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**EMPLOYEE RIGHTS IN THE ADVENT OF EMPLOYER  
INSOLVENCY:  
A COMPARATIVE CONSIDERATION OF THE RIGHTS OF  
NEW ZEALAND EMPLOYEES**

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## **I EMPLOYERS AS CREDITORS**

Employees as creditors of an insolvent employer have long been recognised as possessing unique characteristics that distinguish them from other creditors. One of the essential distinctions is that employees do not identify themselves as creditors until the employer suffers financial distress. Employees generally are not predisposed to monitor information about the financial health of an employer and do not negotiate sufficient compensation to counterbalance the risk of non-payment of wages.<sup>1</sup> Also employees are unique in that, unlike most other creditors, they are dependant on a single debtor. In those insolvency situations where the business of the employer is not capable of rescue, either through some form of arrangement or compromise with creditors or hiving off the viable parts to another entity, most countries have recognised the necessity of some form of preferential treatment for unpaid employees over other unsecured creditors.<sup>2</sup> As employees are often unable or ill prepared to protect their own interests, and employers and other creditors are unlikely to put first the interests of employees, the public interest demands some form of government intervention to provide a degree of protection for employees on the insolvency of their employer.

The desirability of some form of employee wage protection has also been recognised at the international level with the International Labour Organisation (ILO) in 1949 adopted the *Protection of Wages Convention* (the 1949 Convention).<sup>3</sup> Article 11 of the Convention provides that workers' wages due for services provided during a certain period prior to the liquidation or up to a certain amount should be treated as a privileged debt, although details are left to the discretion of the ratifying nations. *The Protection of Workers' Claims (Employer's Insolvency) Convention (No. 193)*, which was adopted by the ILO in 1992 (the 1992 Convention), strengthened the protection

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<sup>1</sup> Susan J. Cantlie, 'Preferred Priority in Bankruptcy' in Jacob S Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law* (1994) 423.

<sup>2</sup> See Andrew Keay, Andre Boraine and David Burdette, 'Preferential Debts in Corporate Insolvency: A Comparative Study' (2001) 10 *International Insolvency Review* 167; Susan J. Cantlie, 'Preferred Priority in Bankruptcy' in Jacob S Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law* (1994) 412.

<sup>3</sup> C95 *Protection of Wages Convention, 1949*, adopted 1 July 1949, ILO, Geneva.

afforded to workers' claims by requiring ratifying countries to either protect workers claims by means of a privilege<sup>4</sup> or by the increasingly common approach of some form of institution to guarantee workers' claims.<sup>5</sup> For instance, the European Union requires member countries to guarantee a certain amount of unpaid wages if an employer becomes insolvent.<sup>6</sup>

## II NEW ZEALAND POSITION

This paper examines the protections afforded to employees in New Zealand in the advent of employer insolvency which results in the employee losing his or her job. It also suggests that the failure to adopt some form of guarantee fund disadvantages New Zealand wage earners. For although the laws regulating insolvency in New Zealand have been under review since 1999, with considerable public consultation and policy review by the Law Commission and the Ministry of Economic Development and have resulted in some enlargement of employee entitlements as preferential creditors in 2004<sup>7</sup> and further minor changes were enacted as part of insolvency law reforms that were enacted in November 2006,<sup>8</sup> there has been little substantive change in the level of protection. The sole safeguard remains the ability of employees to claim as preferential creditors, a protection mechanism that has been discredited in comparable jurisdictions as incapable of providing certain, timely and efficient protection.

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<sup>4</sup> C173 *Protection of Workers' Claims (Employer's Insolvency) Convention 1992*, adopted 23 June 1992, ILO, Geneva, Part II, Arts 5-8,

<sup>5</sup> *Ibid*, Part III, rts 9-13.

<sup>6</sup> *The European Union Directive on Worker Protection in Employer Insolvency* (80/987/EC) as amended by Directive 2002/74/EC.

<sup>7</sup> *Companies Amendment Act 2004* (NZ); *Insolvency Amendment Act 2004* (NZ).

<sup>8</sup> *Insolvency Law Reform Bill 2005*, No14-2 (NZ) was by Supplementary Order Paper, No 61, 2006 split into the *Insolvency Act 2006* (NZ) and the *Companies Amendment Act 2006* (NZ). Both Acts received Royal Assent on 7 November 2006, but as at 21 January 2007, neither Act is in force.

***A Current Legislative Framework***

Employee entitlements are required to be paid by an insolvency administrator<sup>9</sup> from the unsecured assets of an insolvent employer as a second level debt. First level debts are certain costs arising from the administration, whether it is a bankruptcy,<sup>10</sup> liquidation<sup>11</sup> or administration.<sup>12</sup> At the second level of priority, employees<sup>13</sup> are entitled to claim for unpaid wages and salary<sup>14</sup> in respect of services rendered to the insolvent employer during the four months preceding the commencement of the formal insolvency as well as any amounts due for accrued holiday pay.<sup>15</sup> Since 29 May 2004, employees are now able to claim for unpaid redundancy payments that accrued before or by reason of the employer insolvency and any court ordered reimbursement for lost remuneration.<sup>16</sup> One consequence of the insolvency law review that ultimately resulted in the *Companies Amendment Act 2006* and the *Insolvency Act 2006* being passed in November 2006 is that payments under the two Acts, (when they are in force) will be harmonised. For currently there are relatively minor differences in the scope of employee entitlements under the respective schemes

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<sup>9</sup> In this paper, the term ‘insolvency administrator’ is used as a non-specific term to describe the person empowered in the bankruptcy of a non-corporate employer or in the liquidation of a corporate employer and who is charged by the *Insolvency Act 1967* (NZ) or the *Companies Act 1993* (NZ) to distribute the insolvent employer’s property to the creditors in accordance with a hierarchy of privilege *determined by the relevant statute*.

<sup>10</sup> *Insolvency Act 1967* (NZ) s 104(1).

<sup>11</sup> *Companies Act 1993* (NZ) sch 7, cl (1).

<sup>12</sup> The *Companies Amendment Act 2006* (NZ) s 40, when it is in force, will amend sch 7 of the *Companies Act 1993* (NZ) by the addition of a limited new priority debt at this first level to cover the costs of creditors who finance actions for liquidators to recover assets and reasonable solicitor-client costs incurred when procuring an order of adjudication or liquidation.

<sup>13</sup> Also certain non-employee related creditors currently fall within this class of preferential creditors, but apart from the rights of lien holders, are to be removed from sch 7 by virtue of the *Companies Amendment Act 2006* (NZ) s 40.

<sup>14</sup> This is specifically provided to include unpaid wages and salary whether or not earned wholly or in part by way of commission and whether payable for time or for piece work.

<sup>15</sup> *Companies Act 1993* (NZ) sch 7, cl 12 (b) provides generally that holiday pay, in relation to a person, means all sums payable to that person by the company under sub-pt 1 of pt 2 of the *Holidays Act 2003* (NZ). As stated above, claims for unpaid wages and salary must relate to the four-months prior to the commencement of the appointment of the insolvency administrator; however claims for unpaid holiday pay are not limited by time in the same manner.

<sup>16</sup> Any reimbursement or payments required to be made by the company to an employee by employment institutions, including the Employment Court and the Employment Relations Authority, under the *Employment Relations Act 2000* (NZ) in respect of wages or other moneys or remuneration lost during the 4 months before the commencement of liquidation.

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of each Act.<sup>17</sup> Of the total owed to any one employee from all of the above categories, only NZ\$16 420 qualifies for preferential status.<sup>18</sup>

After payment of these debts,<sup>19</sup> an insolvency administrator is required to pay in order other classes of preferential creditors including lay-by sales, costs of compromises and certain outstanding Crown revenue debts.

Revenue debts are required to be paid after all other classes of preferential debt, although before unsecured creditors and there is no cap on these payments. Although, compared to certain countries, the level of preference is not extreme,<sup>20</sup> the policy decision<sup>21</sup> to continue the preferential status of certain revenue debts with only minor changes<sup>22</sup> is out of step with developments in Australia and the United Kingdom. While this decision to maintain the status quo may have a significant impact on the new voluntary administration scheme which also is included in the *Companies*

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<sup>17</sup> For example, currently any amounts due to a worker under the *Workers Compensation Act 1956* (NZ) owing before liquidation are claimable under the sch 7 of the *Companies Act 1993* (NZ), but not under the *Insolvency Act 1967* (NZ) regime. Further, any amounts payable to the Inland Revenue Department for child support by an employee and any amounts deducted to meet student loan repayment obligations are claimable under the *Insolvency Act 1967* (NZ), but only child support deductions are claimable in liquidation.

<sup>18</sup> The figure applies from 1 July 2006 to 30 June 2009 and is required to be adjusted every three years in accordance with changes in average weekly earnings, *Companies Act 1993*, (NZ) sch 7, cl 6A; *Insolvency Act 1967* (NZ) s104 (1B).

<sup>19</sup> Also preferential treatment includes any part of funds advanced by a third party, (such as a bank) for specific payment of wages and salary, on the basis that if the advance had not been made, any employees who otherwise would not have received remuneration, would have been eligible to become preferential creditors. *Companies Act 1993* (NZ) sch 7, cl 7; *Insolvency Act 1967* (NZ) s104(2).

<sup>20</sup> Andrew R. Keay (ed), *McPherson's Law of Company Liquidations* (2001), 744 states that while countries such as France, Spain, Ireland and Italy retain wide preferential rights for tax liability and can be seen at one end of the spectrum, other countries such as Denmark, Sweden, Finland, Austria, Germany, Portugal and Australia are at the other end of the spectrum as they have abolished any priority status for the revenue authorities. The United States, New Zealand and the United Kingdom are representative of countries which are somewhere in between these two extremes as they have reduced the level of preference, but not abolished it.

<sup>21</sup> Commerce Select Committee, New Zealand Parliament, *Commentary on Insolvency Law Reform Bill* (2006) [16, 17].

<sup>22</sup> Proposed to be removed from the current crown preferential debt are unpaid duty under the *Customs and Excise Act 1986* (NZ) from the sch 7 of the *Companies Act 1993* (NZ) and accident compensation deductions payable to the Accident Compensation Corporation as well as unpaid custom duties from the *Insolvency Act 1967* (NZ), s 104(1)(e).

*Amendment Act 2006*,<sup>23</sup> it does also impact on employees as it reduces the likelihood that employees, with claims over A\$16 420 will recover any part of their unsecured debts.<sup>24</sup>

### **B Privileged Employees**

In 2004 a problematic definition of employee as ‘any person of any age employed by an employer to do any work for hire or reward under a contract of service (including a homemaker as defined in s 5 of the *Employment Relations Act 2000*)’ was introduced into both Acts.<sup>25</sup> This amendment was originally proposed by the Law Commission<sup>26</sup> to clarify that other types of workers were not eligible to be preferential creditors. The recommendation was that the existing priority granted to employees should continue, but that it ‘be expressed as being limited to employees who have the right to bring a personal grievance under the *Employment Contracts Act 1991*’.<sup>27</sup> Under that Act, the terms of the contract between the parties were viewed as indicative of the parties’ contractual intent.<sup>28</sup> However, by the time the definition was introduced in 2004,<sup>29</sup> the principal Act governing employment relationships was the *Employment Relations Act 2000*. Concerns that the unregulated bargaining system which had developed during the 1990s, had encouraged some employers to require workers to become ‘contractors’ in order to avoid the ‘minimum code’ afforded to employees, had led to a revised definition of employee in the new Act. Specifically the definition of employee now includes an express direction to any Court or Authority, in any case requiring determination, to decide on the real nature of the relationship and not to treat

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<sup>23</sup> *Companies Amendment Act 2006* (NZ) s 6 sets out new pt 15A to be inserted in to the *Companies Act 1993* (NZ).

<sup>24</sup> However, it is noted that if crown preference was removed entirely would however not necessarily guarantee that employees receive a greater proportion of the debts owed to them. For although it may result in a increased likelihood that there will be funds left to distribute to the unsecured creditors, the pool of unsecured creditors would undoubtedly increase if the crown was entitled to claim. That is although the size of the pie would increase, it would need to be cut more ways.

<sup>25</sup> *Companies Act 1993* (NZ) sch 7, cl 12(ab); *Insolvency Act 1967* (NZ) s 104(3). This definition is also restated in the *Insolvency Act 2006* (NZ) s 276(4)(b).

<sup>26</sup> The New Zealand Law Commission, *Priority Debts in the Distribution of Insolvent Estates - An Advisory Report to the Ministry of Commerce*, Study Paper No 2 (1999).

<sup>27</sup> *Ibid* [50].

<sup>28</sup> See *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 2 NZLR 681(CA) when the interpretation of the terms of contract was considered determinative as to the status of the worker in question.

<sup>29</sup> *Companies Amendment Act 2004* (NZ); *Insolvency Amendment Act 2004* (NZ).

any document or statement between the parties as definitive.<sup>30</sup> In *Curlew v Harvey Norman (NZ) Ltd*,<sup>31</sup> Colgan J commented that a judge after considering all relevant matters, ‘including by applying ‘tests’ such as control, integration, and what is known by the shorthand of ‘the fundamental test’,<sup>32</sup> must decide the real nature of the relationship. At this stage it is unclear what will be the impact for the preferential payments regime. If an insolvency administrator did adopt the ‘real nature of the relationship’ test for employees, a dependant contractor, being a person although described as self-employed, but who works exclusively for a failed employer, may qualify as a preferential creditor, but this has yet to be tested by the courts.

*The Companies Act 2003* definition of employee additionally expressly excludes directors as it states that an employee ‘does not include a person who is, or was at any time during the 12 months before the commencement of liquidation, a director of the company in liquidation, or a nominee or relative of, or a trustee for, a director of the company.’<sup>33</sup> The broad definition of director contained in the Act<sup>34</sup> also extends the application of the definition beyond appointed directors. This exclusion was a more radical departure from the previous regime, although provisions excluding director-employees or reducing the amount that they are entitled to claim as preferential creditors are not uncommon in insolvency regimes in other countries.<sup>35</sup> As reported in the 2003 ILO *Survey on the Protection of Wages*, many countries exclude certain employees ‘from privileged protection on account of their possible responsibility for the insolvency of the enterprise...The assumption is that those accountable for the business failure should not, by the mere fact of their legal status as employees of the insolvent enterprise, be allowed to benefit from the legal mechanism designed to protect the unintentional victims of the insolvency’.<sup>36</sup> This total exclusion of directors

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<sup>30</sup> *Employment Relations Act 2000* (NZ) s 6(2).

<sup>31</sup> *Curlew v Harvey Norman (NZ) Pty Ltd* [2002] 1 ERNZ 114.

<sup>32</sup> *Curlew v Harvey Norman (NZ) Pty Ltd* [2002] 1 ERNZ 114, 116.

<sup>33</sup> *Companies Act 1993* (NZ) 7<sup>th</sup> sch, cl 12 (ab).

<sup>34</sup> *Companies Act 1993* (NZ) s 126.

<sup>35</sup> *General Survey of the reports concerning the Protection of Wages Convention (No 05) and the Protection of Wages Recommendation (no 85) 1949*, Report of the Committee of Experts for the International Labour Organisation, Geneva, (2003) ch v, [304].

<sup>36</sup> *Ibid.*

and their relatives<sup>37</sup> is certainly more hard line than in Australia which restricts claims of excluded employees, namely those employees who were directors of the insolvent company at any time during the 12 months before the commencement of the winding up, their spouses and relatives to A\$2 000 in respect of wages and A\$1 500 in respect of leave entitlements.

## II QUALIFICATION OF PRIVILEGE

Article 11 of the *1949 Convention* provides that the length of the period or the amount to be privileged is to be determined by the national laws of ratifying countries. Similarly, it provides that it is up to ratifying countries to determine the priority of wages relative to the priority of other privileged debts.<sup>38</sup> The *1992 Convention* partially revised the earlier *Convention* by providing that the period should not be less than three months prior to the insolvency, that privilege should extend to all holiday pay earned during the year in which the insolvency occurred and should include all severance pay due to the worker upon termination of the employment.<sup>39</sup> It further provides that while the amount of workers claims may be prescribed, this amount should not fall below a socially acceptable level.<sup>40</sup>

In 2003 at the 91<sup>st</sup> Session of the International Labour Conference a report of the findings of a survey concerning the implementation of both *Conventions* was tabled.<sup>41</sup> The survey included both ratifying and non ratifying countries and revealed substantial variance between countries as to the nature of the privilege and also how wage claims are ranked in comparison to other privilege claims such as crown revenue and insolvency administration claims.

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<sup>37</sup> However, directors and relatives are excluded from the definition of employees only for the purposes of sch 7.

<sup>38</sup> C95 *Protection of Wages Convention, 1949*, adopted 1 July 1949, ILO, Geneva, Art 11.1 but note art 11.2 requires that any part of wages owing to workers that is a privileged debt is required to be paid in full before ordinary creditors can be paid at all.

<sup>39</sup> C173 *Protection of Workers' Claims (Employer's Insolvency) Convention 1992*, adopted 23 June 1992, ILO, Geneva, pt II, art 6.

<sup>40</sup> Ibid art 7.

<sup>41</sup> *General Survey of the Reports concerning the Protection of Wages Convention (No 95) and the Protection of Wages Recommendation (no 85) 1949*, Report of the Committee of Experts for the International Labour Organisation, Geneva (2003).

In Canada, wage debts are ranked after court expenses, funeral expenses and the expenses of a terminally ill debtor.<sup>42</sup> However the *Bankruptcy and Insolvency Act* only provides a limited measure of protection to wage earners, in that wage claims up to a maximum of A\$2 000 are privileged. The Canadian system is currently under reform as discussed later in this paper.

In Australia, in consumer insolvency, employee wage claims are ranked after costs relating to the insolvency, including expenses related to the administration of the bankruptcy, expenses of the trustee and the costs of any audit and funeral expenses of the bankrupt. There is a limit in bankruptcy proceedings per employee, with the exact figure adjusted annually, but separate and subsequent priority claims are permitted for any payments due for workers compensation and for long service leave, annual leave or sick leave. The current iteration in terms of corporate employers is contained in the *Corporations Act 2001*<sup>43</sup> which provides a distribution priority upon insolvency as to wages and superannuation contributions, payments in lieu of notice, annual leave, long service leave, workers compensation payments and redundancy. One key distinction is that there is no time or monetary limit on wages and other entitlements.

Employees in the United Kingdom in terms of insolvency law rights are granted minimum protection, but may be entitled to additional protections from other sources. The *Insolvency Act 1986*, while substantially amending the United Kingdom preferential creditor regime by the removal of a person or entity's assessed taxation, such as income tax or corporation tax, did not remove employee preferences. The 6<sup>th</sup> Schedule to the *Insolvency Act 1986* lists wages and salaries of employees and earning related social security contributions as well as certain taxes collected for the Crown such as PAYE, national insurance contributions and various duties as having preferential status and employees share their priority rateably with these other

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<sup>42</sup> *Bankruptcy and Insolvency Act*, RSC 1985, cB-3, s 136(1)(d).

<sup>43</sup> *Corporations Act 2001* (Cth) s556.

creditors. However, the *Enterprise Act 2002*<sup>44</sup> removed the crown preference. Specifically, employees are entitled to claim unpaid wages and holiday pay accruing in the four months prior to a maximum of £800.

### **III GUARANTEE INSTITUTION OR FUND**

Although employees in the United Kingdom have limited preferential payment rights, they are entitled to claim against the National Insurance Fund (NIF) by virtue of the *Employment Rights Act 1996*.<sup>45</sup> This Act provides that qualified employees are entitled to claim for unpaid wages (up to eight weeks to a maximum of £290<sup>46</sup> per week), notice pay, holiday pay, and certain other payments. Once the employee is paid, the NIF is subrogated to the rights of the employee as a creditor against the employer, including any rights as a preferential creditor.

Workers in Australia may be insulated from the effects of employer insolvency by the operation of a government funded scheme to protect workers unpaid entitlements on employer insolvency. In 2000, the federal government introduced a nationally funded scheme.<sup>47</sup> This scheme was replaced by a new scheme in 2001 known as the *General Employee Entitlements and Redundancy Scheme* (known as GEERS) that operated since September 2001.<sup>48</sup> The latest version of the Scheme which took effect from 1

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<sup>44</sup> *Enterprise Act 2002* (UK) s 251, but note because of concerns that this reform would only benefit certain creditors, the *Insolvency Act 1986* (UK) was amended to require floating chargeholders who benefit from the reform to pay a proportion of the net assets to a fund available to unsecured creditors.

<sup>45</sup> *Employment Rights Act 1996* (UK) ss 166-170 and ss 182-190.

<sup>46</sup> The *Employment Rights (Increase of Limits) Order 2005* (SI 2005 No 3352) (UK) provides that the increase to this amount from £280 will apply where the event giving rise to the entitlement to compensation (the insolvency of an employer) occurs on or after 1 February 2006.

<sup>47</sup> This was known as the Employee Entitlements Support Scheme and provided for capped payments that guaranteed entitled employees up to 29 weeks of pay at ordinary time's rates. This consisted of a maximum of four weeks unpaid wages, four weeks annual leave, 12 weeks annual service leave, five weeks pay in lieu of notice and four weeks redundancy payments and applied to employees who employment was terminated by reason of employer insolvency after 1 January 2000.

<sup>48</sup> The 2001 Scheme was replaced by a revised Scheme that took effect from 1 November 2005 until 31 October 2006 in accordance with a revised version of the GEERS Operational Arrangements. See Department of Employment and Workplace Governance: *General Employee Entitlement and Redundancy Scheme* <[http://www.workplace.gov.au/workplace/Category/SchemesInitiatives/EmployeeEntitlements/GEE\\_RSV2/](http://www.workplace.gov.au/workplace/Category/SchemesInitiatives/EmployeeEntitlements/GEE_RSV2/)> at 29 March 2007.

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November 2006 reduced the ambit of the Scheme by limiting claims for unpaid wages to the period of three months prior to the appointment of an Insolvency Practitioner. Eligible employees<sup>49</sup> are still entitled to claim any unpaid annual leave, unpaid long service leave, unpaid pay in lieu of notice arising from the termination of the employment and any unpaid redundancy up to a maximum of 16 weeks. There is a cap per employee, which at December 2006 is A\$98 200.

Canada has also considered some form of wage earners protection fund as part of a broad reaching review of its insolvency legislation including substantial public consultation. In reviewing the options, it was accepted that employees are vulnerable creditors who lack the information capacity to assess the risk that an employer will go bankrupt and have limited powers to protect themselves.<sup>50</sup> It was also recognised that the current laws provide inadequate protection to employees. Various alternatives such as elevating employee claims to super priority, some form of wage protection fund scheme or employment insurance related funding have been considered.<sup>51</sup>

The result was that in November 2005 the *Wage Earner Protection Program (WEPP) Act*<sup>52</sup> was enacted to amend the *Bankruptcy and Insolvency Act*<sup>53</sup> and the *Companies' Creditors Arrangement Act*.<sup>54</sup> The Preamble provides that it is an Act to establish a program for making payments to individuals in respect of wages owed to them by

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<sup>49</sup> Eligible employees are those whose lost their job because the employer became bankrupt or a liquidator was appointed, the claim is lodged within 12 months of ceasing employment or the date on which the former employer became bankrupt or went into liquidation, whichever is the later and the employment entitlement is one that is legislated, in a statutory agreement or a written contract of employment or otherwise confirmed in writing at the time of appointment of the Insolvency Practitioner.

<sup>50</sup> Marketplace Framework Policy Branch, Policy Sector of Industry Canada, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002) [25-32]. This Report was produced for a Parliamentary Committee set up to view both Acts <<http://strategis.ic.gc.ca/epic/internet/incilp-pdci.nsf/en/cl00675e.html>> at 29 March 2007.

<sup>51</sup> Jacob Ziegel, 'Bill C-55 and Canada's Insolvency Law Reform Process' (2006) 43 *Canadian Business Law Journal* 76; Margaret Smith, Law and Government Division of Parliamentary Research Branch, Depository Services Program, *Protecting Employee Wages in Bankruptcy* PRB No 01-34E (2002) [5-6] <<http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0134-e.htm>> at 29 March 2007.

<sup>52</sup> Wage Earner Protection Program Bill 2005 (C-55) received Royal Assent in 25 November 2005.

<sup>53</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3

<sup>54</sup> *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

employers who are bankrupt or subject to a receivership. Wages include salaries, commissions, compensation for other services rendered, vacation fees but does not include severance or termination pay. At the time of writing, the implementation of this Act is still under debate,<sup>55</sup> and for this reason and that the accompanying regulations have yet to be promulgated, the specifics are not known. However the basic scheme of the Act is that wages must be owed to an employee by a former employer and payments to such eligible employees up to specified limits are to be funded by the Crown and in consideration, workers will be required to assign their rights to prove in the insolvency to the Crown. Directors, officers, persons with managerial positions or controlling interests are ineligible. The WEPP is one part of a comprehensive insolvency package which also proposes amendments to the existing priority regime by giving unpaid wages a super priority over certain secured creditors to a maximum of CA\$2 000.<sup>56</sup>

In 1999 the Law Commission in New Zealand recommended that some form of wage earner protection fund be considered as a means of better securing the protection of vulnerable employees at whom priority or privilege is directed.<sup>57</sup> The advantages listed by the Commission of a fund based on employer levies, as identified in the Harmer Report,<sup>58</sup> were guarantee of payment, reduction in the amount of litigation and the limited amount of government funding required to maintain such a fund. The Ministry of Economic Development published in January 2001 a Discussion Document<sup>59</sup> which strongly recommended against such a fund. In the Ministry's view, it would penalise successful firms, create a moral hazard, benefit only some

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<sup>55</sup> See generally Jacob Ziegel, 'Bill C-55 and Canada's Insolvency Law Reform Process' (2006) 43 *Canadian Business Law Journal*, 76 for an in-depth outline of the history and likely future of the WEPP Act.

<sup>56</sup> Above n 50, cl 67.

<sup>57</sup> The New Zealand Law Commission, above n 26, [88-9], but unfortunately as consideration of such a fund was not within its terms of reference, the Law Commission did not make detailed suggestions as to possible form or structure.

<sup>58</sup> Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988).

<sup>59</sup> New Zealand Ministry of Economic Development, *Insolvency Law Review: Tier One Discussion Documents* (2001) <[http://www.med.govt.nz/templates/StandardSummary\\_\\_\\_188.aspx](http://www.med.govt.nz/templates/StandardSummary___188.aspx)> at 29 March 2007.

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employees and was excessively costly.<sup>60</sup> Not surprisingly, the issue has not progressed further.

The *Companies Act 1993* will contain new provisions that may offer assistance, albeit of a limited nature, to employees as creditors of an insolvent corporate employer, once the *Companies Amendment Act 2006* comes into force. The new voluntary administration scheme is intended to make it easier to resurrect failing businesses and new s 380(2) will make it an offence for a director who, with intent to defraud a creditor or creditors of the company, does any thing that causes material loss to any creditor.<sup>61</sup> Although, the new offence is aimed at reducing the incidence of phoenix company activity, it will, when in force, supplement the existing arsenal of civil actions<sup>62</sup> that can be used against directors who cause creditors loss. However, it does not go as far as the Australian *Corporations Act 2001* that was amended to penalise persons who intentionally enter into agreements or transactions for the purposes of preventing or significantly reducing the recovery of entitlements by employees and significantly, grant to the court powers to order compensation from such person to the company's employees.<sup>63</sup> Currently in Canada, under s 119(1) of the *Canadian Business Corporations Act*, employees may sue the company's directors jointly and severally for up to six months of unpaid wages and accrued holiday pay. Similar provisions exist in some state legislation such as the *Ontario Business Corporations Act*.

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<sup>60</sup> Ibid [84].

<sup>61</sup> *Companies Amendment Act 2006* (NZ) s 33.

<sup>62</sup> Breach of directors duties, specifically the duties against reckless trading and incurring unperformable obligations contained in the *Companies Act 1993* (NZ) ss 135-6 may, upon the liquidation of a company, result in a director or directors becoming personally liable for unpaid debts of the company to the extent that such duties arose as a consequence of the breaches of duty under s 310 of the *Companies Act 1993* (NZ).

<sup>63</sup> *Corporations Act 2001* (Cth) pt 5.8A introduced by the *Corporations Law Amendment (Employee Entitlements) Act 2000*. See Christopher F Symes, 'A New Statutory Directors' Duty for Australia—A 'duty' to be concerned about Employee Entitlements in the Insolvent Corporation' 12 (2003) *International Insolvency Review* 133; John Dunns, *Insolvency—Law and Policy* (2002) 322.

#### IV CONCLUSION

The key issue with solely protecting employees' rights on an employer's insolvency by means of privileging their debts is that at best it may be an ambulance at the bottom of the cliff. Employees have to wait for the insolvency administrator to distribute the assets and pray that there are sufficient funds to cover their unpaid emoluments. However, as the New Zealand government appears very reluctant to substantially alter the status quo as evidenced by the lack of success of recent demands to remove the Crown preference,<sup>64</sup> wage earners in New Zealand are likely to remain disadvantaged compared to comparable jurisdictions and continue to be the 'lost souls of insolvency law'.<sup>65</sup>

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<sup>64</sup> See Commerce Select Committee, New Zealand Parliament, *Commentary on Insolvency Law Reform Bill* (2006) [16] that a large number of submitters had expressed concern that the bill maintains the Crown Priority, and proposed that the bill should remove it. The Committee considered the issues raised by the submitters, but by majority considers that the Crown priority should be retained.

<sup>65</sup> Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2002) 571.