and salary. The Crown also makes an initial 'kick-start' payment of NZ$1000 and provides annual tax credits.[24] Accordingly, a member's interest comprises three elements: the member's own financial contribution; the employer's financial contribution (where applicable);[25] and the Crown kick-start payment and annual tax credits.

To achieve the purposes of the *KSAct*, it provides that a KiwiSaver account cannot, with prescribed early withdrawal exceptions, be accessed until the member's 'end payment date', which for most will be when the member turns 65.[26] The early withdrawal rules are set out in Schedule 1 of the *KSAct*. These include withdrawals in instances of significant financial hardship, including hardship arising from serious illness; withdrawals to allow a member to purchase a first home; and the ability to transfer to foreign schemes on permanent emigration from New Zealand. Clauses 10 and 11 of Schedule 1 contain rules for significant hardship and serious illness. Any withdrawal in cases of significant financial hardship is at the discretion of

[19] *Official Assignee v Trustees Executors* [2014] NZHC 345, [18].
[20] *Trustees Executors Ltd v The Official Assignee* [2015] NZCA 118, [26].
[21] New Zealand, *Parliamentary Debates*, vol 634, 28 October 2006, 6171.
[22] Except ss 10–21, 22, 23, 33–39, 40–43, 45, 66, and sch 3 as it relates to sub-ss NE3(2)–(6) of the *Income Tax Act 2004* (NZ).
[23] *KiwiSaver Act 2006* ss 9, 10 and 13 ('*KSAct*').
[24] Ibid ss 4 and 226; *Income Tax Act 2007*, s MK1.
[25] *KSAct* s 64(1).
[26] Ibid sch 1, cl 4.

the relevant KiwiSaver scheme manager or administrator who may permit a withdrawal only if there are no reasonable alternative sources of funding and the amount to be withdrawn is limited to an amount sufficient to alleviate the particular hardship.[27] Guidance in clause 11 indicates that 'significant financial hardship' includes difficulties that arise because of a member's inability to meet minimum living expenses or to meet mortgage repayments on his or her principal family residence, resulting in the mortgagee seeking to enforce the mortgage on the residence.[28]

The *KSAct* was amended in 2014 because the *Financial Markets Conduct Act 2013* introduced new governance rules for all managed investment schemes, including KiwiSaver schemes. Section 128 of the *Financial Markets Conduct Act* provides that the purpose of all KiwiSaver schemes must include the provision of 'retirement benefits directly to individuals'[29] and must 'accordingly, restrict exemptions, withdrawals, and the provision of benefits in respect of a member's accumulation (including in the way the trust deed is applied) to those permitted under the KiwiSaver scheme rules under the *KiwiSaver Act 2006'*.[30] The High Court observed in *Trustees Executors* that section 128 was introduced to 'reinforce the clear Parliamentary intention to lock in savings for the future benefit of individual members and to permit early withdrawals only in carefully constrained circumstances'.[31]

Section 127 of the *KSAct*,[32] restricts the ability to assign a member's interest in the following terms:

> (1) Except as expressly provided in this Act, a member's interest or any future benefits that will or may become payable to a member under the KiwiSaver scheme must not be assigned or charged or passed to any other person whether by way of security, operation of law, or any other means.
> (2) However, subsection (1) does not prevent a member's interest or any future benefits that will or may become payable to a member under the KiwiSaver scheme from being released, assigned, or charged, or from passing to any other person if it is required by the provisions of any enactment, including a requirement by order of the court under any enactment (including an order made under section 31 of the *Property (Relationships) Act 1976*).

Accordingly, although both the *Insolvency Act* and the *KSAct* were enacted within six months of each other, neither Act contains any material reference to the other.[33] The question as to how to reconcile the provisions of the two Acts was the central issue before the courts in the *Trustees Executors* decisions.

III THE *TRUSTEES EXECUTORS* DECISIONS

In *Trustees Executors*, the OA's position was that the KiwiSaver accounts of two recently adjudicated bankrupts were property for the purposes of the *Insolvency Act*, and therefore these accounts vested in the OA at the time of adjudication under section 101. In addition, any additional funds accumulated in the accounts during the period of their bankruptcy also were vested in the Assignee. It follows therefore that the OA was entitled to exercise the right of a member under the *KSAct* to apply for early withdrawal of a KiwiSaver account as bankruptcy

[27] Ibid sch 1, cl 10(3)(a)–(b).
[28] Ibid sch 1, cl 11.
[29] *Financial Markets Conduct Act 2013* (NZ) s 128(1)(b).
[30] Ibid s 128(1)(c).
[31] *Official Assignee v Trustees Executors* [2014] NZHC 34, [38].
[32] Prior to the 2014 amendments, s 127 was s 194.
[33] *Official Assignee v Trustees Executors* [2014] NZHC 34, [22].

was an event of 'significant financial hardship' in terms of Schedule 1. Ronald Young J in the High Court found that a KiwiSaver account was 'property' for the purposes of the *Insolvency Act*.[34] He held that such an account was a chose in action as it is a right to receive something in the future that arises in circumstances where the right to claim the account interest is enforceable and will eventuate.[35] In reaching this conclusion, his Honour relied upon the reasoning of Justice Blanchard (as he was at that time) in *Official Assignee v NZI Life Superannuation Nominees Ltd*[36]*('NZI Life')* in relation to whether savings in a private pension scheme were 'property' for the purposes of the *Insolvency Act 1967*. The definition of 'property' in the earlier Act stated that it included any 'valuable thing', and Blanchard J found that a member's interest in such a scheme is

> …at the very least, a contingent interest arising out of a valuable thing. Therefore … in New Zealand an Official Assignee becomes vested … with the bankrupt's rights, whatever they may be, in relation to a superannuation scheme: they are "property … belonging to, if not vested in" the bankrupt.[37]

Ronald Young J held in *Trustees Executors* that the private pension scheme in the *NZI Life* case, which was established under the *Superannuation Schemes Act 1976*, had many features in common with schemes governed by the *KSAct*. This conclusion assisted his Honour to determine that a KiwiSaver account is more than just an expectancy[38] and instead a member has a 'fundamental entitlement'[39] to the member's account balance on retirement at 65. His Honour determined that this fundamental entitlement to receive a KiwiSaver interest, with minimal exceptions, underlay the submission 'that the KiwiSaver scheme is more than an expectancy' and therefore 'a member has a property interest in the scheme'.[40]

The High Court's finding that a KiwiSaver account was property for the purposes of the *Insolvency Act* was accepted by both the OA and Trustees Executors and was not appealed. Instead, Trustees Executors focused its appeal to the Court of Appeal on the High Court's decision that the *KSAct* was not protected from the vesting provisions of the *Insolvency Act*. The OA cross-appealed the High Court's interpretation of the non-assignability provision of the *KSAct*.

Section 105(2) of the *Insolvency Act* provides that 'sections 101 to 104 do not affect the operation of any other law that prevents any property from vesting in the Assignee' but Ronald Young J concluded that the *KSAct* was not an 'other law' for the purposes of this section. He found that section 127(1)[41] of the *KSAct*, which provides that 'an interest under a KiwiSaver scheme must not be assigned or charged or passed to any other persons whether by way of security, operation of law, or any other means', did not apply to claims under the *Insolvency Act* because of the operation of section 127(2), which provides that section 127(1) does not apply to protect KiwiSaver accounts against claims required by another enactment, including

[34] Ibid [32], [51].
[35] Ibid [51].
[36] *Official Assignee v NZI Life Superannuation Nominees Ltd* [1995] 1 NZLR (HC) 684 ('*NZI Life*').
[37] Ibid 697.
[38] See also *Krasner v Dennison* [2000] 3 All ER 234 (CA); *In Re Landau (A Bankrupt)* (1988) Ch 223 where the English Court of Appeal concluded similarly with regard to a personal pension scheme.
[39] *Official Assignee v Trustees Executors* [2014] NZHC 34, [44] and [51].
[40] Ibid [51].
[41] The High Court judgment refers to sub-ss 196(1) and (2), but these provisions were renumbered in the 2014 amendments to sub-ss 127(1) and (2). For the sake of clarity, this article refers to the later numbering, which is also found in the Court of Appeal judgment.

an order under the *Property Relationships Act 1976*, and his Honour held that the *Insolvency Act* was 'another enactment' for the purposes of this provision.[42]

However, the Court of Appeal took the opposite approach and held that the correct interpretation of the Act is that a member's KSA interest is not assignable. Counsel for Trustees Executors argued that section 127(1) is expressed in 'emphatic terms'[43] and 'strong language',[44] and accordingly the divestment exemption in section 127(2) must be interpreted as requiring the enactment in question to provide expressly for the vesting, which is not the case in sections 101 and 102 of the *Insolvency Act*. The Court of Appeal accepted these arguments, although the Court did appear to want to adopt a 'practical and sensible'[45] approach, given the uncertainty arising out of the High Court decision, which left any decision to allow early release of a bankrupt's savings to the managers of the particular KiwiSaver scheme in question. In addition, the Court of Appeal considered that the lower court's finding that such savings were assignable to the OA would create significant practical difficulties in the event that a scheme manager subsequently declined to make the member's savings available to OA. A manager of a scheme would need to set up two separate accounts, one for the OA's interest and one for the member's contributions after discharge. In addition, it is unclear what right the OA would have in relation to those funds once a member has been discharged from bankruptcy.[46]

A *Implications of the* Trustees Executors *Decision*

The Court of Appeal decision in *Trustee Executors* clarifies that KSA funds are protected by the *KSAct*'s non-divestment provision as the law is currently drafted. As this conclusion was principally based on the text of the two enactments and the relevant statutory purposes,[47] by implication, the decision only applies to KiwiSaver schemes, and cannot be applied to other forms of private pension schemes. This is because there is no specific statutory protection for pension savings in the *Insolvency Act 2006*. In its place, New Zealand courts have had to rely on general principles of law, specific superannuation regulations and the terms of the scheme in question, when called upon to decide if funds invested in private pension schemes are exempt property.[48] This has led to inconsistent results.

As discussed above in the *NZI Life* case, the Court held that in the absence of any government regulations providing for it, a clause in a trust deed for a private pension scheme which purported to shield a bankrupt member's account from vesting in the OA was a fraud on the laws of bankruptcy.[49] Nonetheless, on the facts of the case, the Court determined that the forfeiture clause was a valid exception to that rule, because the clause was created by statutory regulation. As such, the clause did shield members who joined the relevant scheme before 1 April 1990. However, for those who joined after this date, the clause was void, as the enabling statutory regulation had been repealed on that date.[50] Accordingly, for those members who joined the scheme after 1 April 1990, their pension savings would vest in the OA on bankruptcy. But the OA was held only to have identical rights to those of the bankrupt members

[42] *Official Assignee v Trustees Executors* [2014] NZHC 34, [72]–[73].
[43] *Trustees Executors Ltd v The Official Assignee* [2015] NZCA 118, [51].
[44] Ibid [52].
[45] Ibid [50].
[46] Ibid [67]–[68].
[47] Ibid [80].
[48] *Official Assignee v NZI Life Superannuation Nominees Ltd* [1995] 1 NZLR (HC) 684.
[49] Ibid 694.
[50] Ibid 695.

of the fund. As the bankrupt member under the terms of the trust deed was not entitled to receive benefits other than on death, permanent disability, permanent emigration or retirement age of 60 (unless the trustee exercised its discretion to make an early payment on the grounds of hardship), the OA was required to wait for the occurrence of the first of the eventualities before being entitled to receive any benefit from the fund.[51] The *NZI Life* decision has been described as giving the OA an interest that 'might merely represent a pyrrhic victory for creditors'.[52] This would be the case especially if the bankrupt member is relatively young and where 'it will be difficult if not impossible for the Official Assignee to realise that interest for the benefit of creditors'.[53]

Nonetheless, the *NZI Life* decision does stand for the principle that some forms of private pensions may be available to meet the debts of a bankrupt.[54] In contrast, other forms of pensions are expressly stated to be inalienable. For example, the *Government Superannuation Fund Act 1956* (which regulates the provision of a government superannuation fund for certain public sector employees) provides in section 92 that a retirement allowance under that Act is inalienable. Furthermore, the New Zealand National superannuation, which is a universal pension payable at 65 to all New Zealanders, is expressly stated not to be assignable and exempt from OA claims.[55] New Zealand first introduced a pension that was not means tested in 1938, as part of a range of measures in the *Social Security Act 1938* under a broad framework of citizenship entitlement.[56] Universal entitlement continues to be a feature of the New Zealand regime,[57] as the current statute expressly provides that every person is entitled to receive New Zealand superannuation, subject only to satisfying the age and residency requirements of the Act.[58] Accordingly, a person's financial or employment status does not affect that person's entitlement to New Zealand superannuation. However, receipt of superannuation (or any other form of government benefit) by a bankrupt is taken into account by the OA in determining whether to provide an allowance for the support of the bankrupt and his or her relatives and dependants, or the amount of any such allowance.[59]

As stated above, the claim by the OA against Trustees Executors was brought as a test case to clarify the status of funds invested in a KiwiSaver scheme on the insolvency of a member of the scheme. As the OA was ultimately unsuccessful, MBIE published a Discussion Document about retirement savings being accessible for creditors of a bankrupt,[60] in July 2016. The Discussion Document proposed changes to the current statutory regime, and these are discussed in the next part of this article.

---

[51] Ibid 697.
[52] Paul R Heath and Julie K Maxton, 'Superannuation Schemes and Insolvency' (1997) 3 *New Zealand Business Law Quarterly* 43, 55.
[53] Ibid 55.
[54] McKenzie Skene, above n 4, 39.
[55] *Government Superannuation Fund Act 1956* (NZ) s 92. Similar exceptions also apply to other government benefits such as war pensions under the *Veterans Support Act 2014* (NZ) s 207(1).
[56] Margaret Tennant, *The Fabric of Welfare: Voluntary Organisation, Government and Welfare in New Zealand, 1840–2005* (Bridget Williams Books, 2007) 73.
[57] The *Social Security Act 1964* (NZ) s 84(1) provides that benefits, as that term is defined in that Act and which includes New Zealand Superannuation, are expressly stated to be not capable of being assigned or charged or passed to any other person by operation of law.
[58] *New Zealand Superannuation and Retirement Income Act 2001* (NZ) ss 7(1) and 8. Note there is an exception to this entitlement in sub-s 7(2), if a person has made an election under the *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) to receive weekly compensation under that Act rather than to receive New Zealand superannuation.
[59] *Insolvency Act* s 163. See also *Insolvency Regulations 2007*, cl 8 that requires a bankrupt to provide the OA with details of all income.
[60] Ministry of Business Innovation and Employment, above n 6.

B *Ministry of Business, Innovation and Employment Discussion Document*

1 *Policy Objectives and International Practice*

MBIE's starting point in the Discussion Document is that the inconsistency around the treatment of 'retirement savings' in bankruptcy in New Zealand is unsatisfactory and creates uncertainty for retirement scheme managers, bankrupts and their creditors.[61] This is an assertion that ignores the fact that KiwiSaver schemes are increasingly dominating the superannuation savings landscape in New Zealand and the Court of Appeal decision in *Trustees Executors* has clarified the law in this respect. Furthermore, as discussed above, it overstates any uncertainty that derives from the *NZI Life* decision. Nonetheless, as a solution to this 'problem', MBIE proposes a law change whereby some or all of a bankrupt's pension savings will be made available to the OA and this change would apply across all types of pension schemes. However, in the case of KiwiSaver savings, accessible assets would exclude contributions from the Crown (kick-start contributions and a member's tax credits) on the basis that, otherwise, Crown contributions would be used to repay private debt.

In addition to providing consistency of treatment for private pensions, the asserted rationale for this proposed change is the existence in New Zealand of the universal National Superannuation. MBIE observed that this means 'most individuals will not be in poverty in retirement if they do not have additional retirement savings'.[62] The Discussion Document continues by noting that 'currently, private retirement savings … are considered to be an addition to an adequate retirement income provided by New Zealand Superannuation'. This is a claim that goes against the government policy objective behind the enactment of the *KSAct* which is to encourage Kiwis to save for their retirement in order to allow people to live post-retirement with a standard of living enjoyed during pre-retirement. MBIE's argument also ignores the views of many academics and policymakers who consider that the current rules of eligibility for New Zealand Superannuation are unsustainable. For example, the Commission for Financial Capability, which is a government-funded, independent Crown entity to encourage and provide financial education and planning, states 'the cost of NZ Super (which is taxpayer-funded now) will double by mid-century. Healthcare costs will increase too.' MBIE also noted in its Discussion Document that New Zealand's ageing population is projected to put pressure on government spending.[63] 'Sorted', a government funded website run by the Commission for Financial Capability[64] to promote financial decision-making, states that for most people there 'will be a gap between the income NZ Super provides, and the income we want in retirement'.[65] The rate of NZ Super is set each year and the after-tax NZ Super rate for couples (who both qualify) is based on 66 per cent of the average ordinary time wage after tax.[66] For single people, the after tax rate is around 40 per cent of that average wage.[67]

One of the most important criticisms of the measures proposed in the Discussion Document, is that New Zealand would be out of line with the rules governing the treatment of pensions in comparable jurisdictions. In 2011, Donna McKenzie Skene undertook a survey of the laws regulating the composition of a debtor's estate in insolvency in Australia, Canada, France, Italy, New Zealand, South Africa, the Netherlands and the USA. The survey was completed by

[61] Ibid 5.
[62] Ibid 12.
[63] Ibid.
[64] Sorted, *About Us* < https://www.sorted.org.nz/about-us>.
[65] Sorted, *Guides: Planning for Retirement* < https://www.sorted.org.nz/guides/planning-for-retirement >.
[66] *New Zealand Superannuation and Retirement Income Act 2001*, s 15.
[67] Sorted, *Guides: About NZ Super* < https://www.sorted.org.nz/guides/about-nz-super>.

leading insolvency law academics in each jurisdiction, who were asked a number of questions regarding the nature and extent of the exemptions from a debtor's estate in their respective jurisdictions. In her report, she stated that 'in almost all jurisdictions, the pension fund (or at least, an approved/defined fund) itself is exempt'.[68] MBIE's assessment of why other countries do not allow retirement schemes to be accessed in bankruptcy is that in such countries the population is expected to rely on their own savings to fund their retirement. As discussed above, this is an expectation that now applies equally to the New Zealand population.

2 *Role of Creditors in Insolvency*

In the Discussion Document, MBIE stated that if a bankrupt's retirement savings are protected from the OA's claims, there will be less to meet creditors' claims. While this claim is not disputed, it ignores the reality that creditors also have some responsibility in the creation of debt, especially in relation to consumer debtors. Internationally, there has been a growing amount of research on the causes and consequences of the increasing number of consumer debtors. More recently, there is an emerging body of research on the link between credit and consumption, due to links between the underlying demand for credit and societal changes to consumption.[69] Burton argues that 'credit underpins many aspects of consumption and has been instrumental in the development of what has become known as consumer society'.[70] Related research into the deregulation of financial institutions also indicates that government action or inaction, particularly of the fringe market for financial services, has contributed to rising levels of consumer debt. Furthermore, globally a number of studies have recorded the rise in consumer debtors as a consequence of the lack of controls on the providers of consumer credit, including the providers of credit cards, and calling for increased protection against what is often referred to as predatory lending. Squires, after charting the rise of consumer debt in the United States in the second half of the 20th century, observed that 'accompanying expansion of credit, sometimes by consumer choice, sometimes in response to aggressive marketing by financial institutions, reflects restructuring of financial services in many ways'.[71] Ramsay commented that restructuring of regulation, including consumer lending practices such as 'securitisation and computerised risk-based lending' and the accompanying dominance of neo-liberal ideology, may be included in an account of the changes towards a credit culture in the United Kingdom.[72]

A 2013 World Bank Report into insolvency of natural persons[73] affirmed the value for a country of developing its insolvency regime to provide solutions for the increasing number of insolvent individuals. In this sense, the World Bank Report argues that, as most western societies accept, if not encourage the benefits of lending, the insolvency regime should be

[68] McKenzie Skene, above n 4, 39.
[69] See for example Jason J Kilborn, *Comparative Consumer Bankruptcy* (Carolina Academic Press, 2007); Johanna Niemi-Kiesiläinen, Iain Ramsay and William C Whitford (eds), *Consumer Bankruptcy in Global Perspective* (Hart Publishing, 2003); Stephanie Ben-Ishai and Saul Schwartz, 'Bankruptcy for the Poor?' (2007) 45 *Osgoode Hall Law Journal* 471; Mary Wyburn, 'Debt Agreements for Consumers under Bankruptcy Law in Australia and Developing International Principles and Standards for Personal Insolvency' (2014) 23 *International Insolvency Review* 101, 112–16; Katherine Porter, 'The Damage of Debt' (2012) 69 *Washington and Lee Law Review* 979.
[70] Dawn Burton, *Credit and Consumer Society* (Routledge, 2008) 38.
[71] Gregory D Squires, 'Inequality and Access to Financial Services' in Johanna Niemi, Iain Ramsay and William C Whitford (eds) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart Publishing, 2009) 1, 12.
[72] Iain Ramsay, 'Wannabe WAGS and Credit Binges: The Construction of Overindebtedness in the UK' in Niemi, Ramsay and Whitford above n 71, 75, 77.
[73] World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (2013).

viewed as representing 'a sort of trade-off for deregulation of consumer lending. If natural persons are to be exposed to inevitable risk that they do not — and likely cannot — understand or avoid, insolvency restores fair equilibrium by offering insurances against those risks, with the "premiums" financed through small and appropriately distributed increases in the costs of credit'.[74]

Furthermore, the Discussion Document states that from an insolvency policy perspective, the ideal outcome would be for a bankrupt's retirement savings account to be fully utilised to repay its creditors. This statement, however, does not take into account other objectives of New Zealand's insolvency law, including to encourage a former bankrupt to fully contribute to the community after discharge. While it can be argued that the clean slate from liability for most debts, on discharge from bankruptcy, achieves this objective, it can be argued that meaningful rehabilitation requires taking a broader approach.[75] Howell suggests, after reviewing recent bankruptcy literature, that ideas about the scope of these terms fall on a continuum. She states that at the narrow end of the continuum, it is confined to relieving the bankrupt from obligations to pay debts on discharge, or being freed from debt without a payment plan. She observes that other commentators nevertheless take a broader approach, arguing that 'debt discharge may not be sufficient to provide the opportunity for a fresh start for all, or even most, debtors'.[76] Debt discharge, she argues, may be merely a palliative solution that fails to address a debtor's underlying social, economic and financial problems in any meaningful way.[77] Prevention of future indebtedness, through supporting financial literacy education and attention to housing and employment prospects, form part of approaches at the other end of the continuum, which Howell characterises as a rehabilitation-focused fresh start.[78] It is worth noting that recent statistics published by New Zealand Insolvency and Trustee Services identify the most common cause of insolvency nominated by bankrupts who were adjudicated in 2015–16 was 'unemployment or loss of income', at 19 per cent. Domestic discord or relationship breakdown (8 per cent) and excessive use of credit facilities (8 per cent) are the second and third most common contributors to insolvency, as identified by debtors who responded to this question.[79] If the objective of New Zealand insolvency law is rehabilitative in this broader sense, then allowing a bankrupt to retain retirement savings may encourage the bankrupt's rehabilitation into the community or at least encourage the bankrupt to continue contributing where possible to his or her post-retirement funds.

MBIE's Discussion Document does not discuss the financial implications for a bankrupt of the proposed law change. In the United States, a number of studies have analysed the post-discharge financial situation of consumer debtors. In 2006, Porter and Thorne analysed the financial position of 359 debtors who had undertaken a Chapter 7 bankruptcy and found that post-bankruptcy, one in four debtors were struggling to pay routine bills, and one in three reported an overall financial position similar to or worse than when they filed debtor bankruptcy. They reported factors such as decline in household income through unemployment and underemployment, and illness or injury or old age undermined the chance of financial

[74] Ramsay, above n 72, 77.
[75] Nicola Howell, 'The Fresh Start Goal of the *Bankruptcy Act:* Giving a Temporary Reprieve or Facilitating Debtor Rehabilitation?' (2014) *QUT Law Review* 29, 31–3.
[76] Ibid 33.
[77] Howell refers to Jay L Zagorsky and Lois R Lupica, 'A Study of Consumers' Post-Discharge Finances: Struggle, Stasis, or Fresh Start?' (2008) 16 *American Bankruptcy Institute Law Review* 283, as support for this statement.
[78] Howell, above n 75, 33.
[79] New Zealand Insolvency and Trustee Service, *Insolvency Statistics and Debtor Profile Report: 1 July 2015–30 June 2016* (Ministry of Business, Innovation & Employment, 2016) 26. Note: 13 per cent of debtors had indicated 'other' as the primary cause of bankruptcy and 12 per cent of debtors had made no response to this question.

recovery.[80] Zagorsky and Lupica undertook analysis of a large national longitudinal survey which had tracked young baby boomers in the United States from 1979 to 2004 questioning the same group of people 22 times over this period. In 2004, the survey asked whether the individual had been declared bankrupt and 13.5 per cent of respondents answered affirmatively. The survey also asked all responders a series of questions about their financial wellbeing, including income, home and vehicle ownership, credit card debt and savings. The financial wellbeing data for filers and non-filers was then compared. They found that bankruptcy filers were less likely to own a home or have a credit card and that it took 14 years for bankruptcy filers to reach the same level of home ownership as non-filers.[81] Furthermore, filers earn less and have less total income immediately after bankruptcy, but they catch up with non-filers approximately 13 years after having received a discharge. Such studies support the view that releasing a person from debt does not guarantee rehabilitation, or at least that it will take some considerable time for a former bankrupt to be able to participate fully in the economic life of a community.[82]

As stated above, there have been no comparative studies undertaken in New Zealand. However, given the limitations on the business activities of a person who is adjudicated bankrupt,[83] together with the fact that their name is on a public register during the period of the bankruptcy and for four years after discharge, an adjudication of bankruptcy[84] would almost universally reduce a person's ability to achieve full financial recovery after discharge. If the MBIE proposal is implemented into New Zealand law, the likely result will be to further undermine the objective of economic rehabilitation.

3 *Other Implications*

MBIE suggests that it is equitable to treat pension savings equally to other assets of a bankrupt. In the same manner as any equity in real property and any personal property of a bankrupt (subject to limited exceptions) are assets that are realisable by the OA, pension savings should be available in the event of bankruptcy.[85] At first glance, there is some merit to this argument, at least with respect to the *KSAct*. A member of KiwiSaver scheme can apply for early withdrawal of part of their KiwiSaver account to buy a first home and, post-purchase, any equity in such a home would be available to the OA if the member became bankrupt. However, if pension savings are treated as property capable of vesting in the OA upon bankruptcy for the benefit of the unsecured creditors, then it also raises questions as to whether such assets can be treated as property for other purposes. Could a secured creditor claim an interest in pension savings? Alternatively, would it encourage a secured creditor to surrender its charge[86] and submit a proof of debt as an unsecured creditor if the bankrupt's pension savings are substantial?

The Discussion Document does not state what percentage of a bankrupt's retirement savings should be made available to the OA but instead sets out three options.[87] Option 1 provides that the OA can access all financial benefits, including personal and employer contributions (but

[80] Katherine Porter and Deborah Thorne, 'The Failure of Bankruptcy's Fresh Start' (2006–2007) 92 *Cornell Law Review* 67.
[81] Zagorsky and Lupica, above n 77, 298–304, 314.
[82] Ibid 314.
[83] *Insolvency Act* s 7.
[84] Ibid s 62.
[85] Ministry of Business, Innovation and Employment, above n 6, 12.
[86] *Insolvency Act* s 243 (1)(c).
[87] Ministry of Business, Innovation and Employment, above n 6, 14–16.

excluding Crown contributions) of a bankrupt, whereas Option 2 excludes employer contributions from being available to the OA. Option 3 suggests that a set percentage of all retirement savings be accessible by the OA. There is very little detail in the Discussion Document about how these options would work in practice, other than commenting that both Options 1 and 2 could be administratively complex as they would require separate funds for the accessible portion of a bankrupt's pension savings.

The Discussion Document does briefly outline other implications of the proposal to bring pension savings within the pool of assets that are realisable by the OA on behalf of creditors.[88] First, the inclusion of pension savings in the total assets of a bankrupt may reduce the number of debtors who are eligible for the no asset procedure[89] introduced by the *Insolvency Act*. There are also considerations as to whether such savings may be available under a summary instalment order. Perhaps more challenging is how any change might interact with vesting schedules in non-KiwiSaver retirement schemes and how it would influence a defined benefit scheme, where the amount that a member receives depends on his or her final salary and contributions over a fixed period. Finally, the Discussion Document raises the issue of foreign-sourced retirement savings that have been transferred to New Zealand based savings plans.[90]

In conclusion, MBIE's objective of achieving consistency in the treatment of all pension schemes is laudable, but this article suggests a different pathway is needed to achieve this result. Instead of amending the *Insolvency Act* to provide that all or part of retirement savings are accessible by the OA, it is suggested that the Act be amended to state expressly that all such savings be inalienable irrespective of the type of scheme. However, such protection should not be absolute and an order could be made requiring a manager to divest funds to the OA if there is evidence of fraud or that a bankrupt took measures to defeat the interests of creditors. This recommendation is discussed in the final part of this article.

III BANKRUPTCY AND ANTECEDENT TRANSACTIONS

A *The New Zealand Position*

Under the present law, where all KiwiSaver savings are protected from OA claims, these savings may include payments made by the bankrupt in the period leading up to the adjudication of bankruptcy and at a time when the debtor is not making payments to other creditors. Although the *Insolvency Act* does empower the OA to challenge certain transactions in the period prior to the adjudication of bankruptcy, it is unlikely that the insolvent transaction or insolvent gifting provisions of that Act would capture such payment. Such a payment would not be an insolvent transaction, as it does not enable a creditor to receive more than that person would receive or be likely to receive in the bankruptcy.[91] There is potentially an argument that such a payment could be challenged as an insolvent gift by the OA, provided the payment fell within the two year limit before adjudication.[92] However, the requirement in section 204, that

[88] Ibid 17–18.
[89] The eligibility criteria for the no asset procedure are set out in s 363(1) of the *Insolvency Act*, which provides that the debtor must have no realisable assets; have not previously been admitted to the no asset procedure or been adjudicated bankrupt; have total debts not less than NZ$1000 or more than NZ$40 000; and, under a prescribed means test, the debtor does not have the means of repaying any amount towards the debt.
[90] Ministry of Business, Innovation and Employment, above n 6, 17–18 where it is stated that further discussion will be needed with those countries that allow retirement savings to be transferred to New Zealand.
[91] *Insolvency Act* s 195(1)(b).
[92] Ibid s 204.

gift must be 'to another person'[93] is likely to be problematic, as case law has found that KiwiSaver savings are the property of the bankrupt for the purposes of the Act.[94]

There is potentially an alternative cause of action available to the OA under the subpart 6 of part 6 of the *Property Law Act 1997* (NZ). An order under this Act can be made in a wider range of circumstances and applies when a debtor who was insolvent at the time of transaction, or became insolvent as a result, makes a disposition with the intent to prejudice a creditor, or by way of gift, or without receiving reasonable value in exchange.[95] However, an action under this Act is likely to face similar challenges to one under the *Companies Act 1993* (NZ).

B *The Australian Solution*

An example of the difficult policy issues that can arise in such a situation is illustrated by the Australian case of *Cook v Benson*[96] in 2000. The case concerned the meaning and application of section 120 of the Australian *Bankruptcy Act 1966* (Cth). It provides that except for specified exceptions, a trustee in bankruptcy is able retrospectively to claw back property disposed of by the bankrupt within a given time of the commencement of the bankruptcy. In this case, within the specific period, the bankrupt, Benson, directed that a sum of A$80 000 of money under his control should be paid to three private superannuation corporations. He gave this direction knowing that, four months earlier, judgment had been entered against him for A$35 216.25 which remained unpaid at the time of his direction. Following a sequestration order made in respect of his estate, the trustee in bankruptcy sought to recover the $80 000 from the recipients to whom the payments had been made. The primary judge in the Federal Court (Marshall J)[97] and the dissenting judge in the Full Federal Court (Hely J)[98] found in favour of the trustee, with the majority of the Full Federal Court declining to make the order.[99] An appeal to the High Court by the trustee was unsuccessful, with the majority of the Court refusing to order that the funds be repaid.[100] Kirby J, in his minority judgment, noted that the Federal Court decision would result in significant and 'deleterious consequences for bankruptcy administration and the rights of creditors',[101] and 'would effectively permit persons such as the bankrupt, facing the possibility of bankruptcy, to put beyond the reach of creditors very significant funds (including in money or money's worth) by a simple device, beneficial to the bankrupt'.[102]

The *Bankruptcy Act 1996* (Cth) was amended in 2007 by the inclusion of two new provisions to allow recovery of superannuation contributions which can be seen as a 'legislative response to the legal position'[103] following the High Court decision in *Cook v Benson*. Section 128B is the main avenue of recovery and provides that the trustee may recover superannuation contributions from a person who later becomes bankrupt. It provides that a transfer of property by a person who later becomes a bankrupt (the transferor) to another person (the transferee) is void against the trustee in the transferor's bankruptcy if three requirements are met. First, that

---

[93] Ibid.
[94] *Official Assignee v NZI Life Superannuation Nominees Ltd* [1995] 1 NZLR (HC) 684; *Official Assignee v Trustees Executors* [2014] NZHC 34; *Trustees Executors Ltd v The Official Assignee* [2015] NZCA 118.
[95] *Property Law Act 2007* (NZ), ss 345–9.
[96] *Cook v Benson* (2003) 214 CLR 370.
[97] *Cook (Trustee); In the matter of Benson* [2000] FCA 1777.
[98] *Benson v Cook* (2001) 114 FCR 542, [142].
[99] Beaumont, Kiefel and Hely JJ.
[100] *Cook v Benson* (2003) 214 CLR 370.
[101] Ibid [44].
[102] Ibid.
[103] Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (9th ed, Thomson Reuters, 2016) 163.

the transfer is in fact a contribution to an eligible superannuation plan. Second, that the property which made up the transfer would probably have become part of the transferor's estate. Third, the transferor's main intention was to prevent the transferred property from being available to creditors or to hinder or delay the process of making the property available for division among the transferor's creditors.

Section 128B(2) provides that a transferor's main purpose in making a transfer is taken to be the purpose described in paragraph (1)(c) if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent. In addition, section 128B(3) states that regard must also be had to whether, during any period ending before the transfer, the transferor had established a pattern of making contributions to one or more eligible superannuation plans; and, if so, whether the transfer, when considered in the light of that pattern, is out of character. However, subsections (2) and (3) are expressly stated not to limit the ways of showing a transferor's main purpose. There is also a rebuttable presumption of insolvency where the transferor has not kept proper books and records relating to the time of the transfer.

A second provision permits a trustee to recover certain superannuation payments relating to the situation when the contribution is made by a third party for the benefit of a person who later become bankrupt.[104] This section is 'designed largely to cover arrangements under which the person agrees that money which would ordinarily be paid directly to them should instead be paid to a superannuation plan for that person's benefit'.[105] This most common third party contributor is a person's employer, including payments under a salary sacrifice arrangement. There are similar requirements as for section 128B. Sections 128E to 128K set out the procedure for the Official Receiver to recover funds which are void against the trustee under sections 128B or 128C. The Official Receiver may give a superannuation account freezing notice to the trustees of the relevant superannuation plan to recover the void contributions.[106]

C *Other Solutions*

There is a similar provision in section 342A of the *Insolvency Act 1986* (UK)[107] applying to England and Wales,[108] which also allows recovery of excessive pension contributions if a person has been adjudged bankrupt and the bankrupt has certain rights under an approved pension arrangement. The trustee of the bankrupt's estate may apply to a court for an order in respect of any 'excessive contributions', which are defined as contributions that have unfairly prejudiced the individual creditors.[109] The court can make any order that the Court sees fit to restore the position to what it would have been had the excessive contributions not been made. The relevant contributions that the court may consider are the contributions which the individual has made on his or her own behalf and any other contributions made on his or her behalf. In deciding if contributions are 'excessive', the court is required to take into account factors similar to those in the Australian *Bankruptcy Act 1966* (Cth), specifically, to consider whether the purpose of such contributions was to put assets beyond the reach of the person's

[104] *Bankruptcy Act 1966* (Cth) s 128C.
[105] Murray and Harris, above n 103, 163.
[106] See *Bankruptcy Act 1966* (Cth) s 128D for claims by a trustee in bankruptcy.
[107] *Insolvency Act 1986* (UK) c 45; ss 342A to 342C were inserted by s 95(1) of *the Pension Act 1995* (UK) c 26, and were repealed and substituted by the current provisions in 1999 under the *Welfare Reform and Pensions Act 1999* (UK) c 30, s 15.
[108] There is also a similar provision in the *Bankruptcy (Scotland) Act 1985* c 66, s 36A; which was consolidated into the *Bankruptcy (Scotland) Act 2016*, s 101.
[109] *Insolvency Act 1986* (UK) s 343A(2).

creditors and to look at the individual circumstances when those contributions were made. Section 342B provides that the court has a wide discretion as to the orders that can be made and that any sum that is required by order under section 342A is to be paid to the trustee in bankruptcy and forms part of the bankrupt's estate.

IV CONCLUSION

Heath and Maxton observed in 1997, after the *NZI Life* case, that this is an area of law where consistency of approach is all important.[110] They stated:

> The factory worker must be given the same opportunities to use his or her savings for retirement as the city executive. The ability of the executive to employ skilful professionals to make the investment in an inalienable form (eg a family trust) … should not be allowed to undermine the retirement policies of the day. After all, the object is to ensure that all citizens save for retirement so that the State is not obligated to expend large sums of money to maintain them. That is also the rationale for lower tax rates.
>
> We do not have any magic answers to the complexities of this area. Whatever decisions are taken they will have an extensive impact not only on individuals but on society generally.[111]

Heath and Maxton concluded by recommending that much more debate needs to occur before 'firm policy conclusions are drawn'.[112] Although these observations were made almost 20 years ago, they apply equally to the reforms proposed in the Discussion Document.[113] The Court of Appeal decision in *Trustees Executors* has eliminated any uncertainties for KiwiSaver managers arising from the earlier High Court decision[114] and thereby removed any urgency to repeal the law arising from the High Court decision. Any decision to alter the terms of private pension schemes on a uniform basis will be difficult to implement in practice and, in addition, may have a number of unintended consequences. The Discussion Document states that KiwiSaver accounts can have significant value, and if they are 'fully released this may provide an avenue by which creditors can be repaid a greater percentage of the money they are owed by bankrupt persons'.[115] This conclusion ignores the rehabilitative objective of insolvency law, the facts that for many debtors financial distress arises from factors outside of their control and that the proposed law change is contrary to the reality facing most New Zealanders — that an occupation based retirement plan will be essential to retirement security.

Murray and Harris noted that the anti-evasion provisions inserted into the Australian *Bankruptcy Act 1966* (Cth) filled a gap in legislation that gave too much protection to superannuation payments.[116] It is recommended that measures to increase the powers of the OA in cases of fraud or avoidance should also be included in New Zealand's insolvency laws.

---

[110] Heath and Maxton, above n 52, 67.
[111] Ibid 67, 68.
[112] Ibid 68.
[113] Submissions on the Discussion Document closed on 30 September 2016. There has been no response from the MBIE as to the number or content of submissions received at the time of writing of this article.
[114] See Ministry of Business, Innovation and Employment, above n 6, 5, where it is stated that before the Court of Appeal decision, some KiwiSaver managers had 'accepted that a bankrupt person's funds should be withdrawn on the basis of significant hardship in order to repay creditors'.
[115] Ministry of Business, Innovation and Employment, above n 6, 9
[116] Murray and Harris, above n 103, 165.