

Submission

to the

Ministry of Business,
Innovation and Employment

on the

Discussion Document:
Accessibility of retirement
savings in bankruptcy for
the repayment of creditors

30 September 2016

About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.
2. The following fifteen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (NZ) Limited
 - Bank of New Zealand
 - Bank of Tokyo-Mitsubishi, UFJ
 - Citibank, N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited.

Background

3. NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on the Discussion Document: Accessibility of retirement savings in bankruptcy for the repayment of creditors (**Discussion Document**).
4. NZBA members have a particular interest in the Discussion Document, as they uniquely have competing interests in both insolvency policy (from a creditor perspective) and retirement savings policy (from a KiwiSaver provider perspective). Despite this, NZBA members have a clear view on the proposals in the Discussion Document, outlined below.
5. As noted above, NZBA is made up of fifteen members, six of which, through various arrangements within banking groups, are KiwiSaver scheme providers. Five out of these six are also default providers. One of NZBA's members (ANZ) is the largest KiwiSaver provider in New Zealand.
6. In 2014, the five largest New Zealand banks (all of whom are NZBA members) controlled 65% of the assets under management (**AUM**) in the KiwiSaver market.¹

¹ Andreas Heuser, Jack Kwok, Daniel Snethlage and Dillon Watts *Review of the KiwiSaver Fund Manager Market Dynamics and Allocation of Assets* (The Treasury, September 2015) at 32.

As noted by the Financial Markets Authority in 2015, banks' KiwiSaver market share, growth in membership and AUM is outstripping the growth of other firms.²

7. If you would like to discuss any aspect of the submission further, please contact:

Verity Kemp
Associate Director - Policy & Legal Counsel
04 802 3353 / 027 470 7669
verity.kemp@nzba.org.nz

Executive summary

8. NZBA supports the status quo under the common law, which confirmed KiwiSaver assets should not be accessible in bankruptcy.
9. If it is decided that a uniform approach to retirement savings in bankruptcy is required, NZBA submits that MBIE should rather implement a policy where KiwiSaver and other retirement schemes with equivalent features are not accessible in bankruptcy.
10. Making retirement savings available to creditors on the grounds that NZ Super will remain available in the future would be misguided and short-sighted.
11. MBIE's proposals pose a number of significant practical and operational issues.
12. NZBA does not support any of the three Options proposed in the Discussion Document, and the operational burden of implementing any of them would be disproportionately high.

KiwiSaver assets should not be accessible in bankruptcy

13. NZBA supports the status quo under the common law, which confirmed KiwiSaver assets should not be accessible in bankruptcy.
14. NZBA submits that the public, social and economic importance of KiwiSaver means it should be protected from creditors. Parliament made this intention clear in the KiwiSaver Act 2006 (**KSA**), which NZBA respectfully submits was correctly interpreted and applied in the Court of Appeal decision of *Trustees Executors Limited v The Official Assignee*.³ In that case the Court of Appeal noted:

The objective of the KSA is to encourage a long-term savings habit and the accumulation of funds that will increase the wellbeing and financial independence of individuals, particularly in retirement. There is nothing in the KSA to suggest that a purpose of the legislation is to accumulate funds for the benefit of creditors in the event of the member's bankruptcy. If that

² At 33.

³ [2015] 3 NZLR 224.

were the case, the important social and economic purposes of the KSA would be undermined and the burden of providing for the welfare of individuals would fall back on the state.

15. While MBIE does not offer the status quo as an option in the Discussion Document, NZBA submits there must be a convincing case made out for a policy setting that deviates from the common law and, based on the Discussion Document, is not convinced such a case has been made out.

Alternative policy approach

16. If it is decided that a deliberate policy decision needs to be made to create a uniform approach to retirement savings in bankruptcy, NZBA submits that rather than making KiwiSaver accessible in bankruptcy, MBIE should further investigate, with a view to implementing, a uniform policy where KiwiSaver and other retirement schemes with equivalent features (for example lock-in) are not accessible in bankruptcy (**Alternative Approach**).
17. Although such retirement savings should be protected, it is important that this protection cannot be abused by people seeking to hide assets or disadvantage their creditors. This Alternative Approach should therefore (as currently provided in the Insolvency Act 2006) be subject to a general insolvency law claw back where it can be shown that funds have been put into a KiwiSaver/retirement scheme to undermine the availability of funds to creditors.
18. This Alternative Approach would:
 - a. Preserve the core principles of retirement savings policy and the objectives of the KSA, and promote New Zealanders saving for retirement.
 - b. Align with the treatment of retirement assets in equivalent Commonwealth jurisdictions, such as the UK, Canada and Australia. Importantly this would provide for consistent treatment of transfers of foreign-sourced retirement savings and resolve any issues around inconsistent treatment in bankruptcy, reducing administrative and operational burdens.
 - a. Align with the position at common law, discussed above.

Emphasis placed on NZ Super

19. When discussing New Zealand's retirement income landscape and the appropriate balance between promoting retirement savings and insolvency law, the Discussion Document places considerable emphasis on the availability of NZ Super, its uniqueness and its adequateness in ensuring retirees will not live in poverty if they do not have additional retirement savings. With respect, this is misguided and short-sighted for several reasons:
 - a. There is evidence that NZ Super is already insufficient to live on. To achieve what Massey University's latest Retirement Expenditure Guidelines show is a

relatively conservative weekly income of \$489.77 for a single person in retirement, retirees need a lump sum of \$113,216, and NZ Super.⁴

- b. There is no guarantee that NZ Super will be available to retirees in the future, and as indirectly identified in the Discussion Document, is not available to all retirees today. NZ Super could be amended at some future date or it could be removed altogether. We note in last year's budget the Government set aside \$11.6 billion for NZ Super payments (accounting for 16 per cent of core Government expenses, more than is spent on all other benefits combined).⁵ Furthermore, the number of retirees NZ Super is expected to support is anticipated to almost double by 2038.
- c. In other jurisdictions where a universal pension is not available there are established retirement saving cultures and systems which New Zealand has only introduced and fostered (via the KiwiSaver regime) in the last decade.
- d. Connected to the above points, KiwiSaver and other retirement schemes play an important societal role in alleviating the pressure that an aging population places on NZ Super. This would be undermined by allowing such assets to pass to the Official Assignee in bankruptcy and, as noted by the Court of Appeal, would result in the burden of providing for the welfare of individuals falling back on the state (see paragraph 14 above).

Practical and operational issues

20. The Discussion Document raises a number of "additional issues to consider". NZBA submits that each of these issues raise complex practical and operational challenges, which would be resolved by our Alternative Approach discussed above.
21. Specifically, NZBA submits that if retirement savings are to be made accessible in bankruptcy, the issue of the treatment of defined benefit schemes is so complex that it is practically unresolvable. This is because defined benefit schemes are typically payable in perpetuity (i.e. until the death of the member), the member's contribution is realised on a regular basis (e.g. by fortnightly payments) rather than as a total amount and the amount received is consumers price index adjusted. It would therefore be impossible to quantify the value of any realisable portion of assets at the time of bankruptcy.
22. In addition to the issues identified by MBIE, NZBA wishes to raise the following practical and operational issues presented by the proposals:
 - a. The Discussion Document appears to envisage that the Official Assignee would be able to access retirement assets immediately upon bankruptcy (i.e. the Official Assignee would not be required to wait until the bankrupt's retirement). This is

⁴ Susan Edmunds "Retirees need more than the pension gives them, research shows" <<http://www.stuff.co.nz>> (9 November 2015).

⁵ Andy Fyers and Henry Cooke "Budget 2016: Can we afford the superannuation status quo?" <<http://www.stuff.co.nz>> (25 May 2016).

not in keeping with insolvency law and policy, where the Official Assignee obtains no better rights than the bankrupt.

- b. KiwiSaver (and other retirement schemes) typically have a hardship withdrawal provision, which may be drawn upon by a member who finds themselves experiencing significant financial hardship as a possible precursor to bankruptcy. There is therefore potential for the member, subject to the trustee's discretion as to them satisfying the hardship withdrawal requirements, to exhaust their KiwiSaver or other retirement assets prior to bankruptcy, rendering redundant the Official Assignee's ability to access these assets in bankruptcy.
- c. Insolvency law allows bankrupts to retain property that allows them to maintain basic living standards. Assuming all other assets of a bankrupt are realised and distributed to creditors, if the bankrupt has not already done so (see paragraph 22(b) above) it is likely they may apply for a hardship withdrawal after their bankruptcy for funds to allow them to maintain a basic living standard. If a hardship withdrawal is made in bankruptcy, that money will then pass onto the Official Assignee, not the bankrupt, regardless of the reason for the release. As confirmed by the Court of Appeal, the significant financial hardship withdrawal provisions in the KSA are meant to assist the individual to meet the basic necessities of everyday living, not pay creditors.⁶

No support for proposed options

- 23. In line with the above, NZBA does not support any of the three Options proposed in the Discussion Document. Furthermore, the operational burden of implementing any of the Options would be disproportionately high.
- 24. Each of the Options raise significant implementation and workability challenges. For example, if the Official Assignee must wait until the bankrupt's retirement to access their retirement assets (see paragraph 22(a) above), this would require significant system changes (including costs) to allow KiwiSaver and retirement scheme providers to run two separate accounts for a bankrupt member: one account for the Official Assignee's interest in the account, and one for the member's ongoing contributions post-discharge from bankruptcy.
- 25. Other difficulties with each of the Options include the need for the KSA (and other relevant retirement scheme legislation) to be amended to clarify, for example:
 - a. Management of the investment strategy – would the Official Assignee's account need to be invested in a different class of fund from the member's selected or default fund class?
 - b. Would the accounts need to be managed separately, and who would the provider accept instructions from?
- 26. If the Official Assignee is able to access retirement assets immediately upon bankruptcy this would also create significant difficulties for scheme providers. For

⁶ Above n 3, at [73].

example, under Option 2 employer and Crown contributions would not be available for the repayment of creditors. Employer contributions are frequent and vary. There are currently no permitted withdrawals that exclude employer contributions and therefore this Option would necessitate a different and more complex process than for existing withdrawal types. This would create potential for manual work arounds, and therefore errors.

27. Each of the three Options in the Discussion Document would require a significant IT build for each scheme provider.
28. NZBA submits that it is likely the cost of system changes to implement any of the Options would ultimately be passed on to all KiwiSaver and retirement scheme members, and are disproportionate due to the very low number of bankrupt members when compared with overall members. For example, the number of total bankrupts in 2015-2016 represents less than 0.01% of the total number of members in one of our member's KiwiSaver schemes. A scheme would need to build the functionality to address the treatment of a handful of members' contributions (as noted in the Discussion Document less than 50% of all bankrupts have KiwiSaver), yet all members would likely bear the cost of building this functionality, despite it never being relevant to their membership.