Taxation (Annual Rates, Business Taxation, KiwiSaver, and Remedial Matters) Bill

Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill

Volume 2

KiwiSaver

17 September 2007

Prepared by the Policy Advice Division of Inland Revenue, The Treasury and the Ministry of Economic Development

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KiwiSaver

OVERVIEW

The bill contains the legislation to give effect to some of the KiwiSaver enhancements announced as part of Budget 2007[1], namely:

- Matching compulsory employer contributions if an employee is contributing to a KiwiSaver scheme or a complying superannuation fund. The compulsory contributions are phased in over four years, starting at 1% from 1 April 2008 and reaching 4% of gross salary or wages from 1 April 2011.
- An employer tax credit of up to $20 a week for each employee to reimburse employers for their contributions to a KiwiSaver scheme or a complying superannuation fund.

The bill also contains a number of technical amendments to fine-tune the scheme as enacted last year in the KiwiSaver Act 2006. Two supplementary order papers (SOP No. 130 and SOP No 139) were released by the government and referred to the Committee for consideration and inclusion in the bill. The key features of the SOPs are:

- Amendments to the member tax credit rules clarifying the relevant period of membership for the calculation of the credit (so that contributions held by Inland Revenue are included in contributions received for the purpose of calculating the member tax credit), and remedying a drafting error with the basic formula used to calculate the amount of the credit.
- Amendments relating to complying superannuation funds to require employer participation agreements to be lodged with the Government Actuary and a requirement that members of such schemes will have the option to make a lump sum withdrawal.
- Amendments to the rules that allow employer contributions to an existing superannuation scheme to count towards compulsory employer contributions, to explicitly include employer contributions and superannuation subsidies paid to Members of Parliament, judicial officers, and sworn members of the Police. Additional classes of employees may be prescribed by regulations.
- The requirement for providers to disclose their approach to responsible investment.

Issues relating to the member tax credit raised in supplementary submissions on SOP No. 130 will be considered in a later volume.

[1] Other enhancements announced as part of Budget 2007 were contained in the Taxation (KiwiSaver and Company Tax Rate Amendments) Bill, which was tabled during the Budget debate and passed through its final stages in Parliament on 18 May.

Over 40 submissions on the proposed KiwiSaver changes were received. Most of the submissions supported the enhancements and focussed on technical matters. A small number of the submissions opposed the introduction of the compulsory employer contribution and others commented on the policy process relating to the announcements in Budget 2007, including the lack of consultation.

Officials consider that the key policy issues include:

- the minimum employee contribution rate of 4% and whether it should be lowered to 2%;
- the impact of compulsory employer contributions on existing employment agreements; and
- the age of eligibility for compulsory employer contributions and the member tax credit.

The key technical submissions relate to:

- What existing employer contributions should be included in the concept of "other contributions". The amount of "other contributions" is offset against the amount of compulsory employer contribution so that employers who are contributing do not have to contribute twice.
- The proposed change that will require contributions to a complying superannuation fund to be based on "gross salary or wages" rather than "gross base salary".
- The need to legislate rules around invalid accounts.

A number of submissions commented on the need to renumber subpart KJ as it covers both the member tax credit (as enacted in the Taxation (KiwiSaver and Company Tax Rate Amendments) Act 2007) and the employer tax credit, which is included in the bill. SOP No.130 renumbers the employer tax credit provisions.

Some submissions commented on the need for the design and administration of KiwiSaver to be practicable and minimise compliance costs for employers, employees and providers. Officials acknowledge the importance of this, which is reflected in our recommendations, as appropriate.

POLICY RATIONALE AND PROCESS

Issue: Policy rationale

Submission
(81 and 81A – Retirement Policy and Research Centre, The University of Auckland)

There are major concerns of principle with KiwiSaver as it has now evolved. What started as a relatively simple, universal workplace-based retirement savings scheme ("KiwiSaver I") has now emerged as "KiwiSaver II", a complex, distortionary, expensive instrument that will add significantly to the cost to New Zealand of our ageing population.

Concerns include:

- the way KiwiSaver I was transformed, virtually overnight and without debate;
- the potential threat that KiwiSaver II now poses to the long-term future of New Zealand Superannuation;
- the absence of a rigorous justification for the changes to KiwiSaver I in the bill;
- the process of change;
- the absence of local evidence to support the rewrite of the KiwiSaver I framework, even before it began;
- the failure to acknowledge international evidence that indicates KiwiSaver II probably will not "work" (increased national savings to the extent justified by the costs);
- the failure of KiwiSaver II to meet the standards suggested by the OECD for the measurement of good regulatory changes; and
- the way in which the government seems now to have re-politicised superannuation as an issue.

KiwiSaver II may not change anything of substance in the face of New Zealand's ageing population, but will re-arrange things without growth in output, and KiwiSaver II may make things worse.

Comment

Several submissions dispute the policy rationale for the KiwiSaver package and its likely impact. Others support both the policy intent of the enhancements and their contribution to the objectives of encouraging 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.

Consultation on changes to the KiwiSaver scheme is being done through the Select Committee process, as was signalled when the proposals were announced in Budget 2007.

Recommendation

That the submission be noted.

Issue: Regulatory impact statement

Submissions
(9 – New Zealand Business Roundtable, 81 and 81A – Retirement Policy and Research Centre, The University of Auckland Business School)

The bill should not proceed on the basis that it is in breach of the Cabinet regulatory analysis requirements. The government should be required to produce a rigorous regulatory impact statement and allow interested parties to make submissions on it before the bill is reported back to the House. The regulatory impact statement should indicate the problem the proposed legislation is attempting to address, the objectives of legislative action, a consideration of feasible options, the costs and benefits of those options and consultation.

Comment

The regulatory impact analysis (RIA) requirements have recently been updated to more accurately reflect good policy process. Part of this development has been the shift from the focus on the regulatory impact statement to the analysis undertaken in the development of regulation – the regulatory impact analysis.

The new RIA guidelines provide that the RIA requirements do not apply if the proposal is to give effect under urgency, in terms first announced in the Budget, to a specific Budget decision, where the decision is to:

- repeal, impose, or adjust a tax, fee or charge; or
- confer, revoke, or alter an entitlement; or
- impose, revoke, or alter an obligation.

The matters relating to KiwiSaver in this bill were first announced in the Budget and were introduced under urgency. The proposals confer entitlements and impose obligations within the KiwiSaver framework. Accordingly, the bill is exempted from the RIA requirements and, as such, is not in breach of the Cabinet regulatory analysis requirements.

Recommendation

That the submissions be declined.

Issue: OECD test of quality regulation

Submissions

(81and 81A – Retirement Policy and Research Centre, The University of Auckland Business School)

The bill fails most of the eight OECD *Guiding Principles for Regulatory Quality and Performance*. Specifically, the bill:

- only partly achieves Principle 1: to serve clearly identified policy goals and be effective in achieving those goals;
- fails Principle 2: to have a sound legal and empirical basis as no evidence has been supported the objectives indicated by the bill;
- fails Principle 3: to produce benefits that justify costs as there are no estimates of benefits to justify the doubling of government expenditure;
- fails the second leg of Principle 4: to minimise costs and market distortions as the proposal confers further significant property rights on default providers;
- fails Principle 5: to promote innovation through market incentives and goal based approaches as there is no ability to choose between alternative providers;
- fails Principle 6: to be clear simple and practical for users as remuneration arrangements are likely to become substantially more complex and will affect employees at all tax levels;
- fails Principle 7: to be consistent as far as possible with other regulations and policies as it breaches the fundamental voluntary nature of superannuation in New Zealand, by giving rewards for designated behaviours; and
- fails Principle 8: to be compatible as far as possible with competition, trade and investment facilitating principles at domestic and international levels by conferring a benefit on default providers.

Comment

The OECD guidelines on quality regulations stemmed from an increasing reliance on OECD governments on regulation as a policy-making tool. As such, the guidelines were predominantly aimed at providing governments with a framework within which regulatory reform could be undertaken with more efficient results. Specifically, the guidelines stem from an OECD recommendation that member countries take measures to ensure the quality and transparency of regulation. The measures recommended by the OECD, are premised around establishing an appropriate regulatory impact analysis (RIA) framework.

New Zealand has adopted these guidelines into our own RIA framework. The new RIA guidelines provide that the RIA requirements do not apply if the proposal is to be given effect under urgency. As such, the bill is exempted from the RIA requirements.

Recommendation

That the submissions be noted.

Issue: Process, timing and consultation

Submissions
(17 – Mercer Human Resource Consulting, 23 – Investment Savings and Insurance Association of New Zealand INC (ISI), 33 – Corporate Taxpayers Group, 47 – ING (NZ) Ltd)

Superannuation is complex. Recent changes to key features of KiwiSaver have not been subject to any consultation with employers or the industry. The changes proposed in the bill have significant implications for employers, employees and superannuation providers. The lack of consultation and the very tight timelines will result in poorly crafted legislation which will need remedial legislation as the problems emerge. This will jeopardise the success of the initiatives and may have a long-term detrimental impact on attitudes to both KiwiSaver and the financial services industry. The proposals, if implemented in their current form, will force employers to restructure their remuneration arrangements and have the potential to cause industrial unrest. *(Mercer Human Resource Consulting, ISI)*

There has been no consultation with the industry and the submitters believe there was minimal consultation with the Inland Revenue's KiwiSaver project team. As a result the legislation is unworkable in parts. *(ISI, ING* (NZ) Ltd*)*

The manner in which the changes were introduced has been significantly at variance with the Generic Tax Policy Process. *(CTG)*

Comment

Remuneration agreements established prior to Budget announcements obviously could not factor in compulsory employer contributions. KiwiSaver does, however, provide a transition path to ensure employers and providers can accommodate compulsory employer contributions. These include:

- introducing compulsory employer contributions from 1 April 2008, to allow for consultation through this process, and more than 10 months from announcement to implementation;
- the phasing in of employer contributions from 1 April 2008 until 2011; and
- the employer tax credit of up to $20 per week, with no phasing, to partly offset additional employer costs.

The phasing in of employer contributions and tax credits will mean employers face no additional cost for employees earning less than $52,000 (which exceeds the average wage) until 31 March 2010. Employers will therefore have almost three years from Budget announcements to factor compulsory employer contributions into their industrial settlements, before incurring any costs for the majority of their employers.

In addition, employers who already provide employer contributions to KiwiSaver complying schemes will be able to access employer tax credits of up to $20 per week from 1 April. This will provide a windfall gain for payments these employers would have already been making. Also, employer contributions to existing superannuation schemes for employees employed before 1 April 2008 will count towards the compulsory employer contributions.

In relation to the submission that the KiwiSaver enhancements were introduced at variance with the Generic Tax Policy Process, the proposals were developed in the context of Budget 2007, and the opportunity to present comments on the KiwiSaver proposals has been allowed through the select committee process.

Recommendation

That the submissions be declined.

Issue: Treasury report, *A Synopsis of Theory, Evidence and Recent Treasury Analysis on Saving*

Submission
(81B – Retirement Policy and Research Centre, The University of Auckland Business School)

The Treasury report *A Synopsis of Theory, Evidence and Recent Treasury Analysis on Saving* implies that the radical extensions to KiwiSaver through Budget 2007 cannot, or by not much, change behaviour to increase either total individual or national saving.

The submission argues that:

- The report was written after the government had taken its controversial decision rather than to inform the government decision-making process.
- The report highlights that policy analysis of savings remains difficult because high quality data remains elusive, the effectiveness of possible interventions to lift savings is often not unambiguous, and even interventions that are effective in achieving one objective usually have downsides measured against other objectives.
- The OECD has stopped publishing New Zealand's household saving numbers in its semi-annual Economic Outlook because of an apparent lack of confidence in them.
- The report uses the Reserve Bank data that shows large increases in household wealth but this data excludes the value of businesses, farms, horticultural and forestry investments, and directly held commercial property, which is a recognised shortcoming of that data.
- The report arrives at a disconnected conclusion.

The submission considers that:

- Nothing much has changed in the economy or with respect to saving(s) to reach the conclusion that further or stronger pro-saving action is now justified, and that more compelling evidence is needed to support such a large and expensive change in government policy direction.
- There is no clear economic analysis on how KiwiSaver II will address the national saving issues, distributional consequences, or the fate of the universal State pension.

Comment

Several submissions dispute the policy rationale for the KiwiSaver package and its likely impact. Others support both the policy intent of the enhancements and their contribution to the objectives of encouraging 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. Treasury's specific advice on KiwiSaver and its likely impacts is set out in a separate report, *Overview of Enhanced KiwiSaver Package,* which was posted on the Treasury website on 28 June 2007.

Recommendation

That the submission be noted.

Issue: Employers already providing employee superannuation are penalised if contributions are provided in the wrong form

Submission
(8 – Christchurch City Council)

Some employers are already providing employees with either a contribution to a superannuation fund or a cashed-up equivalent. These employers are unfairly penalised by only being allowed to count direct superannuation fund contributions as an offset for KiwiSaver compulsory employer contributions.

Employees receiving a contribution that is directed to a superannuation fund are also relatively disadvantaged compared with cashed-up colleagues, as the former group will be able to access additional KiwiSaver compulsory employer contributions.

To address this issue it is suggested that previous superannuation subsidies count against KiwiSaver compulsory employer contributions.

Comment

Over time, many employees and employers have developed arrangements where some employees have "cashed up" superannuation, while others receive superannuation contributions. It would be difficult, misleading and potentially inequitable to try to "rebalance" the playing field retrospectively by, for example, asking employers to disentangle previous decisions to identify superannuation from other components of remuneration. An individual determination would be required for potentially every employment agreement in New Zealand. Allowing previously cashed-up superannuation payments to count against compulsory employer contributions would also encourage gaming to identify elements of existing remuneration as being a superannuation component. Arbitrary decisions would be required to determine what previous payments count as superannuation components and for what timeframes.

In addition to potential extra costs, submissions neglect to mention that there are also potential extra benefits to employers. Employers making contributions to existing KiwiSaver-compliant schemes may receive a windfall gain from the employer tax credit. Any legislative change would need to address both aspects. Officials consider that this is a matter that is best left to wage bargaining discussions between the employer and the employee.

The costs and complexity of addressing this issue are likely to be excessive and would require equally arbitrary and inequitable decisions.

Officials note that for an existing employee, depending upon the provisions of his or her employment contract, a switch from a cashed-up subsidy to an employer contribution that meets the "other contributions" criteria in proposed section 101D of the KiwiSaver Act may count towards the compulsory employer contribution.

Recommendation

That the submission be declined.

Issue: Whether KiwiSaver should form part of total remuneration

Submissions
(12 – Employer & Manufacturers Association (Northern), 26 – Hospitality Association, 30 – NZ Public Service Association, 50 – Eriksens Actuarial, 66 – Business New Zealand, 78 – Council of Trade Unions, 86 – Employer & Manufacturers Association (Central) Incorporated), 96 – New Zealand Nurses Organisation)

A clause should be introduced to provide for employer contributions to be recognised as coming from an employee's total employment package, whether or not the employee remains a KiwiSaver member on beginning employment or opting in later. *(Hospitality Association)*

If employer contributions are not treated on a total remuneration basis (meaning that an employee joining KiwiSaver receives a reduction in salary or other benefits), then employers will be uncertain of their total remuneration bill. This will occur if employees later join KiwiSaver, compelling the employer to make unexpected additional compulsory contributions. (This cost would be partly offset by the employer tax credit.) *(Employer & Manufacturers Association (Northern), Business New Zealand, Employer & Manufacturers Association (Central) Incorporated)*

If employer contributions are treated on a total remuneration basis, then employers would receive a windfall gain from employees joining KiwiSaver. This would occur as the employer would be able to reduce wages to offset compulsory employer contributions and the employer would also receive the employer tax credit. *(NZ Public Service Association, Council of Trade Union, New Zealand Nurses Organisation)*

The employer tax credit should go to the right party. A number of employers are permitting their employees to salary sacrifice in order to fund their "employer" contributions. These salary sacrifice contributions are basically the employee's and the employee should receive the tax credit for it, not the employer. *(Eriksens Actuarial)*

Comment

The bill is deliberately silent on this matter as it is expected that employers and employees will bargain all employee terms and conditions in good faith. This will include negotiations on the appropriate way to include KiwiSaver in the employment relationship.

Employers and employees have, however, raised concerns that, in the absence of government intervention, there may be opportunities for the other party to "game" industrial settlements. In particular, clarification has been sought on:

- the legal standing of existing employment agreements that purport to require employees to fund KiwiSaver compulsory employer contributions through a reduction in employees' gross pay;
- whether employee funding of compulsory employer contributions can legitimately be negotiated into future employment agreements; and
- whether the employer tax credit is available to employers who require employees to fund the compulsory employer contributions through a reduction in gross pay.

Policy to date has been to let employers and employees resolve any issues through negotiations. Ambiguity about the initial treatment of KiwiSaver employer contributions and the future ability to bargain in good faith is now, however, threatening to disrupt the smooth introduction of KiwiSaver.

It is therefore recommended that KiwiSaver legislation clarify the policy preference underlying the funding of KiwiSaver compulsory employer contributions during the phase-in of compulsory contributions. These are:

- Initial KiwiSaver compulsory employer contributions are not intended to decrease current total remuneration for existing or new employees opting into KiwiSaver before compulsory employer provisions come into force. As the employer tax credit removes or reduces the initial cost to employers of compulsory employer contributions, this benefit should be passed on to employees as an "on top of remuneration" payment.
- While initial KiwiSaver compulsory employer contributions are "on top of remuneration", further into the transition period KiwiSaver employer contributions may be offset in part against pay movements. The funding of future compulsory employer contributions is therefore a legitimate matter for mutual agreement between the parties.
- Where employers require employees to fund or part-fund compulsory employer contributions through a bargained agreement, the employer tax credit should be available only to the extent that employers themselves pay or part-pay for the employer contribution. (Without this provision, there would be a windfall gain to employers who have not previously provided for employees' superannuation.)

To address the issue of any pre-existing agreements that purport to require salary sacrifice, it is recommended that legislation be amended to explicitly void any provisions entered into prior to the availability of full information on KiwiSaver. This is best timed from the date of enactment of legislation in the Taxation (Annual Rates, Business Taxation, KiwiSaver, and Remedial Matters) Bill.

It is recommended that KiwiSaver legislation prescribe immediate transitional arrangements only. Any legislation seeking to achieve industrial relations outcomes risks dragging the government into a central role in individual employment negotiations.

While it is most appropriate to allow parties to come to decisions themselves, the government will monitor any instances of discrimination arising from KiwiSaver membership and take whatever action is deemed appropriate where discrimination on the basis of KiwiSaver membership is identified as a problem.

Recommendation

That the concerns raised by the submissions be addressed by amending KiwiSaver legislation to provide that:

- any employment agreement provisions entered into before the date of enactment of legislation contained in the Taxation (Annual Rates, Business Taxation, KiwiSaver, and Remedial Matters) Bill that bind employees to fund KiwiSaver compulsory employer contributions (or arrangements with the same effect) are null and void;
- initially, KiwiSaver compulsory employer contributions will be in addition to current remuneration;
- further into the transition period, KiwiSaver compulsory employer contributions may be offset in part against pay movements (that is, the funding of contributions is therefore a legitimate matter for mutual agreement between the parties of the parties); and
- where employers require employees to fund or part-fund compulsory employer contributions through a bargained agreement, the employer tax credit should be available only to the extent that employers themselves pay or part-pay for the employer contribution.

DEFINITION OF "SALARY AND WAGES"

Issue: Scope of salary and wages definition

Submissions
(3 – Tonkin & Taylor, 74 – Deloitte, 78 – Council of Trade Unions, 86 – Employers and Manufacturers Association (Central) Incorporated, 91 – New Zealand Institute of Chartered Accountants, 94 – ABN-AMRO, 96 – New Zealand Nurses Organisation)

Submissions raised the following issues in regards to payments included in the "salary and wages" definition for the purposes of calculating contributions to KiwiSaver.

- Consideration needs to be given as to whether the definition of "salary and wages" for the purposes of the compulsory employer contribution should exclude unexpected one-off payments. *(New Zealand Institute of Chartered Accountants)*
- Consideration should be given to allowing employees that receive bonus payments to choose whether extra pay over and above the capped amount are taken into account in calculating the employee's KiwiSaver deduction. *(Deloitte, ABN-AMRO)*
- Contributions should not be deducted from redundancy pay as that is a compensatory payment. *(New Zealand Council of Trade Unions, New Zealand Nurses Organisation)*
- Benefits should be removed from the scope of "gross salary and/or wages" under the KiwiSaver Act and there would be more clarity if it instead referred to "base salary and/or wages and commission earnings". *(Employers and Manufacturers Association (Central) Incorporated)*

Other issues raised regarding the use of gross salary and wages as the KiwiSaver definition include:

- Having 4% calculated on all pay including bonus amounts may be a barrier to some employees electing into KiwiSaver or may force employees into a contributions holiday when they become eligible for bonus schemes. *(Deloitte, ABN-AMRO)*
- The terms of KiwiSaver should be altered so that contributions are made only as a percentage of base salary, therefore giving both the employer and employee a clear understanding of what savings level they are actually committing to. *(Tonkin & Taylor)*
- The salary that is used to calculate the employer's contribution should be capped at a reasonable level. *(Tonkin & Taylor, Deloitte, ABN-AMRO)*

Comment

As KiwiSaver utilises the PAYE collection mechanism, the definition of salary and wages used in the KiwiSaver Act is based on the definition in the Income Tax Act 2004. The definition of salary and wages for KiwiSaver was devised to integrate with existing payroll systems so as to reduce compliance costs to employers and therefore uses a definition based on gross salary and wages as opposed to gross base earnings. The definition includes almost all income from employment, including sources such as overtime and bonuses. It does not include fringe benefits subject to fringe benefit tax.

For simplicity and to limit compliance costs to employers, the definition of salary and wages used to calculate the employer contribution should be the same as that used to calculate the member contribution.

However, officials agree that the inclusion of certain payments may have an impact on the affordability of KiwiSaver, from both employees' and employers' perspectives.

Officials have reconsidered the types of payments included in the definition and agree that redundancy payments should be excluded from the KiwiSaver definition of salary and wages. However, we do not consider that bonus payments and other one-off payments should be excluded. The basis of excluding redundancy payments is that they are infrequent in nature and less likely to be open to abuse – that is, they are not likely to be used for the main purpose of limiting KiwiSaver contributions. We also consider that those being made redundant are less likely to be able to afford to forgo a percentage of their redundancy payment so as to contribute to KiwiSaver. Also, excluding payments made irregularly is less likely to impose significant compliance costs on employers. We note that after the first year, the contribution holiday mechanism can be used to prevent contributions being made from such payments if the employer is willing to accept a contribution holiday for a pay period.

Officials also consider that the value of accommodation benefits and taxable allowances received for accommodation and the cost of living overseas should be excluded from the KiwiSaver definition of salary and wages as they are likely to have a significant impact on affordability for both employers and employees.

Employer contributions are capped at 4% of an employee's gross salary or wages and are dependant on the employees themselves also contributing at least the same amount. Officials do not consider that there should be an income threshold (cap) to limit contributions as this presumes that the government knows what an adequate level of retirement savings is, and that all people need the same amount of employer contributions to reach an adequate level of saving for retirement.

Recommendation

That the submission that employees be given the choice of whether bonus payments and extra amounts are to be included in the calculation of employees' KiwiSaver deduction be declined.

That the value of accommodation benefits and taxable allowances received for accommodation and the cost of living overseas be excluded from the definition of salary or wages for KiwiSaver purposes.

That the submission that unexpected one-off payments be excluded from the definition of "salary and wages" for the purposes of the compulsory employer contribution be declined.

That the submission that contributions not be deducted from redundancy payments be accepted.

That the submission that the salary that is used to calculate the employer's contribution should be capped at a reasonable level be declined.

Issue: Definition of "salary and wages" applicable to complying superannuation funds

Submissions

(3 – Tonkin & Taylor, 17 – Mercer Human Resource Consulting, 28 – ANZ National, 45 – Chapman Tripp, 70 – Simpson Grierson, 74 – Deloitte, 87 – ASFONZ, 92 – Airways Corporation, 94 – ABN-AMRO)

Submissions raised the following issues with respect to the definition of salary and wages used by complying superannuation funds for the purposes of calculating contributions:

- Amendment should be made so that the contribution rate minima for complying superannuation funds remain specified by reference to gross base earnings. *(Mercer Human Resource Consulting, Simpson Grierson)*
- Existing registered superannuation schemes as at 17 May 2007 should be allowed to retain their existing salary definitions for a period of, say, 10 years before gross salary must be used. *(Mercer Human Resource Consulting)*
- For complying superannuation funds, employers should be allowed to elect to use gross base salary or wages if their existing schemes currently use that approach. *(ANZ National)*
- Clause 144(2)(b) of the bill, in respect of the contribution rate for complying superannuation funds being "gross salary and wages", creates a level of complexity that is confusing for employees, and costly for employers, and will ultimately discourage members from locking-in funds to age 65. *(ANZ National)*

- By introducing the wider total gross salary and wages multiplier for contributions to complying funds from 1 April 2008, existing schemes will be required to use two multipliers: the wider gross salary for the lock-in section (including bonuses, overtime, allowances, etc); and gross base salary multiplier for the conventional non-complying section. *(ANZ National)*
- A "grandfathering" arrangement should be introduced that would allow schemes (as a trade-off for attracting fewer government subsidies) to continue using salary or wage definitions that are at least equal to "gross base". *(Chapman Tripp, Airways Corporation)*
- Not introducing grandfathering:
  - will create significant administrative, member communication and remuneration design challenges; and
  - forced non-alignment with existing scheme definitions will (for many) terminally prejudice complying superannuation fund status. *(Chapman Tripp)*
- Existing salary or wage definitions that are at least equal to "gross base" should be recognised. *(ASFONZ)*
- A discretion should be vested in the Government Actuary to approve salary or wage definitions used for complying fund rules purposes where he is satisfied that the definition employed is genuinely required to align deductions made, and not a device to circumvent more onerous KiwiSaver obligations. *(ASFONZ)*

Comment

At present, the complying fund rules in the Income Tax Act 2004 require total minimum contributions to be deducted at 4% of annual gross base salary or wages. This allows contributions to be based on the definitions already in place for these existing superannuation schemes such as gross base salary.

A change to the definition of salary and wages (from gross base salary and wages to gross salary and wages) will cause additional administrative and compliance costs for complying superannuation funds and may mean existing schemes are less likely to establish complying funds. There is also a risk that existing schemes may wind up and that savings may be leaked.

Recommendation

That the submission that complying superannuation schemes be able to continue to use the gross base salary definition for the purpose of calculating the employee deductions and matching employer contributions be accepted.

Issue: Shareholder-employees

Submission

(91 – New Zealand Institute of Chartered Accountants)

An amendment is required to allow those shareholder-employees in a close company who have opted for non-source deduction from their salary to be eligible for KiwiSaver, the member tax credit and the employer compulsory contribution.

Comment

Shareholder-employees have the option of joining and contributing to KiwiSaver either as an employee through the PAYE system contributing at 4% or 8%, or as a self-employed person (non-employee) by contracting directly with a provider. Shareholder-employees participating in KiwiSaver as employees will receive the compulsory employer contribution (and their employer the accompanying employer tax credit) whereas shareholder-employees participating as self-employed will not. Shareholder-employees who contribute outside the PAYE system will be entitled to the member tax credit (to the extent to which they contribute), as this is not limited to those making contributions from salary or wages. Allowing shareholder-employees who do not contribute from salary and wages that are not subject to PAYE to be eligible for the compulsory employer contribution would create significant administration costs, and would prompt calls for the compulsory employer contribution and employer tax credit to be extended to other self-employed persons.

Recommendation

That the submission be declined.

COMPULSORY EMPLOYER CONTRIBUTIONS

Issue: Employer contributions aspect of the bill should not proceed

Submission
(26 – Hospitality Association, 66 – Business New Zealand)

The provision for employers to make any type of compulsory contribution to employee KiwiSaver accounts should not proceed.

Comment

Employees and employers alike have a stake in lifting the saving performance of New Zealand. Increased savings helps employees enjoy a higher standard of living in retirement and also increases the supply of domestic savings that can be invested in New Zealand businesses, helping local businesses grow.

The compulsory employer contribution is being phased in over time (1% of an employee's salary and wages from 1 April 2008, rising to 4% by 1 April 2011) to help ease the transition. Employers will be reimbursed for KiwiSaver contributions with a matching tax credit up to a maximum of $20 per week per employee. Employers may incur some compliance costs but these have been minimised by integrating KiwiSaver into the PAYE system. The employer tax credit will be paid through the PAYE system by offsetting the credit against the employer's contribution and other PAYE liabilities, which will minimise cash flow issues. Contributions will also be exempt from Specified Superannuation Contribution Withholding Tax (SSCWT) up to a cap. The tax credits and the SSCWT exemption mean that employers can provide a larger benefit to staff through KiwiSaver contributions than through other remuneration, at the same cost to the employer.

KiwiSaver gives all employers (in particular, smaller employers) access to a sophisticated and efficient superannuation scheme at low cost. KiwiSaver schemes are likely to be comparable to those currently offered by the largest employers and are something that smaller employers are not able to set up or offer themselves.

Recommendation

That the submissions be declined.

Issue: Employer contributions to existing and KiwiSaver schemes

Submissions

(21 – MCK Metals Pacific, 26 – Hospitality Association of New Zealand, 35 – AW Fraser Ltd, 53 – BP, 66 – Business New Zealand, 70 – Simpson Grierson)

If existing schemes do not become KiwiSaver schemes, companies will be faced with a double-up in superannuation contributions – potentially having to contribute up to 14% by way of contribution to both the existing and KiwiSaver schemes. *(MCK Metals Pacific, AW Fraser Ltd)*

Employers should be given an opportunity to assess the implications of compulsory employer contributions for their current superannuation arrangements before they are required to contribute to multiple schemes. *(BP, Simpson Grierson)*

The provision to ensure total employer contributions for all employer's work-based superannuation schemes are not required to total more than 4% of an employee's gross earnings should proceed. *(Hospitality Association of New Zealand, Business New Zealand)*

Comment

Employers will not be required to contribute to both the existing scheme that they have offered to employees and to KiwiSaver schemes for those same employees. Proposed section 101D of the KiwiSaver Act provides that employer contributions to an existing registered superannuation scheme will count towards the employer compulsory contribution rate if:

- the employer provides access to a registered superannuation scheme on 17 May 2007;
- the employer contributions are for employees who are members of that scheme before 1 April or, in the case of existing employees (employed before 1 April 2008), the employment contract provides access to that scheme; and
- the employee is employed before 1 April 2008.

The bill, as introduced, requires that the contributions that count towards the compulsory employer contribution must vest immediately in the employee.

These transitional rules have been implemented to mitigate the effects on employers if they were required to contribute 4% of the employee's salary or wages to KiwiSaver in addition to contributing to an existing superannuation scheme.

The current transitional provision of allowing existing contributions to count in respect of employees who begin employment before 1 April 2008 allows employers time to asses the implications of compulsory employer contributions on their existing scheme in respect of new employees after 1 April 2008.

Recommendation

That the submissions be noted.

Issue: Scope and impact of provision concerning employer contributions to existing superannuation schemes

Submissions

(11 – Water Industry Superannuation Fund, 17 – Mercer Human Resource Consulting, 23 – Investment Savings & Insurance Association of New Zealand Incorporated, 45 – Chapman Tripp, 47 – ING (NZ) Limited, 53 – BP, 61 – KPMG, 70 – Simpson Grierson, 71 – PricewaterhouseCoopers, 85 – Minter Ellison Rudd Watts, 87 – ASFONZ, 91 – New Zealand Institute of Chartered Accountants, 95 – New Zealand Law Society, 98 – DLA Phillips Fox)

A drafting error in the proposed section 101D(1)(c)(ii) defeats the policy by restricting the grandparenting to individual employees who were already offered access to the relevant scheme on 17 May 2007. This disqualifies contributions made in respect of:

- persons first employed between Budget day 2007 and 31 March 2008; and
- persons who were already employed on 17 May 2007, but had not yet been offered access to the relevant scheme (or were not yet receiving employer contributions) on that day. *(Chapman Tripp)*

The section should be amended to include employees employed after 1 April 2008 but on terms agreed prior to 1 April 2008. *(BP, Simpson Grierson)*

Employer contributions to existing schemes should continue to apply to employees employed after 1 April 2008. The section should be amended so that employer contributions to an existing registered superannuation scheme can count towards the employer compulsory contribution for employees who commence work between 17 May 2007 and 1 April 2008. *(KPMG, New Zealand Institute of Chartered Accountants)*

The restrictions on when the employee began employment and when the agreement was reached should be removed and the requirement should simply be that the registered scheme was in existence as at 17 May 2007. *(Mercer Human Resource Consulting)*

Amend section 101D(c)(ii) by adding the following on the end (after 17 May 2007) "and access to this registered superannuation scheme for employees who commence employment in the period 18 May 2007 to 31 March 2008 (inclusive)". *(Investment Savings & Insurance Association of New Zealand Incorporated, ING (NZ) Limited)*

Section 101D(2)(c)(ii) should be amended to require that the employer provides access to a registered superannuation scheme for its employees generally instead of to a particular employee who is employed before 1 April 2008. *(BP, Simpson Grierson)*

"Other contributions" would exclude contributions made by an employer on behalf of all employees employed after 17 May 2007 and before 1 April 2008 from counting towards the compulsory matching employer contributions. The definition of "other contributions" should be amended to include specified superannuation contributions to a registered superannuation scheme that existed as at 17 May 2007 in relation to employees employed by the employer before 1 April 2008. *(PricewaterhouseCoopers)*

The definition should include any employer superannuation scheme contribution irrespective of whether the employee was employed to 1 April 2008. *(Minter Ellison Rudd Watts)*

The "other contributions" offset in the proposed 101D causes difficulty for employers who have a scheme that is compulsory for employees. Fully vested employer contributions should be included in the definition of "other contributions" in respect of employees whether they are employed before 1 April 2008 or after 1 April 2008 in circumstances where the contribution arrangement has been agreed to by the employer before 1 April 2008. *(DLA Phillips Fox)*

Alternatively, it is suggested that an implied provision be added to the KiwiSaver Act whereby compulsory employer contributions that must be paid by the employer to a KiwiSaver scheme can be set off against the contributions the employer makes to a specified superannuation contribution to a superannuation scheme. This will avoid the need for costly deed amendments. *(DLA Phillips Fox)*

The definition of "other contributions" is likely to have the practical effect of forcing employers to close existing registered superannuation schemes in respect of new employees after 1 April 2008. *(Mercer Human Resource Consulting)*

The "other contributions" offset allowed against the compulsory employer contribution at the proposed section 101D(2) of the KiwiSaver Act is problematic and unduly limited in its scope. *(ASFONZ)*

The "other contributions" offset will result in inconsistencies in the treatment of new and current employees. *(Waterfront Industry Superannuation Fund)*

The definition should be expanded to accommodate employees employed after 1 April 2008, but on terms determined prior to 1 April 2008 or on terms determined prior to the bill coming into effect. *(ASFONZ)*

Section 101D(2)(c)(ii) should be amended to confirm that an employer is able to benefit from the ability to off-set if it was providing its employees in general with access to superannuation arrangements as at 17 May 2007. *(ASFONZ)*

Greater flexibility should be introduced to section 101D(2)(c)(iii) to recognise superannuation contributions made by the employer pursuant to any arrangement agreed by the employer prior to 1 April 2008. *(ASFONZ)*

Comment

The policy intention of the rules allowing employer contribution to existing superannuation schemes to count towards the compulsory employer contribution was to:

- mitigate against the risk that existing schemes may wind up if employers were required to contribute twice; and
- apply to those employees that were employed before 1 April 2008, and who received an employer contribution or whose employment contract provided access to the scheme.

This protected existing arrangements before the proposed application of the compulsory employer contribution. In respect of new employees from 1 April 2008, employers would be able to change their superannuation offer to take into account compulsory employer contributions to KiwiSaver.

Officials agree with the submissions that the current rules do not apply to employees that began employment during the period 18 May 2007 to 31 March 2008. This was not the intention.

The theme of these submissions is that the carve-out in respect of employer contributions to existing schemes should apply for new employees from 1April 2008. These existing schemes do not have the same lock-in rules as KiwiSaver, and members are able to withdraw their accumulated savings at the end of service.

The reason for this limitation on new employees is to avoid undermining the objectives that, going forward, employer contributions are subject to KiwiSaver lock-in rules. Otherwise KiwiSaver schemes would be less attractive because employer contributions could be accessed via an existing scheme with less stringent lock-in rules.

The effect of the "existing scheme member" restriction is that employers will likely set up a complying fund within their existing scheme and change their offer to new employees so that employer contributions up to the compulsory amount go towards the complying fund. If they do not change the offer they will be in the position of having to pay compulsory contributions on top of the current employer contributions (if they are not able to cease the contributions under the provisions of the scheme offer).

DLA Phillips Fox suggest in their submission that an implied provision be included in the legislation to provide that compulsory employer contributions that must be paid by the employer to a KiwiSaver scheme can be offset against the contributions the employer makes as a specified superannuation contribution to a superannuation scheme. This is to avoid the need to make trust deed amendments.

This suggestion has the same outcome as the purpose of allowing "other contributions" to count towards the compulsory employer contributions. Instead of reducing the compulsory contribution amount to be paid it reduces the existing contribution, and the employer would receive the employer tax credit in respect of those compulsory contributions. Officials consider that it would be inappropriate to legislate for this outcome and that employers need to change their superannuation offer to new employees to take into account compulsory employer contributions to KiwiSaver and the employer tax credit.

Recommendation

That the submissions be declined but the legislation be clarified to ensure that it applies to employees who started employment during the period 18 May 2007 to 31 March 2008.

Issue: Employer contributions and the age of eligibility of withdrawal for funds

Submission
(17 – Mercer Human Resource Consulting)

Employers are not required to pay contributions in respect of an employee once they have reached the age of eligibility for withdrawal of funds from KiwiSaver or a complying superannuation fund. However, as employers do not always know when an employee reaches age 65, the employer will not know when this date has been reached.

Comment

Employers are required to make compulsory contributions into their employees' KiwiSaver or complying superannuation fund only for employees who are over 18 and under the age of eligibility to withdraw. Members become eligible to withdraw their KiwiSaver savings when they reach the age of eligibility for New Zealand Superannuation or after having been a member for five years, whichever occurs later.

Officials consider that as employers may not have the information needed to know when employees have reached the age of eligibility to withdraw their funds, scheme providers should inform Inland Revenue about members' eligibility to withdraw their funds. Inland Revenue will in turn inform employers that compulsory employer contributions can cease.

Recommendation

That providers be required to inform Inland Revenue before members reach the age of eligibility to withdraw funds so that Inland Revenue can then inform employers of the date that employees will reach the age of eligibility to withdraw their funds and, accordingly, that they should cease their employer contributions from that date.

Issue: Contributions holiday

Submissions
(61 – KPMG, 78 – Council of Trade Unions, 96 – New Zealand Nurses Organisation)

It should be made clearer that the compulsory employer contributions cease when an employee takes a contributions holiday. *(KPMG)*

When a worker takes a contributions holiday, employer contributions should continue. *(Council of Trade Unions, New Zealand Nurses Organisation)*

Comment

After members have been contributing to KiwiSaver for 12 months, they are able to apply for a contributions holiday of between three months and five years, or less than three months if their employer agrees. There is no limit to the number of times a member can take a contributions holiday.

An employer is required to make a compulsory contribution only if contributions to a KiwiSaver and a complying superannuation fund are being deducted from the employee's salary or wages. The policy is that an employer contribution must be made if an employee contribution is deducted from salary or wages. If there is no requirement to deduct employee contributions because the employee is on a contributions holiday, the employer is not required to make an employer contribution.

Further, KiwiSaver is designed to encourage a saving habit by providing incentives for New Zealanders to save. If employer contributions continued while the member was on a contributions holiday (and thus did not contribute), it would remove the incentive for employees to save by providing for benefits to accrue to them even when they take no action of their own.

A provision to require that employer contributions cease when an employee takes a contribution holiday is not necessary as the draft legislation already provides for this.

Recommendation

That the submissions be declined.

Issue: Employer contributions to be paid through Inland Revenue

Submissions
(70 – Simpson Grierson, 87 – ASFONZ)

There is an inconsistency between section 68(2)(b) of the KiwiSaver Act, which provides that contributions for "other things" such as life insurance cannot be paid via the Commissioner, and section 93 of the KiwiSaver Act as amended by section 64 of the Taxation (KiwiSaver and Company Tax Rate Amendments) Act 2007, which requires all employer contributions to be paid via the Commissioner of Inland Revenue. It is therefore not clear whether or not employers can provide their employees with benefits such as life insurance through KiwiSaver schemes. *(Simpson Grierson)*

The KiwiSaver Act should be amended to clarify that other employer contributions, such as for life insurance, can be made to KiwiSaver whether via the Commissioner or otherwise. However, the current position set out in section 68(2)(a), that these other employer contributions will not count as contributions under the KiwiSaver Act or towards the contribution rate, should remain. *(Simpson Grierson)*

The proposed section 93 of the KiwiSaver Act requires all employer contributions to a KiwiSaver scheme to be paid through Inland Revenue. This creates an inconsistency with section 68(1)(b), preventing the use of funds paid through Inland Revenue for benefits other than retirement benefits. Remedial legislation is needed to address this. *(ASFONZ)*

Comment

The KiwiSaver Act 2006 does not prohibit money being paid to providers for things other than retirement benefits (such as life insurance). However, under section 68 money that is paid for things other than retirement benefits cannot count towards the contribution rate and cannot be paid via the Commissioner of Inland Revenue.

With the introduction of compulsory employer contributions, section 93 of the KiwiSaver Act was amended by the Taxation (KiwiSaver and Company Tax Rate Amendments) Act 2007 to require that all employer contributions be paid via the Commissioner of Inland Revenue. Consequently, if an employer makes contributions for things other than retirement benefits, these are now required to be paid via the Commissioner.

The system that Inland Revenue has designed and that will be developed further for the collection of compulsory employer contributions is premised on the basis that an employer contribution is for a particular employee. The collection of amounts that do not relate to a particular employee, such as the payment of group life insurance premiums and contributions to the costs of the administration of the scheme, cannot be integrated into the current Inland Revenue system without significant change. This is due to the need to incorporate this information into the existing employer monthly schedule system. Such a change is likely to place the 1 April 2008 implementation target at risk.

On this basis, officials recommend amending the proposed legislation so that employer contributions for things other than retirement benefits are to be paid directly to the provider.

Recommendation

That the legislation be amended to require employer contributions for things other than retirement benefits to be paid directly to the provider.

Issue: Shortfall of employer contributions

Submission

(91 – New Zealand Institute of Chartered Accountants)

Employee contributions that are short-paid are allocated by Inland Revenue according to the formula in section 99 of the KiwiSaver Act. A similar formula is required for any shortfall of employer contributions under section KJ 1 of the Income Tax Act 2004.

Comment

From 1 July 2007, all employer contributions (both compulsory and voluntary) are required to be paid via Inland Revenue using the PAYE process. This is to allow Inland Revenue to ensure that compulsory contributions are being made. If an employer fails to make a compulsory contribution, Inland Revenue will make a payment to the employee's KiwiSaver provider on the employer's behalf (up to the value of the tax credit available to employers – $20 per week per employee). Inland Revenue will recover the short payment from the employer and pay any shortfall on to the employee's KiwiSaver provider. The non-payment of compulsory employer contributions will be subject to current compliance and enforcements practices and penalties that apply to tax.

In regard to the short payment of employer contributions to complying superannuation funds, from 1 April 2009, providers will be required to notify the Government Actuary when a compulsory employer contribution to a complying fund has not been paid in full. Debts of unpaid compulsory employer contributions will be transferred to Inland Revenue for collection.

Officials contacted the New Zealand Institute of Chartered Accountants to clarify its submission on this issue. After discussing what is proposed in the bill in regard to shortfalls of employer contributions, NZICA reported that it was satisfied that its submission on this matter has already been addressed in the current drafting of the bill.

Recommendation

That the submission be declined.

Issue: Employees on paid parental leave or ACC

Submissions
(51 – National Distribution Union [NDU], 78 – Council of Trade Unions [CTU], 96 – New Zealand Nurses Organisation)

When a worker is on paid parental leave or ACC and continues to contribute (and has not taken a contributions holiday), the employer contributions should continue *(CTU and New Zealand Nurses Organisation)*, or a payment equivalent to compulsory employer contributions should be made *(NDU)*. The payments should be based on 4% of an average week's pay prior to leave or ACC being collected. *(CTU and New Zealand Nurses Organisation) (In its oral submission the CTU noted that the employer tax credit would offset the cost to ACC and Inland Revenue.)*

Earnings-related compensation under the Injury Prevention, Rehabilitation and Compensation Act 2001 and parental leave payments under part 7A of the Parental Leave and Employment Protection Act 1987 are included within the definition of "wages and salary" under the KiwiSaver Act. This means that, unless a member seeks a contributions holiday, member KiwiSaver payments will continue to be deducted from their income. *(NDU)*

Further, paid parental leave and ACC payments replace members' normal remuneration while they are unable to work, and KiwiSaver payments will become an increasingly important part of total remuneration. If KiwiSaver payments are not continued/replaced when a member is on benefits, then their income replacement will be eroded. *(NDU)*

Comment

As people receiving paid parental leave or ACC compensation payments are no longer part of the workforce, compulsory employer contributions should not be required. In respect of paid parental leave and weekly compensation payments from the ACC, Inland Revenue and the ACC (respectively) are deemed to be the employer under the KiwiSaver Act 2006. However, there is no real employment relationship between those government agencies and the persons receiving these payments. Further, paid parental leave is considered to be more of a grant to aid parents taking parental leave, rather than employment payments. Finally, having compulsory employer contributions apply in respect of contributions deducted from such payments would add complexity.

Employer contributions to KiwiSaver are also not included in the definition of salary/wages for the purposes of ACC payments, so they are not included in the replacement income employees receive from ACC.

It should also be noted that those receiving ACC payments and paid parental leave are less likely to be in the position to make contributions to their long-term retirement savings at that time. For this reason, employees can take a contributions holiday and then restart their contributions to KiwiSaver when they are in a better position to do so (for example, upon returning to the workplace).

In any case, KiwiSaver members (or members of a complying superannuation scheme) that receive paid parental leave or ACC are still eligible for the member tax credit if they make KiwiSaver contributions direct to the provider (even if these deductions are made from their ACC or paid parental leave payments).

Recommendation

That the submissions be declined.

Issue: Employer contribution transition path ignores employers' collective agreement commitments

Submissions

(1 – VT Fitzroy, 8 – Christchurch City Council, 12 – Employer & Manufacturers Association (Northern), 51 – National Distribution Union, 53 – BP, 70 – Simpson Grierson, 92 – Airways NZ)

Under the proposed legislation, contributions to existing superannuation schemes count as compulsory contributions for KiwiSaver purposes only if the employee concerned was employed before 1 April 2008. This is problematic for employers who have legal obligations under a previously agreed collective agreement to provide access to an existing superannuation scheme. Employers will be legally compelled to continue to provide access for new employees to this scheme for the duration of the collective agreement. *(VT Fitzroy, Christchurch City Council)*

The section should be amended to include employees employed after 1 April 2008 but on terms agreed prior to 1 April 2008. *(BP, Simpson Grierson)*

Employers could be required to pay an employer contribution to the existing superannuation scheme as set out in the collective agreement. In addition, the employer would be liable for KiwiSaver compulsory employer contributions if those new employees also elected to join KiwiSaver. Some consider that employers should not be required to pay compulsory employer contributions until the expiry date of existing collective employer agreement. *(Christchurch City Council, BP, Airways NZ)*

Related issues are the maintenance of employee rights achieved under collective agreements (particularly employer commitments to paying 2% of employer contributions) and company rules (rather than legal entitlements) providing for a stand-down period prior to becoming eligible to join a company superannuation scheme. *(National Distribution Union, BP)*

Others argue that employer contributions are being introduced too early. As a result, this cost cannot be factored into recent collective agreements, leading to onerous costs on employers. *(Employers and Manufacturers Association (Northern))*

Comment

It is a legitimate concern that certain employees could double dip as a result of existing legal obligations.

Collective agreements established before Budget 2007 announcements obviously could not factor in compulsory employer contributions. KiwiSaver does, however, provide a transition path to ensure employers can accommodate compulsory employer contributions. These include:

- not starting compulsory contributions until 1 April 2008, to allow for consultation;
- phasing in of employer contributions from 1 April 2008 to April 2011;
- the employer tax credit of up to $20 per week, introduced in full from 1 April 2008; and
- allowing existing contributions to count towards compulsory employer contributions in certain circumstances.

As the requirement for compulsory employer contributions will apply from 1 April 2008, it allows employers a limited period to convert their superannuation offerings into KiwiSaver-compliant schemes and thus have access to KiwiSaver benefits. This grace period assumes that employers will be able to modify their existing superannuation offer to any new employees before 1 April 2008. As the submissions correctly identify, this is incorrect where an existing collective agreement compels an employer to offer new employees access to an existing superannuation scheme after 1 April 2008.

However, the phasing in of employer contributions and the employer tax credit means employers face no additional cost for employees earning less than $52,000 (which exceeds the average wage) until 31 March 2010. Employers will therefore have almost three years from Budget 2007 announcements to factor compulsory employer contributions into their industrial settlements, before incurring any costs for the majority of their employees. In addition, employers who already provide employer contributions to KiwiSaver-compliant schemes will be able to access employer tax credits of up to $20 per week. This will provide a windfall gain for payments these employers would have already been making.

The impact on collective agreements could be addressed by grandparenting all good faith legal obligations entered into by employers (those entered into prior to Budget announcements on 17 May 2007) until the expiry of the collective agreement.

It should be noted that this will not apply to an individual employment agreement in that employees starting new employment are free to negotiate their agreement on an individual basis.

In cases where company rules dictate a stand-down period that would allow employees to qualify for two employer contributions, it is entirely within the power of the company to amend its rules. The expectation is that companies could change their rules in these cases and no legislative changes should occur.

Recommendation

That the submissions related to existing legal obligations be accepted, which would require:

- amendments to allow contributions made to employees enroled in a registered superannuation scheme under the terms of a collective agreement settlement established prior to 17 May 2007 to count against KiwiSaver compulsory employer contributions; and
- accepting the submission that ongoing employee rights and obligations contained in existing collective agreements should be maintained.

That the submissions requesting the grandparenting of company rules be declined.

Issue: Level of employer compulsory contribution

Submission
(78 – Council of Trade Unions)

Employer contributions should be either the relevant percentage or $20 per week, whatever is the greater (given that an employer tax credit is available).

Comment

Employers are required to make a compulsory employer contribution starting at 1% on 1 April 2008 and increasing to 4% by 1 April 2011. These employer contributions match employee contributions and are offset by an employer tax credit of up to $20 per week.

The Council of Trade Unions' proposal would do two things:

- set a minimum employer contribution level at $20 per week, irrespective of the amount of the employee's 4% contribution; and
- transfer the cost from the employer to the Crown through invoking full claiming of the $20 per week employer tax credit.

In the absence of a link between employer and employee contribution rates, an example of the impact of this proposal would be as follows:

	Employee	Employer	Government matching contribution	Ratio Crown and employer to employee contributions
Current	$10	$10	$10	2:1
$20 minimum proposal	$10	$20	$10	3:1

The affordability of KiwiSaver contributions to the Crown, employers and employees has been carefully considered. In officials' view, there is no compelling reason to increase the KiwiSaver subsidy or level of contribution of any group at this time.

Recommendation

That the submission be declined.

Issue: Impact on defined benefit schemes

Submissions
(17 – Mercer Human Resource Consulting, 45 – Chapman Tripp, 64 – NZ Anglican Church Pensions Board, 71 – PricewaterhouseCoopers, 87 – Association of Superannuation Funds of New Zealand, 53 – BP, 7 – Simpson Grierson)

- The definition of "db increase" in the proposed section 101D(2)(d) of the KiwiSaver Act does not reflect the intention of including this provision. This provision should be re-drafted in consultation with the Government Actuary. *(PricewaterhouseCoopers)*
- There is no distinction between the member's contributions in defined benefit schemes and the benefits accrued. In practice, the only way of determining how much the employer has contributed is to subtract the member contribution from the benefits that are accrued. *(PricewaterhouseCoopers)*
- The changes in the accrued benefits can be a result of a number of factors, including a change in the assumptions made by the actuary. The change in the assumptions should not form part of the db increase, and the accrued benefit should be measured on the assumptions used at the start of the year. *(PricewaterhouseCoopers)*
- Most defined benefits are contingent on specific events occurring. As such, to restrict the db increase to the amount that is vested is not considered to be appropriate. *(PricewaterhouseCoopers)*
- For many defined benefit schemes, full vesting occurs only when an employee reaches retirement age and salary multiples for the defined benefit cease increasing. *(Association of Superannuation Funds of New Zealand)*
- The Superannuation Schemes Act 1989 requires an actuarial valuation of defined benefit schemes once every three years. To require a valuation to be done annually would increase compliance costs for schemes significantly. *(PricewaterhouseCoopers)*
- Proposed section 101D(2)(d)(iv) should be deleted as the concept of accrued benefits has already been captured. *(Association of Superannuation Funds of New Zealand, Chapman Tripp)*
- Proposed section 101D(2)(d)(ii) should be extended to recognise increase in benefits as a result of scheme reserves. *(Association of Superannuation Funds of New Zealand, Chapman Tripp)*

- The requirement for contributions to vest immediately creates difficulties for employers, as the employer will have to contribute the total amount in addition to a top-up to a KiwiSaver scheme for any part of the compulsory rate that has not been made up by the existing vested contribution. *(Mercer Human Resource Consulting)*

- It is not clear what is meant by section 101D(2)(d)(v) as there will be no undertaking by an employer to contribute at any set rate. *(Mercer Human Resource Consulting)*

- The frequency with which the db increase has to be calculated causes concerns. For practical reasons there should be an annual calculation of the extent of the db increase for the following year, which can then be apportioned appropriately between members. *(Mercer Human Resource Consulting)*

- Vesting in the employee in a defined benefit scheme can occur only when the employee leaves service and the employee's final salary and length of service are known. *(BP)*

- Existing schemes are likely already to be making contributions that have a vesting scale. This will effectively require the employer to contribute twice. In defined benefit schemes, the problem is exacerbated by the fact that benefits may not be able to be determined until the employee leaves service, and variables such as length of service and final salary are known. *(Simpson Grierson)*

- Clause 219 of the bill, which inserts a new section 101D into the KiwiSaver Act 2006, should be amended. In particular, the definition of "other contributions" should be altered so that it applies where either:
  - the employee is employed by the employer before 1 April 2008 (the existing provision); or
  - the employer contributes a net amount of 4% or more of gross salary or wages. *(NZ Anglican Church Pensions Board)*

- The qualification "before 1 April 2008" in the proposed section 101D(c)(iii) should be deleted. The proposed exemption from the compulsory employer contribution should be widened to allow it to apply to new employees after 1 April 2008 provided the employer contributes a net amount of 4% more of gross salary or wages. One of the reasons for the suggested amendment is that when ministers move between dioceses it is treated as new employment as each diocese is a separate employer. *(NZ Anglican Church Pensions Board)*

Comment

The intention of this provision was to ensure that contributions to defined benefit schemes could also count towards the compulsory amount. The provision should also ensure that employers that are not required to make additional compulsory contributions are, in fact, contributing an equivalent amount to an employee's retirement savings.

Officials recommend that employers making contributions to defined benefit schemes be exempted from making compulsory employer contributions, if the contribution meets all of the following criteria:

- the contribution is to a registered superannuation scheme;
- the contribution is to a scheme that was in existence on 17 May 2007;
- the contribution is for an employee in employment at 1 April 2008 or is otherwise employed under a collective agreement negotiated prior to 17 May 2007;
- the contribution is a term of the employment contract; and
- the contribution is made towards a benefit for the member that is established as a factor of salary.

This approach will enable employers currently offering a defined benefit scheme to be exempt from the requirements of compulsory contributions. The exemption will be limited to employers that offer defined benefits in their defined benefit schemes. As such, it will not cover cash accumulation schemes, which are – technically – defined benefit schemes but are operated much more like a defined contribution scheme.

This exemption is also likely to extend to Crown schemes, such as the Government Superannuation Fund (GSF), as they are likely to meet the criteria. The exemption will not affect the ability of anyone employed after 1 April 2008 (or on a collective agreement formed after 17 May 2007) to contribute to a KiwiSaver scheme or a complying fund, for which employers will be required to make employer contributions.

In relation to specific concerns raised by the Anglican Church, officials consider that if an existing employee (employed before 1 April 2008) changes employers and the new employer is required to contribute to the same scheme on the same basis, that contribution by the new employer will count. This approach would also extend to movements within the same group of companies and within government in relation to, say, GSF. It should apply only to defined benefit schemes.

Recommendation

That the submissions be accepted as follows.

That the bill be amended to exempt employers from the requirement to make a compulsory employer contribution if they are making contributions to a defined benefit scheme that meets the following criteria:

- the contribution is to a registered superannuation scheme;
- the contribution is to a scheme that was in existence on 17 May 2007;
- the contribution is for an employee in employment at 1 April 2008 or is otherwise employed under a collective agreement negotiated prior to 17 May 2007;

- the contribution is in terms of the employment contract; and
- the contribution is made towards a benefit for the member that is established as a factor of salary.

That the bill allow existing contributions to a defined benefit scheme to count if the existing employee (employed before 1 April 2008) changes employer and the new employer is required to contribute to the same scheme on the same basis.

Issue: Contribution from reserve accounts

Submission
(17 – Mercer Human Resource Consulting)

Section 101D should be amended to enable contributions from employers' reserve accounts to count towards the compulsory rate. The present drafting precludes the use of reserves to fund the contribution rate, while many employers may use their existing reserve account to fulfil their contractual contribution obligations.

Comment

The purpose of the compulsory employer contribution is to encourage greater savings accumulation by members. This should not necessarily require employers to make active contributions on an ongoing basis, if those contributions can be made from alternative sources such as reserve accounts.

This will align with the current practice for many existing schemes. As such, it will ensure that employers currently making contributions to an existing scheme from reserves will not be precluded from having those contributions count towards the compulsory rate. This will be especially desirable for existing schemes which are likely to have built up substantial reserves that could be used to top up their ongoing employer contribution.

Recommendation

That the submission be accepted.

Issue: Priority between existing employer contributions and compulsory contributions

Submission
(86A – Employers and Manufacturers Assn (Central) Inc)

The priority of the payments regime in proposed section 101E should be reversed to allow employer contributions into pre-existing superannuation schemes that meet the complying criteria to take priority over compulsory KiwiSaver contributions.

Comment

The proposed section 101E allows an employer and an employee to agree the proportions of a compulsory employer contribution that will be attributable to a KiwiSaver scheme or a complying superannuation fund if the employee is a member of both. If no agreement is made the proposed section provides that the employer contribution first goes to the KiwiSaver scheme and then to the complying superannuation fund.

The provision relates only to the amount of a compulsory employer contribution calculated under proposed section 101D. It will not apply to any employer contribution included in the "other contributions" offset in proposed section 101D against compulsory contributions.

Recommendation

That the submission be declined.

Issue: The proposal in the supplementary order paper No 130, to prevent double dipping, does not go far enough

Submission
(86A – Employers and Manufacturers Assn (Central) Inc)

The submission notes that the 13 August 2007 press statement (Greater protection for savers in super schemes) issued by the Ministers of Finance, Commerce, State Services and Revenue makes it clear that Parliament's intention is to improve regulation over complying private superannuation schemes. However, the proposal to prevent double dipping does not go far enough. It is expressed to apply to state sector schemes. It is suggested that the amendment go further to cover complying private schemes.

Comment

The proposed amendment contained in the supplementary order paper No 130 to the proposed section 101D of the KiwiSaver Act is intended to cover situations where an employer may not be able to prevent employees receiving existing superannuation contributions plus the compulsory employer contribution because the terms relating to their employer contributions are imposed by a person independent of the employer and the class of employees. The proposed amendment names three specific employee groups (Members of Parliament, judicial officers and sworn Police) and allows for regulations to be made to name other groups of employees.

The remuneration of Members of Parliament and judicial officers is set by the Remuneration Authority. In relation to sworn Police, there is the ability for final arbitration in setting remuneration.

The ability to make Regulations for groups of employees is not limited to State sector employees.

The submission's substantive concerns relating to mitigating the risk of double dipping are addressed in officials' recommendations elsewhere. They deal with vesting of employer contributions, exempting defined benefit schemes (that meet specified conditions) and the ability to include new employees covered by collective agreements to count employer contributions to existing schemes against the compulsory KiwiSaver contribution.

Recommendation

That the submission be declined.

Issue: Existing employer contributions to a KiwiSaver scheme or a complying superannuation fund should count towards the compulsory employer contribution

Submissions
(86A – Employers and Manufacturers Assn (Central) Inc, 98 – DLA Phillips Fox)

The definition of "other contributions" in proposed section 101D should be amended to expressly include voluntary employer contributions to a complying superannuation fund. The comfort from Inland Revenue as to the policy intent is that voluntary contributions will be taken into account is insufficient, and probably not compatible with the ordinary rules of statutory interpretation (*EMA (Central)*).

As currently drafted, KiwiSaver employer contributions do not come within the "other contributions" offset in the proposed section 101D. This provision relates only to specified superannuation contributions to a registered superannuation scheme. It should be clarified that compulsory employer contributions to an employee's KiwiSaver scheme are not in addition to existing employer contributions to a KiwiSaver scheme. *(DLA Phillips Fox*)

Comment

The policy intent is that existing employer contributions to a KiwiSaver scheme or a complying superannuation fund would count towards the compulsory amount for existing employees.

We agree that the legislation should be clarified to ensure that the policy intent is achieved.

Recommendation

That the submissions be accepted.

Issue: Vesting of contributions to an existing superannuation scheme for the purposes of counting towards compulsory employer contributions

Submissions
(11 – Waterfront Industry Superannuation Fund, 17 – Mercer Human Resource Consulting, 70 – Simpson Grierson)

The compulsory employer contributions to existing schemes have to be immediately vested for the contribution to count towards the compulsory employer amount, which is contrary to normal scheme design, and inconsistent with the concept of long-term savings. In an existing superannuation scheme this would mean that an employer's contributions may be withdrawn when the employee leaves employment. The requirement for an employer contribution to an existing scheme to be vested should be replaced with a requirement that any unvested contribution that has counted towards the compulsory amount be transferred to a KiwiSaver scheme or complying superannuation fund. *(Waterfront Industry Superannuation Fund)*

The requirement that contributions be fully vested in order to count towards the compulsory contribution is likely to result in increased costs for their employers where the employer also offers a work place scheme, as it will permit double dipping if an employee chooses also to become a member of a KiwiSaver scheme. Employers will have to contribute the total value of their contribution towards their employees existing account, and will have to contribute an additional amount (being the compulsory rate minus the vested employer contributions) towards KiwiSaver. *(Mercer Human Resource Consulting)*

The bill requires employer contributions to vest immediately if they are to count against the compulsory contribution rate. Existing schemes are likely already to be making contributions that have a vesting scale. This will effectively require that employer to contribute twice. *(Simpson Grierson)*

Comment

Officials agree with the submissions and recommend that employer contributions vest within a specified period of time to count towards the compulsory rate. The industry "norm" of five years makes most sense and would be consistent with the rules for exemption from automatic enrolment. (Employers can get an exemption from automatically enroling new employees only if their contributions to the scheme vest within five years.) This option requires a change to the bill.

This would enable most existing employer contributions to count towards the compulsory amount, greatly reducing the double dipping risk for defined contribution schemes, while ensuring that vesting is not used to separate members from employer contributions that are provided.

Officials consider that the change suggested by the Waterfront Industry Superannuation Fund would add complexity to the design of KiwiSaver.

Recommendation

That the submissions be accepted to allow a vesting period of five years.

Issue: Counting contributions to subsidise scheme operation

Submission
(88 – The Colonial Motor Company)

The bill should allow all payments made on behalf of an employee to an existing registered superannuation scheme to count towards the compulsory rate, irrespective of whether such payment is made to a member's account or not.

Comment

The submission argues that superannuation schemes are used by employers to provide a variety of benefits to their employees, including benefits such as the payment of insurance premiums. All contributions for such purposes are for the benefit of the employee, and as such, it recommends that they count towards the compulsory amount.

The purpose of the compulsory employer contribution, however, is to encourage long-term savings and to boost the level of savings accumulated in these schemes. If other contributions towards other benefits were able to count, these policy outcomes would not be served. The contributions would not be locked in for retirement and might be used for the payment of unrelated expenses. It should be noted that this is also consistent with the treatment of funds in KiwiSaver, where the minimum contribution requirements cannot be used for other benefits.

Recommendation

That the submission be declined.

Issue: Group life cover

Submission
(23 – ISI)

ISI raised in its oral submission that group life cover should be able to be provided by a KiwiSaver scheme.

Comment

Group life cover can be provided by a KiwiSaver scheme. However, employee contributions, as required by the KiwiSaver Act and the proposed compulsory employee contribution, cannot be used to pay group life insurance. Those contributions have to be used to provide retirement benefits.

Recommendation

That the submission be noted.

Issue: Corporate restructuring and successor funds

Submission
(17 – Mercer Human Resource Consulting)

The provisions of section 101D need to be modified to ensure that it remains possible for continuing employers in mergers or acquisitions to mirror the superannuation arrangements that existed before the merger or acquisition. This is often a part of the employer's retention of the terms and conditions of the various employment contracts that pre-existed the merger or acquisition. As the section is currently worded, such arrangements would not qualify under section 101D.

Comment

The Superannuation Schemes Act provides a mechanism for employers to transfer between providers if the terms of the new scheme are no less favourable than the terms of the old scheme. This ensures that employers can provide access to the most appropriate scheme for their employees without affecting the terms of the employees' participation. We agree that proposed section 101D should be amended to provide that the scheme must have been in existence at 17 May 2007 or created as an approved scheme under section 9BAA. This change should be applicable only if all members of the existing scheme, or all members relevant to an existing participation agreement, are transferred under section 9BAA.

Recommendation

That the submission be accepted.

Issue: Employers who act on behalf of ACC in paying weekly compensation

Submission
(Matter raised by officials)

The KiwiSaver Act 2006 should be amended so that when KiwiSaver members are paid ACC weekly compensation by their employer instead of by ACC, employer contributions will automatically stop. However, employers who wish to do so may continue to contribute to their employees' KiwiSaver schemes provided that their employees are also contributing while they are on weekly compensation.

Comment

When claimants are incapacitated from a personal injury, ACC pays weekly compensation at 80% of their previous earnings. However, some employers can act on behalf of ACC and pay weekly compensation to their employees for work injuries that require time off work. To pay weekly compensation on behalf of ACC, employers are either:

- part of ACC's Partnership Programme, whereby "accredited employers" take responsibility for managing work-related injuries in exchange for a reduction in levy – meaning the administration of the claim is managed by a third party; or
- part of the Employer Reimbursement Programme, whereby employers who are part of the programme can continue paying their employees salary/wages during the incapacity and seek reimbursement from ACC (at 80%) for weekly compensation.

In a number of cases, employers will often pay 100% of an employee's salary/wages in these situations.

Under KiwiSaver, existing members' contributions automatically stop when ACC starts paying weekly compensation. For contributions to continue, the ACC recipient or Inland Revenue will notify ACC to start making deductions. To have such contributions cease, the recipient will need to apply for a contributions holiday. Employer contributions will also automatically stop for KiwiSaver members who are receiving weekly compensation from ACC, as the bill excludes weekly compensation from being salary or wages for the purposes of compulsory employer contributions.

The situation is different, however, for existing KiwiSaver members who receive their ACC compensation from their employer on behalf of ACC. If such members wish to have their contributions cease while they are on ACC, they will need to apply for a contributions holiday. There is, however, no mechanism that allows employers in this situation to stop making KiwiSaver compulsory employer contributions when they are paying weekly compensation to their employees.

Officials consider that the provisions around ceasing employer contributions while claimants are receiving weekly compensation should equally apply in circumstances where claimants are receiving compensation from ACC or their employer. Accordingly, we recommend that the KiwiSaver Act be amended so that compulsory employer contributions will automatically stop for KiwiSaver members who are receiving weekly compensation from their employer. However, employers who wish to do so may continue to contribute to their employees' KiwiSaver.

It is recommended that the amendment apply from 1 April 2008.

Recommendation

That the submission be accepted.

AGE ELIGIBILITY THRESHOLDS

Issue: Upper age limit for being able to become a member of KiwiSaver

Submissions

(12 – Employers & Manufacturers Association (Northern) Incorporated (EMA), 50 – Eriksens Actuarial, 75 – Matt Barker, 91 – New Zealand Institute of Chartered Accountants matter raised orally)

Allowing people aged 65 and over to join KiwiSaver, with the minimum period of five years applying to them, will encourage people to work later in life, thus contributing positively through paying income tax, helping reduce the acute labour shortage and staying healthier. *(Eriksens Actuarial and EMA)*

People should not be disadvantaged if they leave saving for retirement later in life from necessity and, in contrast to New Zealand, older people in Australia benefit significantly from the Australian superannuation scheme. *(EMA)*

Comment

The upper limit to the age of eligibility reflects KiwiSaver's purpose of encouraging a long-term savings habit and asset accumulation to improve financial wellbeing, particularly in retirement. It could be considered inequitable that those who have reached the age of eligibility for New Zealand Superannuation, and who receive a government pension, continue to benefit from a government policy aimed at retirement savings.

A boundary needs to be drawn at some level and the most reasonable level is that which is considered the "retirement age" when people are eligible to receive the aged pension from the government, notwithstanding whether this is their status or not.

It should be noted that receipt of the Australian pension is subject to two tests – an income test and an assets test, while New Zealand Superannuation is not means tested (meaning that New Zealanders receive the same amount of pension notwithstanding the income they earn or the assets they hold).

Recommendation

That the submissions be declined.

Issue: Lower age limit for being able to become a member of KiwiSaver

Submissions

(12 – Employers & Manufacturers Association (Northern) Incorporated (EMA), 51 – National Distribution Union (NDU), 75 – Matt Barker, 78 – Council of Trade Unions (CTU), 95 – New Zealand Law Society (NZLS), 96 – New Zealand Nurses Organisation)

Automatic enrolment and eligibility for member tax credits should apply to employees above the age of compulsory schooling, or who have been granted an exemption for early release from schooling *(NDU)*. The full benefits of KiwiSaver should apply to workers aged 16 and 17 years old *(CTU)*.

The tax credits are available to all people who are working and paying taxes regardless their age. *(EMA)*

Preventing young workers from the tax credits and the employer contributions is discriminatory *(CTU, NDU and New Zealand Nurses Organisation)* and is inconsistent with the Human Rights Act 1993 *(NDU, NZLS)*. Further, 16 and 17-year-olds in the workforce will not have higher-level qualifications and will never become high income earners and are in more need to save.

Comment

While 16 and 17-year-olds are legally able to work full-time and are eligible for certain benefits (such as the community services card and the independent youth benefit), the government's preference is that 16 and 17-year-olds be engaged in some form of study, rather than working. Setting the threshold at 18 years of age is consistent with this, and with the age of automatic enrolment rules.

While restricting access to the member tax credit on age could potentially act as a disincentive to introducing a savings discipline early in life, the arguments against extending the tax credit to those under the age of 18 are:

- If no age restriction is set on accessing the member tax credit, parents will have an incentive to set up a KiwiSaver account for their children predominantly to benefit from the tax credit. This could benefit high-income earners more, since they are more likely to be in a position to set aside money for their children. In contrast, low-income earners may have no choice but to spend their money on essentials (such as education).
- Along with encouraging savings, another of the government's main priorities is to lift standards of education and skills development. Most young people are in full-time education or training until they are 18 and often far beyond this age, although some are not. The provision of government tax credits (and compulsory employer contributions for those who are working) could conflict with the government's education goals. This is why automatic enrolment of new employees applies only to those aged 18 years and over, and why the government sought to align eligibility for the tax credits to this policy.

- There would be a significant increase in the cost of KiwiSaver if the member tax credits were extended to those aged under 18.

In addition, any disadvantage to members under 18 is transitional. They will still receive the $1,000 kick-start and an ongoing $40 annual fee subsidy, which will provide a reasonable incentive to join, and, as soon as they turn 18, they will be eligible for the member tax credit on their contributions and for compulsory employer contribution if they are in employment and contributing.

Recommendation

That the submissions be declined.

Issue: Age limit for withdrawing funds from KiwiSaver

Submission
(50 – Eriksens Actuarial)

The age at which KiwiSaver members are able to withdraw funds should be reduced from 65 to 60. There is no actuarial cost implication on choosing a slightly lower age, as it is a defined contribution scheme. Further, there is a risk that if the New Zealand Superannuation age is raised to 70, KiwiSaver funds will be locked in until 70 as well.

Comment

To withdraw funds, members must be 65 or over and have been a member for at least five years. That requirement reflects KiwiSaver's purpose of encouraging a long-term savings habit and asset accumulation to improve financial wellbeing, particularly in retirement. This age threshold has not changed since the original KiwiSaver design and has been maintained in relation to the member tax credits and compulsory employer matching contributions, as they maintain the focus on retirement.

Eriksens also argued in its submission and before the Committee that age of entry to KwiSaver should be extended to prolong workers' participation in the workforce. This submission could have the opposite effect.

Setting the age of withdrawal to coincide with the age of eligibility for New Zealand superannuation logically links two complementary policies.

Recommendation

That the submission be declined.

MINIMUM EMPLOYEE CONTRIBUTIONS

Issue: Minimum contribution rate to KiwiSaver

Submissions
(30 – New Zealand Public Service Association (NZPSA), 33 – Corporate Taxpayers Group, 45 – Chapman Tripp, 50 – Eriksens Actuarial, 51 – National Distribution Union (NDU), 61 – KPMG, 74 – Deloitte, 78 – Council of Trade Union (CTU), 87 – The Association of Superannuation Funds of New Zealand, 91 – New Zealand Institute of Chartered Accountants, 96 – New Zealand Nurses Organisation)

The current provision whereby the employee contribution can help make up the 4% minimum should be retained *(NZPSA, CTU and Eriksens)*, or the minimum contribution level should be reduced to 2% of salary or wages *(NDU, CTU and New Zealand Nurses Organisation)*.

A 2% contribution rate is a better point of entry for new savers to establish a savings habit, and the addition of the member tax credits and the employer contributions will help someone accumulate a reasonable saving balance *(CTU and New Zealand Nurses Organisation)*. Further, it can help target KiwiSaver to those that have a saving problem (low income workers), especially in view of the resistance by low-income workers to contribute 4% *(CTU and New Zealand Nurses Organisation)*.

If the minimum employee contribution is not reduced from the proposed level of 4% of salary or wages, alternatives should be considered. The following alternatives are suggested (in order of preference) by the CTU and New Zealand Nurses Organisation:

- Allow employer contributions to count towards the employee contribution rate.
- Allow employer contributions to count towards an employee's minimum contribution rate of 4% of salary or wages until April 2010, then increase to 6% and then to 8% by 2011 (minimal alternative).
- Allow the contributions of employers that have entered an arrangement prior to April 2008 for employer contributions to count towards the minimum employee contribution, and allow those employers to offer any combination of employee/employer contributions totalling 4% for employees beginning work after April 2008 and before April 2010.

Employers and employees should be entitled to choose their contribution rates, provided the minimum total values in clause 2 of Schedule 4 are achieved. *(KPMG, ASFONZ)*

Removing the current ability for employees to contribute on a 2 plus 2 basis will place KiwiSaver beyond the reach of many employees unable to forgo 4% of salary. The original provisions of the Act should be retained. *(ASFONZ)*

Regardless of whether this is accepted, section 66A and Schedule 4 require redrafting to enable their effective application. Apart from being difficult to interpret, requiring references to three different clauses of Schedule 4, the rules do not work properly. *(KPMG, Chapman Tripp, Corporate Taxpayers Group, Deloitte ASFONZ, New Zealand Institute of Chartered Accountants)*

Comment

The design of KiwiSaver has involved trade-offs between encouraging participation by a wider group (greater participation of low-income earners) and encouraging higher rates of saving across the board.

Under the original KiwiSaver design, the minimum employee contribution was 4% of salary or wages, and employer contributions were voluntary. To the extent that employers were prepared to make voluntary contributions, the KiwiSaver Act 2006 allowed for any voluntary employer contributions to count towards the employee's minimum 4% contribution rate if the employee so elected. The bill phases out the ability of employer contributions to count towards the minimum level of employer contribution from 1 April 2008. The decision to phase this out is supported by the purpose of the Act (to increase individuals' well-being and financial independence, particularly in retirement, and to provide retirement benefits), the introduction of incentives proposed in the bill (member and employer tax credits and the compulsory matching employer contributions), and the need to ensure that employees make contributions at a rate that would make a difference.

The key aim of KiwiSaver is to encourage a long-term savings habit and asset accumulation by those who aspire to standards of living in retirement similar to those they enjoy before retirement. While a sustained contribution may be achievable during some periods in people's lives, at other times they may have difficulty in finding 4% of salary or wages to contribute to KiwiSaver. For some people, saving for retirement does not make economic sense – for example, those on very low incomes, since New Zealand Superannuation will give them a similar income level, and those paying high interest on debt. This is why joining KiwiSaver is not compulsory and why members can apply for a contributions holiday.

A contribution rate of 4% could be insufficient to provide a 70% replacement income in retirement for a large number of New Zealanders. The following table shows the saving rate required to supplement NZ Superannuation to achieve 70% income replacement in retirement for different starting ages.[2] For example, someone with a gross income of $30,000 who started saving at age 25 would need to save 2 to 5% until retirement to achieve a retirement income of 70% of $30,000 (after tax, including NZ Superannuation). Starting saving later in life or having a higher salary increases the required savings rate considerably: 12 to 16% would be required for someone starting saving at age 40 with a gross income of $60,000.

[2] The required rates differ for male/female (owing to life expectancy) and single/couple (owing to NZ superannuation rate). The assumptions include: retirement at 65, life expectancy 82/85 (male/female), net real rate of return 2.5% (gross rate of return 8%). Note that these calculations do not include the effects of other asset accumulation, such as a house (for example, when a house is sold and a cheaper house purchased, providing additional income). Also note that the results are sensitive to the rate of return (and other assumptions). For example, an increase in gross rate of return of 2 percentage points would decrease the required contribution rate by around 1 to 2 percentage points.

Contribution rate required for 70% income replacement in retirement

		Income			
		$30,000	$40,000	$50,000	$60,000
Age	25	2%-5%	4%-7%	5%-8%	6%-8%
	30	3%-6%	5%-8%	7%-10%	8%-10%
	40	4%-10%	9%-14%	11%-15%	12%-16%

Source: Treasury calculation using www.sorted.org.nz information.

With employers required to contribute to employees' long-term savings, and with the government contributing more to each member's KiwiSaver account on an ongoing basis, there is an expectation that employees will also seriously commit to their long-term savings.

The CTU and New Zealand Nurses Organisation have suggested a couple of alternatives if the minimum employer contribution level is not decreased. Allowing employer contributions to count towards the employee minimum for those who have entered an arrangement is already allowed under the provisions in the bill relating to those employed at 1 April 2008. That means employees do not have to have started contributing before 1 April 2008 to be eligible for the employer contributions to count towards the employee minimum contribution. They would have had to enter into an agreement before 1 April 2008. In any case, the phasing out of employer contributions counting towards the employee minimum contribution would still apply to such arrangements.

A suggested alternative was to allow employer contributions to count towards an employee's minimum contribution rate of 4% of salary or wages until April 2010, then convert to 6% and then to 8% by 2011. This effectively would just extend the phasing out of the ability for employer contributions by two years for all new employees after 1 April 2008. This would just delay the introduction of a minimum contribution level of 4% and would not overcome the problem of someone not being able to afford to contribute on an ongoing basis to KiwiSaver. As is mentioned above, while a sustained contribution may be achievable during some periods in people's lives, at other times they may have difficulty in finding 4% of salary or wages to contribute to KiwiSaver. This is why KiwiSaver is not compulsory.

Recommendation

That the submissions be declined.

Issue: Minimum contribution rate to complying superannuation funds

Submission
(28 – ANZ)

For complying superannuation funds the minimum employee contribution should be decreased from 4% to 2% of the employee's gross salary or wages.

The employee contribution of 4% is too high for many people and it impacts negatively on many of ANZ's existing schemes by requiring a contribution rate higher than under their current trust deeds.

Comment

The minimum 4% employee contribution rate for complying superannuation funds is consistent with the minimum rate required for KiwiSaver. This minimum rate is discussed further in "Minimum contribution rate to KiwiSaver", above.

Recommendation

That the submission be declined.

EMPLOYEE STATUS

Issue: Recognise employment with multiple DHB employers as continuous

Submissions
(93 – New Zealand Resident Doctors' Association and Auckland Regional RMO Services Ltd)

Registered Medical Officers are obliged to change DHB employer frequently in order to complete their training. These employees are subject to the automatic enrolment and have to opt out (if that is their choice) every time they change employer, creating significant additional administrative and compliance costs for the DHBs as well as Inland Revenue.

An amendment to the Holidays Act has been made to recognise that RMOs change employers frequently but their period of employment is considered as continuous for the purposes of the Act with regard to the accrual of annual leave.

The KiwiSaver Act should be amended to recognise employment with multiple DHB employers as continuous.

Comment

KiwiSaver has been specifically designed so that when there is a change in employment, automatic enrolment occurs and keeps occurring over an employee's working life. This is intended to counter the inertia which prevents people from beginning and maintaining a savings habit.

An exemption to the automatic enrolment rules for RMOs would undermine the intent of these rules as it would create a precedent for other groups that change employers regularly to request an exemption.

Recommendation

That the submissions be declined.

Issue: Casual employees

Submissions

(12 – EMA Northern Incorporated, 26 – Hospitality Association of New Zealand, 66 – Business New Zealand, 86 –EMA Central Incorporated, 91 –New Zealand Institute of Chartered Accountants, 95 – New Zealand Law Society)

The submissions note their support for the amendment to the KiwiSaver Act to ensure that casual employees are not subject to the automatic enrolment rules of KiwiSaver. *(EMA Northern Incorporated, Hospitality Association of New Zealand, Business New Zealand, EMA Central Incorporated)*

Section 12 of the KiwiSaver Act 2006 should be amended, to exclude from the automatic enrolment rules employment under a contract of service that is for a period of 63 continuous days or less rather than the present 28 days. *(New Zealand Institute of Chartered Accountants)*

A provision should be made so that when casual employees become permanent the automatic enrolment rules apply. *(New Zealand Institute of Chartered Accountants)*

Changes to the automatic enrolment rules for casual employees should contain provisions for employers to backdate their application to the commencement of work with the employer so as to provide a clear, ongoing position for employers. *(New Zealand Institute of Chartered Accountants)*

Amendments to section 12 of the KiwiSaver Act 2006 should apply with effect from 1 July 2007. *(New Zealand Law Society)*

Comment

The policy intention was for employees to be exempt from the automatic enrolment rules if they were employed for a continuous period of 28 days or less. If employment was extended beyond 28 days, employees would then become subject to the automatic enrolment rules (as if they had started new employment).

The period of 28 days or less significantly reduces the compliance burden for employers and short-term employees without undermining the automatic enrolment mechanism. Officials consider that a period of more than 28 days could undermine the intent of automatic enrolment.

Whilst casual agricultural workers are able to work for a period of three months without becoming subject to the automatic enrolment rules, they are a defined term in section OB 1 of the Income Tax Act 2004 and have their own special tax rate. Accordingly, casual agricultural workers are an easily identifiable subset of casual employees, and the compliance cost on employers of casual agricultural workers is significantly less than that for employers of other casual employees. The KiwiSaver design has, where appropriate, leveraged off current rules to minimise compliance costs for employers.

Under the proposed amendments to section 12 of the KiwiSaver Act, "casual employment" will be defined by reference to the Holidays Act 2003, which defines it as employment that is "intermittent or irregular". Accordingly, casual employees who are paid holiday pay with their salary and wages will not be subject to the automatic enrolment rules.

There is currently no provision for casual employees to be automatically enroled if they stop being paid holiday pay and become permanent employees. In this situation, it would be up to employees to opt in, either through their employer or by contacting a provider directly. However, temporary employees become subject to automatic enrolment if their employment is extended beyond 28 days, and a person who ceases to be an agricultural worker also becomes subject to automatic enrolment.

There is a consistency argument that casual employees should be subject to automatic enrolment if they cease to be casuals. However, this would require employers to set up systems to monitor whether the employment contract changes. Given the compliance costs associated with this and the incentive to join KiwiSaver, officials would not recommend that such employees be subject to automatic enrolment when they cease to be a casual.

If casual or temporary employees were able to backdate their application for KiwiSaver when they began working for their employer, it would create administrative difficulties for employers. Employers would need to deduct 4% of their employees' salary or wages retrospectively and contribute matching compulsory employer contributions retrospectively. The member tax credit would also need to be applied retrospectively.

The Law Society has recommended that the application date apply from 1 July 2007 rather than 1 April 2008. Officials consider that this could create problems for employers who have automatically enroled casual employees based on current law. However, it would provide certainty for those employers who have not automatically enroled casuals because they thought that they were excluded. On balance, officials consider that the amendments should apply from 1 April 2008.

Recommendations

That the submissions be declined.

Issue: Definition of "permanent employees"

Submission
(98 – DLA Phillips Fox)

The definition of "permanent employee", as it relates to section 46 of the KiwiSaver Act 2006, which deals with an employer choosing a KiwiSaver scheme for employees, needs to be addressed. This definition includes only employees that are not temporary employees and to whom the automatic enrolment rules would apply but for the application of section 14 of the KiwiSaver Act. The recent amendment to this definition has limited its scope.

Comment

Officials agree that the definition should be amended to reflect its intent. The scheme should be open to all new permanent employees of the employer except those who are not subject to automatic enrolment.

Recommendation

That the submission be accepted.

Issue: Secondments

Submission
(Matter raised by officials)

The KiwiSaver Act 2006 should be amended so that when employees enter into a secondment arrangement whereby they are transferred from one employer to another but remain "employed" by the original employer, such an arrangement is not subject to the automatic enrolment rules.

Comment

The definition of "employer" in section 4 of the KiwiSaver Act states that an employer is a person "who pays, or is liable to pay" salary or wages to another. The drafting of this definition means that employees who are seconded under certain arrangements may have two employers. This has the potential to create complications for employers in the management of their responsibilities under KiwiSaver.

The issue arises where an employer (employer A) seconds employees to another employer (employer B) under an arrangement whereby employer B agrees to pay the employee directly (rather than reimbursing employer A for the cost of the seconded employee). Under current law the employee has started new employment and is therefore subject to automatic enrolment.

Officials accordingly recommend that an amendment be made to the KiwiSaver Act, so that when employees are seconded under an arrangement as described above, they will be excluded from the automatic enrolment rules.

However, if an employee terminates employment with employer A and starts with employer B this will constitute new employment and be subject to the automatic enrolment rules.

It is recommended that the amendment apply from the date of assent.

Recommendation

That the submission be accepted.

Issue: Participation agreements established before 1 July 2007

Submissions
(70 – Simpson Grierson, 87 – Association of Superannuation Funds of New Zealand)

There is no good policy reason to exclude schemes from obtaining complying superannuation fund status that are not registered or have not concluded a participation agreement prior to 1 July. It is more appropriate for employers to determine, on an ongoing basis, whether KiwiSaver or an alternative complying superannuation fund offers the best benefits for members. This would necessitate the employer being able to shift between various providers and types of schemes as the employer determines is most appropriate. *(Simpson Grierson)*

The only grandparenting that is necessary should relate to the existing scheme and not to the employer that provides access to the scheme. *(Association of Superannuation Funds of New Zealand)*

Comment

It is important to note that the creation of the complying superannuation funds was a response to a problem that arose for employers that provided access to registered superannuation schemes. The objective of these provisions was to ensure that the introduction of KiwiSaver, and particularly the SSCWT exemption, did not result in existing superannuation schemes winding up. This rationale does not extend to employers that had not already established superannuation arrangements before the introduction of KiwiSaver.

Recommendation

That the submissions be declined.

Issue: Parity between different savings vehicles

Submissions
(17 – Mercer Human Resource Consulting, 33 – Corporate Taxpayers Group, 70 – Simpson Grierson, 78 – Council of Trade Unions (CTU), 87 – Association of Superannuation Funds New Zealand (ASFONZ), 96 – New Zealand Nurses Organisation)

There should be parity between savings vehicles, in particular, the government-funded $1,000 one-off kick-start and the fee subsidy should also be available to complying superannuation funds.

Transfers from KiwiSaver schemes to complying funds should be allowed *(Mercer Human Resource Consulting, Simpson Grierson, CTU, ASFONZ and New Zealand Nurses Organisation)*, and this should occur without the loss of benefits aside from the fee subsidy *(CTU and New Zealand Nurses Organisation)*.

This will ease the complications and the administration burden of employer compulsory contributions *(ASFONZ)* and will allow employees the option of swapping to an employer superannuation scheme when they change jobs *(CTU)*. It is also argued that there is no good policy reason for the disparity between transferring from a KiwiSaver scheme versus a complying superannuation scheme *(Simpson Grierson).*

Comment

Permitting transfers from KiwiSaver to complying funds would undermine a fundamental feature of the original KiwiSaver model by extending a facility that was only intended to be a means of accommodating employers that were already offering and contributing to a superannuation scheme on behalf of their employees. It would provide a way to access all KiwiSaver benefits without members being subject to all the conditions, unless the additional benefits are clawed back and, if they are, would add considerable complexity and cost. Further, it should be noted that portability in the KiwiSaver context is crucial as members can have only one account. This is not the case for complying funds and, as such, there is a reduced need for portability to such funds.

Recommendation

That the submissions be declined.

COMPLYING FUNDS: IRD NUMBERS

Submission
(87 – The Association of Superannuation Funds of New Zealand)

In respect of a complying superannuation fund it would be helpful if the legislation included a power for trustees of the fund to obtain IRD numbers from the Commissioner or from the employer of a member for the purpose of administering the tax credits.

Comment

Inland Revenue requires sufficient information to ensure that members do not receive a member tax credit payment when ineligible because, for example, they may have already received the full member tax credit in respect of their contributions to another fund. Officials consider that, for privacy reasons, a complying fund should obtain the IRD number from the member directly or with the member's consent from the employer.

For Inland Revenue to be able to administer the member tax credits, a complying fund should provide the IRD number, if known. If the IRD number is not known, the Commissioner has the authority to request other information, such as the member's date of birth, from the provider in order to make the payment. If there is insufficient information to make a payment, the provider will be advised to write to the member and request the necessary information. Officials consider that there is sufficient incentive for members to provide this information to providers and that a legislative provision is not necessary.

Recommendation

That the submission be declined, but that complying superannuation funds that do not have a member's IRD number be able to supply other information to Inland Revenue to assist it in making the payment. If it is unable to make the payment based on the information provided, Inland Revenue will inform the provider so that the provider can write to the member requesting the necessary information. This will require an amendment to subsection 68C (3)(a) of the Tax Administration Act 1994 that the IRD number be provided if known.

Issue: Complying superannuation funds – successor funds

Submission

(70 – Simpson Grierson, 87 – Association of Superannuation Funds of New Zealand)

The requirement for a participation agreement to be entered into prior to 1 July 2007 to obtain complying superannuation fund status effectively locks employers into an agreement with a specific provider. It is more effective to allow employers to be able to offer access to other schemes if they determine that their existing provider is no longer appropriate. While the proposed amendments in clause 240 go some way towards allowing successor participation agreements, the test for commercial necessity is too onerous a requirement. There should be no requirement for necessity, and employers should be able to shift between providers as they wish. This would encourage competition between complying superannuation funds and be in the best interests of members. *(Simpson Grierson)*

How will the commercial necessity requirement be applied in practice? *(Association of Superannuation Funds of New Zealand)*

Comment

The purpose of restricting the availability of complying superannuation funds to employers already providing access to superannuation schemes reflects the fact that the complying superannuation fund mechanism was intended to ensure that such employers had a cost-effective option as a result of the introduction of KiwiSaver and that existing schemes were therefore less likely to wind up.

The proposed amendment to the complying fund provisions is aimed at dealing with the issue of mirror schemes. These are essentially schemes that are established to replace existing schemes, which may occur where there is a merger or an acquisition at the employer level. A result of the merger may be to establish a single superannuation offering for all the employees of the merged entity. The inclusion of the term "commercial necessity" is intended to reflect this concept and extend the complying fund mechanism to schemes that replace existing complying funds as a result of mergers and acquisitions. This could be clarified in the clause 240 of the bill.

The first submission also suggests that there is a need to address the lack of competition that has been created by the complying superannuation fund requirements. The Superannuation Schemes Act provides a mechanism for employers to transfer between providers if the terms of the new scheme are no less favourable than the terms of the old scheme. This ensures that employers can provide access to the most appropriate scheme for their employees without affecting the terms of employees' participation. Officials recommend that the eligibility requirements for complying superannuation funds extend out to schemes that replace complying superannuation funds under the transfer provision in section 9BAA of the Superannuation Schemes Act 1989. This vehicle should be applicable only if all members of the existing scheme, or all members relevant to an existing participation agreement, are transferred under section 9BAA and approved by the Government Actuary.

Recommendation

That the submissions be partially accepted and the proposed legislation relating to "commercial necessity" be clarified as follows:

- The provision for successor funds should be extended to schemes that meet the requirements in section 9BAA.
- This vehicle should be applicable only if all members of the existing scheme, or all members relevant to an existing participation agreement, are transferred under section 9BAA and approved by the Government Actuary.

Issue: Inclusion of a trust deed within the meaning of a participation agreement

Submission
(70 – Simpson Grierson, 87 – Association of Superannuation Funds of New Zealand)

Clause 240(2) may have some undesirable consequences. The clause currently allows for the argument that any amendment to the trust deed which impacts on the employer participation in a scheme may mean that a previously complying fund may no longer be compliant. The wording should be clarified to establish the intention that a participation agreement may be entered into by deed.

Comment

The purpose of this provision was to ensure that where successor schemes were established on amalgamation or acquisition of an employer's business, the successor scheme could be either a stand-alone scheme or master trust arrangement. We agree that the intention of this provision should be clarified to provide that trust deeds may replace participation agreements as complying superannuation successor funds.

Recommendation

That the submission be accepted.

Issue: Failure to pay

Submission
(24 – AMP, 87 – ASFONZ)

The proposed section 101H of the KiwiSaver Act introduces strict obligations on the providers of complying superannuation funds to take reasonable steps to ensure payment by the employer if it has reason to believe that an employer has failed to pay the amounts of compulsory employer contribution. The terms "reason to believe" and "reasonable steps" are uncertain and require further definition. *(AMP)*

As the section is currently drafted, it could result in a requirement that the provider stringently monitors employer contributions where the provider may not necessarily have the salary details relating to the relevant members. This may also be a problem where the employer is paying more than the compulsory rate, as the provider may not know what part of the contribution relates to the compulsory rate. *(AMP)*

The proposed section 101H is unduly onerous, and the obligation should be limited to annual certification as to the contribution levels. *(ASFONZ)*

Comment

Officials agree that the requirement for a provider to take reasonable steps to recover funds in this situation creates uncertainty for the provider. A provider may not know how far such an obligation extends. To rectify this uncertainty, officials recommend that the obligation to take reasonable steps be replaced with an obligation to notify the employer that the compulsory contribution has not been received and seek payment of that contribution as soon as practicable after the provider becomes aware of the non-payment. This notification should also be sent to the Government Actuary. Officials note that it is current practice for an employer to certify to providers that all contributions required have been made, a practice we expect to continue.

Further, to remove the uncertainty in respect of the timing of the process, we recommend that the collection process start as soon as the provider is aware that an employer has not made an employer contribution. Providers would have to keep track of the relevant level of contributions being made on behalf of members. This is consistent with the existing framework for superannuation schemes.

Recommendation

That the submission is accepted and the relevant provisions amended accordingly.

Issue: In-service portability

Submission
(45 – Chapman Tripp)

Portability in the context of complying superannuation funds should mean portability when changing employers or otherwise leaving service. The ability to change funds while in-service will risk undermining an existing scheme's critical mass.

The rationale that has been provided in favour of in-service portability has been based on achieving consistency between KiwiSaver and complying superannuation funds. However, such consistency would require reciprocal portability, which is currently not permitted. As such, paragraph (d) of the complying fund rules prescribed in section OB 1 of the Income Tax Act 2004 should be deleted.

Comment

The purpose of allowing in-service portability is to give consumers the power to choose which scheme they wish to become members of, without restricting such portability to changes of employment. Rather than members being tied to a scheme during the term of their employment, which may, over time, fail to meet their needs, members can change to a more suitable scheme. Schemes can compete for new members by providing superior service and returns for members. Schemes that fail to meet consumer expectation may wind up, which will be a positive outcome in respect of market efficiency – ineffective funds may over time be superseded by efficient and effective funds.

Portability and lock-in provisions are fundamental to obtaining complying fund status and obtaining the related benefits – particularly the member tax credit. The rationale behind complying fund status was not to provide an alternative to KiwiSaver, but to enable existing schemes to co-exist with KiwiSaver.

Recommendation

That the submission be declined.

Issue: In-service portability – ancillary benefits

Submission
(87 – Association of Superannuation Funds of New Zealand)

Allowing portability at any time from a complying superannuation fund may impact on the benefit structures in those schemes, including where insurance may be calculated as part of those benefits. These ancillary benefits should be able to be re-adjusted if portability is maintained, irrespective of any adverse consequence to members.

Comment

Many existing superannuation schemes attach insurance benefits to the superannuation benefits that are provided. Most arrangements require an insurer to pay the relevant benefit if the insured event arises during the course of the member's participation in that scheme.

Officials believe that a viable option will be to enable the insurer to cancel the cover if a member chooses to transfer the funds out of the complying funds. This would ensure that the insurer would not have considered the transfer of the accumulation in its risk assessment, which in turn, would mean that the premiums that are currently charged are unlikely to be affected. This protects the status quo, by maintaining the member's right to transfer, while ensuring that employer would not have to bear the costs of premiums on accumulated balances that have been decreased by transfers to other schemes.

Recommendation

That the submission be accepted and a suitable provision allowing the cessation of other benefits on transfer from a complying fund be included.

Issue: Extending the SSCWT exemption to defined benefit schemes

Submission
(64 –The New Zealand Anglican Church Pension Board)

The definition of "complying superannuation fund" should be amended to include defined benefit schemes as long as the terms of the scheme are reasonable. This would allow such schemes to qualify for the SSCWT exemption on employer contributions.

Comment

The complying superannuation fund rules were introduced to minimise the risk of existing employer schemes winding up. The rules do not explicitly exclude defined benefit schemes. Any defined benefit scheme will be able to establish a complying superannuation scheme under the current arrangements. The complying superannuation fund section, however, would be required to operate on a defined contribution basis. Furthermore, an exemption would not increase retirement savings as the retirement benefits are a factor of salary.

Recommendation

That the submission be declined.

MEMBER TAX CREDITS

Issue: Low income employees and the tax credit

Submission
(51 – National Distribution Union)

The full benefit of the member tax credit may not be available to some on low incomes, particularly those working part-time or seasonally, or making member contributions of less than 4%. The submission suggests further investigation of ways to ensure that members with low annual incomes who demonstrate a commitment to the aims of the scheme by saving where they are able to receive the full benefit of the member tax credit.

Comment

The member tax credit is an incentive for people to make regular contributions to KiwiSaver. Not everyone is in the position to do this, which is why joining KiwiSaver is not compulsory and why members can apply for a contributions holiday.

The current KiwiSaver design already benefits those on lower incomes more than those on higher incomes, as the member tax credit operates on a "matching" basis up to the $20 a week cap. For example, people earning $26,000 who save 4% of their salary through KiwiSaver ($20 per week) will receive an additional $20 a week from their employer (from 1 April 2011) and $20 a week from the government – an additional $2 for every $1 saved. In comparison, as the government contribution is capped at $20 per week, the pay-off for an individual earning $52,000 falls to 1.5:1 and decreases the further you go up the income scale. At incomes of $26,000, employees will continue to get the full benefit of the member tax credit. The income threshold was specifically set at this level which is well below the average wage to ensure that employees on lower incomes would receive the full benefit of the credit.

If the member tax credit was to be available to employees notwithstanding the contribution rate (say, for those contributing 2% of salary and wages notwithstanding the amount contributed per week), it would open the system to potential abuse. It would also be inequitable because, at relatively low income levels, some members would contribute more of their salary for the same benefit. This is contrary to the incentive system that the member tax credit aims to imbed (that members receive a larger tax credit the more they contribute up to a cap) and contrary to the objectives of KiwiSaver.

Recommendation

That the submission be declined.

Issue: Member tax credit – payment upon transfer, emigration, death and closure

Submissions
(23 – ISI, 47 – ING, 54 – ASB, 61 – KPMG, 91 – New Zealand Institute of Chartered Accountants)

No allowance is made for payment of the member tax credit upon transfer. Inland Revenue should make the payment to the provider who is the member's current provider at the time of payment. *(ING)*

Allowance should also be made for payment of the member tax credit in exceptional circumstances to the saver or their estate such as in the case when an account is closed. Payment could be made where the saver has permanently emigrated or died before any tax credit due has been claimed. *(Investment Savings and Insurance Association, ING)*

The provider must claim a tax credit on the day prior to the member ceasing membership. The provider must pro rata the credit, which must vest upon receipt of the payment. These are not possible after a full withdrawal. When a member exits KiwiSaver, Inland Revenue should remit any tax credit directly to the member or the member's estate along with any contributions Inland Revenue is holding. *(Investment Savings and Insurance Association, ING, ASB, KPMG, New Zealand Institute of Chartered Accountants)*

Upon permanent immigration providers should inform Inland Revenue of the member's details and Inland Revenue should advise the fund provider of the amount of tax credits to be refunded. Providers should be able to make ad hoc requests to Inland Revenue where there is a closure. Alternatively, the member should lodge the final claim. *(ASB)*

Comment

Providers can claim the member tax credit annually, on the basis of a 30 June year, on behalf of members. They can also claim the credit part-year for those who stop being a member of KiwiSaver or a complying fund during the year (whose account is closed).

The concerns raised in submissions are dealt with by Supplementary Order Paper No. 130. The SOP provides that in respect of members whose accounts are closed, Inland Revenue will make the final payment of credit to them or their estate directly (once probate is granted) provided that members' details are supplied to Inland Revenue.

Inland Revenue will pay the credit to the member's provider at the time the claim is made. Therefore, if there is a change in provider, the credit will be paid to the new provider if requested.

The SOP also provides that a credit will be paid for contributions held by Inland Revenue for members who subsequently cease to be members for reasons such as death before contributions can be on-paid to the member's provider.

Recommendation

That the submission be accepted and note that these submissions are addressed by the Supplementary Order Paper.

Issue: Changes to the claw-back of the member tax credits on permanent emigration

Submission
(17 – Mercer Human Resource Consulting)

Section KJ5 (6)(a)(i) requires that the relevant fund provider must pay to the Commissioner the lesser of three amounts – one of which is the amounts of the tax credit that have been paid for the person. As a person may have tax credits in one or more complying superannuation funds, as well as in a KiwiSaver scheme, this provision should be clarified to capture only the tax credits that have been paid to the provider of the scheme or fund in question plus the amounts of any tax credits that have been transferred in from another scheme.

Comment

The policy intent is that that the nominal value of the member tax credit should be clawed back from the provider when members permanently emigrate and withdraw their accumulated interest. The provider should be required to repay only those credits which that provider has received either directly from Inland Revenue or as a result of a transfer.

Recommendation

That the submission be accepted.

Issue: Abolition of claw-back on permanent emigration

Submission

(23 – Investment Savings and Insurance Association of New Zealand Inc (ISI), 47 – ING, 91 – New Zealand Institute of Chartered Accountants)

The claw-back should be removed on the basis that:

- The claw-back will act as a disincentive to joining KiwiSaver, especially for younger employees. The term "tax credit" implies that employees are receiving back part of the tax they have paid as an incentive to save. The claw-back will be viewed as a tax grab.
- There is a clash between the tax credit claw-back and PIE rules. The member's accumulation may have to be refunded to Inland Revenue, leaving no interest to adjust to fund the member's PIE tax liability. This liability will then be borne by the other investors in the KiwiSaver scheme.
- The claw-back is complicated to implement for both providers and Inland Revenue, especially when members transfer between providers over the life of their KiwiSaver membership.
- There is insufficient time to implement the required changes to enable tracking of tax credits within providers' systems to allow this information to be passed between providers when members transfer.

Comment

KiwiSaver is designed for people living in New Zealand to have access to retirement savings and offers taxpayer-funded benefits and incentives to join. These benefits and incentives also work to encourage inward migration and the return of New Zealanders living overseas. It would be unfair to allow people that have relocated overseas to access tax credits in cash while those who stay in New Zealand have their tax credits locked in until the age of eligibility for New Zealand Superannuation (or after five years of membership, whichever is the later).

KiwiSaver does allow people to start and stop contributing to KiwiSaver as they wish by applying for a contributions holiday for up to five years at a time, enabling young New Zealanders to start saving for their retirement and then to travel overseas, rejoining KiwiSaver on their return. There is no requirement for people to withdraw their accumulated interest on permanent emigration.

The tax credit claw-back does not conflict with the PIE rules as a member's tax liability (and fund management fees) will be taken into account before a member's tax credit is clawed back.

Systems to record and track member tax credits do not have to be in place until after 1 July 2008, as the first member tax credit will not be payable until that date. Furthermore, to manage concerns around providers having the necessary systems in place by July 2008, the bill allows the date on which the member tax credit claim to be made to be determined by the Commissioner. Submissions have recommended that legislation prescribe timeframes for processing the claims.

In addition, a permanent emigration withdrawal cannot be made until one year has lapsed after the permanent emigration.

Recommendation

That the submission be declined.

Issue: Permanent emigration and the member tax credit

Submission
(17 – Mercer Human Resource Consulting)

Clause 14(2) in schedule 1 of the KiwiSaver Act 2006 should be amended. At present there is no requirement to deduct the Crown contribution arising from section KJ 1 of the Income Tax Act.

Comment

Officials agree that an amendment should be made to clause 14(2) of the KiwiSaver Act 2006 to reflect the policy intention that when KiwiSaver members permanently emigrate and transfer all of their funds in their KiwiSaver scheme to a foreign superannuation scheme authorised for that purpose by regulations, the nominal value of their member tax credit, up to the value of their accumulation in their scheme, is repaid to the Crown.

It is recommended that the amendment apply from 1 July 2007.

Recommendation

That the submission be accepted.

Issue: Employer tax credit should not proceed

Submission
(85 – Minter Ellison Rudd Watts)

Clauses 143 and 219 should not be proceeded with. Employer tax credits and compulsory employer contributions should be dropped and replaced with a refundable credit for all eligible taxpayers whose aggregate employer and member contributions exceed the minimum 4% of their gross personal services income. Also, the SSCWT exemption for employer contributions to a KiwiSaver scheme or complying superannuation fund should be replaced with a deduction for 50% of the aggregate employer and member contributions (capped at 4% of the gross personal services income).

Comment

The submission supports the government's aim of increasing incentives to join and make regular contributions to KiwiSaver, although it questions the mechanics adopted.

Officials consider that the suggested mechanisms will not achieve the objectives of increasing savings as there is no requirement for employers to contribute. The employer tax credit is paid in respect of a contribution paid by the employer. The benefits of these suggested mechanisms are likely to be directed at higher income earners who can afford to "salary sacrifice". Both the suggested mechanisms will result in a tax reduction for savers based on the amount contributed to KiwiSaver. This is because the refundable credit is payable to the saver, rather than to the employer to offset the cost of employer contributions or to the provider, as occurs with the member tax credit. The deduction to replace SSCWT has the same effect in reducing the tax payable by the saver.

Recommendation

That the submission be declined.

Issue: Employer tax credit formula

Submission
(17 – Mercer Human Resource Consulting)

The maximum employer tax credit is set as $20 per week and is calculated by considering fractions of a week that are included in any pay period. Consideration needs to be given to the employer tax credit formula as it may result in inadequate compensation to employers who have seasonal operations.

Mercer Human Resource Consulting provided the example of a waged employee who works a 40 hour week for 6 months of the year and a 20 hour week for the remainder of the year. He is paid $17 an hour. In the on-season period his KiwiSaver weekly contributions will be 17*40*0.4 = $27.20. In the off-season they will be 17*20*.04 = $13.60. The employee will qualify for the full member tax credit having made contributions in excess of $1042.86 for the year. However, the employer tax credit will be restricted to $875.95 (26.07*$20 + 26.07*13.60).

Comment

The submission has assumed that the employer tax credit has an annual cap of $1042.86 and that it will match employer contributions up to that cap. The policy intent is that the employer tax credit is to compensate an employer up to $20 per week for contributions made on behalf of the employee for that week. Introducing an annual cap would increase both compliance and administrative costs for both employer and Inland Revenue in having to run annual totals. The employer tax credit has been integrated into the PAYE process, which is based around pay periods in a month to minimise compliance costs and cash flow costs for employers.

Recommendation

That the submission be declined.

Issue: Entitlement to the employer tax credit

Submission
(91 – New Zealand Institute of Chartered Accountants)

Proposed section 101C should be amended to ensure that the entitlement of the employer tax credit occurs from the point at which employee contributions commence through PAYE deduction.

Comment

In contract terms, an individual generally becomes a member of a superannuation scheme when the securities are allotted by the providers.

Section 101C requires an employee to be a member of a KiwiSaver scheme or a complying superannuation fund before the employer is required to make employer contributions. However, the policy intention is that compulsory employer contributions begin at the same time a deduction is first made for an employee. The employer tax credit is to be integrated into the PAYE remittance process so that the value of the tax credit is given to employers at the same time they are required to remit the contributions to providers or to Inland Revenue.

Officials recognise that, owing to the requirement that an employee be a member of a KiwiSaver scheme or a complying superannuation fund before the employer is required to make employer contributions, the policy intention is not met. Accordingly, we recommend that an amendment be made to proposed section 101C so that employer contributions are required to start from the first pay from which an employee deduction is made. Eligibility for the employer tax credit should be tied to that date as well. If the employee opts out, the actual employer contributions paid will be refunded to the employer.

Recommendation

That the submission be accepted.

Issue: Employer tax credits for people employed by two or more associated employers

Submission
(17 – Mercer Human Resource Consulting)

The limitation on the amount of employer tax credit that is available in respect of someone who is employed by two or more associated employers will be difficult for employers to administer and will necessitate the flow of remuneration information between employers that may breach the terms of the Privacy Act. An alternative means of preventing abuse of the employer tax credit arrangements should be sought.

Comment

Proposed new section KJ 7 of the Income Tax Act specifies that if someone is employed by a number of employers who are associated for tax purposes, the associated employers will be considered as one employer for the purposes of claiming the tax credit. This provision is being introduced in order to prevent associated employers claiming more than one credit for the same employee. Officials do not consider that the flow of remuneration information in this manner will create privacy concerns. However, if employers are concerned, they have the option of requiring employee consent.

Recommendation

That the submission be declined.

Issue: Entitlement of self-employed to tax deduction for contributions

Submission
(69R – BKR Walker Wayland)

Self-employed people should be entitled to a tax deduction for contributions to a KiwiSaver scheme to reflect that employer contributions are tax deductible to the employer and not subject to SSCWT. This would:

- equate a self-employed person to an employee;
- ensure the self-employed person was not disadvantaged in relation to an employee;
- ensure both are locked in until 65 years; and
- need some form of maximum contribution limit.

Comment

Self-employed people are able to join and contribute to KiwiSaver schemes. They must contract directly with a provider and agree to a contribution amount. There is no minimum contribution rate for the self-employed as there is for employees (4% of salary or wages).[3]

Self-employed people will be eligible for the member tax credit on their contributions in the same way that employees are eligible.

However, because self-employed people do not have an employer, they will not be eligible for an employer contribution. The change suggested by the submission would result in an actual tax reduction for the self-employed rather than the incentives going into their retirement savings.

Recommendation

That the submission be declined.

Issue: Offset of the employer tax credit

Submission
(Matter raised by officials)

The rules in the bill for offsetting the amount of employer tax credit should be amended to ensure that the amount of employer tax credit is applied against employer contributions in the first instance.

[3] To be eligible for the first home subsidy, self-employed people will need to contribute around 4% of their income for at least three years.

In addition, it is possible to simplify the rules for creating a debt when an employer tax credit that has been offset against employer contributions is subsequently on-paid to a complying superannuation fund, owing to the fact that Inland Revenue has been notified by the Government Actuary of short-paid compulsory employer contributions. In this situation, a debt would be created for the amount of the amount paid to the complying superannuation fund provider and this debt should be collected as if it were unpaid PAYE.

Comment

The bill currently provides that the employer tax credit will be used in the following order:

- to offset the amount of any compulsory employer contribution to a KiwiSaver scheme or paid to a provider to meet any unpaid compulsory employer contributions to a complying superannuation of which the Government Actuary has notified Inland Revenue;
- to offset any amount that is payable to the Commissioner by the employer under the Revenue Acts for the PAYE period to which the employer tax credit relates (which would include any voluntary employer contributions);
- to pay other amounts payable by the employer under the Revenue Acts; and
- if any amount is still to be used it will be refunded.

In most situations the employer tax credit will be fully offset as part of the application of the first two rules.

Given that, the employer tax credit is payable in respect of both compulsory and voluntary employer contributions to a KiwiSaver scheme or complying superannuation fund, officials consider that in the first instance, the credit should be offset against all employer contributions. The effect of this change is that voluntary contributions would move from the second rule to the first rule. This would ensure that employer tax credits are offset against employer contributions so that the value of the credit is paid to the employee's scheme if the employer does not pay such contributions.

In addition, we think it is possible to simplify the proposed process around creating a debt to the employer when employer tax credits arising from employer contributions to a complying superannuation fund have been offset against compulsory employer contributions to a KiwiSaver scheme or other PAYE amounts are subsequently on-paid to the complying superannuation fund provider. These employer tax credits are paid to the provider when Inland Revenue is notified by the Government Actuary of a shortfall in payment of compulsory employer contributions. At present, the bill requires the amount of the tax credit to be reversed in the tax type it was offset against, which adds complexity in having to track the revenue type the credit was offset against. The process can be simplified so that the employer is treated as short-paying an amount and that amount can be treated as PAYE for collection purposes.

We recommend that the change apply from 1 April 2008.

Recommendation

That the submission be accepted.

Issue: Calculation of the amount of the employer tax credit

Submissions
(Matter raised by officials)

The amount of the employer tax credit for a PAYE period should be the lesser of the actual contributions made during that period or the amount calculated on the basis of the number of days in the PAYE period. For a PAYE period with 31 days, the amount calculated would be $88.57. At present, this amount is calculated on the basis of $20 a week for the number of weeks for which an employer contribution is made.

Comment

The bill currently provides that the amount of the employer tax credit for a PAYE period is equal to the lesser of:

- the employer contribution for an employee in that period; and
- $20 a week for the number of weeks (including part weeks) in the PAYE period for which an employer contribution was made.

This is the correct calculation in relation to the tax credit.

However, because of the information Inland Revenue will receive as part of the EMS process, it will not be able to calculate the amount of the tax credit for each employee if it is necessary to refund the employer contributions because an employee opts out. This is because Inland Revenue will receive information, at the employee level, on the amount of employee contribution and employer contribution for the month. (This amount is not reduced by the amount of the tax credit.) The amount of the employer tax credit will be an aggregate amount for all employees which will be off-set against the amount payable. This process reflects the limitation of the EMS in terms of the amount of data that can be incorporated into the form and reducing compliance costs for employers.

This process, however, creates difficulties in determining the amount of employer contribution that should be refunded if the employee opts out. This is because the amount to be refunded to the employer is the actual amount of the employer contributions for that employee, reduced by the amount of the employer tax credit claimed in respect of that employee. Inland Revenue will not hold this data at the employee level. To avoid the need to request additional information from the employer as to the amount of the employer tax credit claimed in respect of an employee that has opted out, officials consider that the employer tax credit for a PAYE period should be the lesser of:

- the actual employer contributions made during the period; and
- the amount calculated on the basis of the number of days in the PAYE period. (For a PAYE period of 31 days the amount calculated would be $88.57.)

This approach does not require an employer contribution to be made every week to claim the credit in respect of a particular week in that PAYE period. The maximum amount per employee can be claimed if the actual contributions made exceed the amount calculated based on the number of days in the PAYE period, despite contribution not being made in respect of each week in the PAYE period. While this approach increases the benefit of the employer tax credit for some employers, it allows Inland Revenue to calculate the amount of any refund of employer contributions without the need to seek additional information. Furthermore, it would allow Inland Revenue to accurately calculate the tax credit in other situations, such as when there is a shortfall, and avoid the need for Inland Revenue to contact employers. It is a trade-off between increased entitlement (a fiscal cost) and a reduction of compliance costs. Employers will benefit from this approach in any PAYE period in which the period for which employer contributions are made is less than the full period and the actual contributions exceed this nominal amount. This will occur when an employer starts or ceases to make contributions because an employee starts or ceases employment, or takes a contribution holiday or starts contributions again.

This approach reduces compliance costs for employers and allows an automated system to be developed to calculate and refund employer contributions when an employee opts out. This will reduce the cash flow consequences of having to wait for such refunds if additional information has to be supplied.

The amendments should apply from 1 April 2008.

Recommendation

That the submission be accepted.

Issue: Application of KiwiSaver to non-resident employers that have no fixed establishment in New Zealand

Submission
(Matter raised by officials)

Section 6 of the KiwiSaver Act, as it applies to employers, should be extended to cover non-resident employers that do not have a fixed establishment in New Zealand if they elect to be an employer for KiwiSaver purposes. In addition, "employer", for the purposes of the employer tax credit, should be limited to employers that are subject to KiwiSaver.

Comment

Section 6 of the KiwiSaver Act sets out the rules to whom the KiwiSaver Act applies. "Employers" are:

- those employers that are New Zealand-resident within the meaning of the Income Tax Act; or
- those employers that carry out a business from a fixed establishment in New Zealand.

This definition includes all employers based in New Zealand except non-resident employers who do not carry on a business from a fixed establishment in New Zealand – for example, a non-resident company that operates a warehouse in New Zealand for the storage of goods.

The policy intent was that KiwiSaver should apply to all non-resident employers that employ resident employees if PAYE is deducted in respect of those employees. Officials consider that this policy intent has not been achieved with the current wording of the legislation as it excludes a small group of non-resident employers.

We consider that non-resident employers with no fixed establishment in New Zealand should be included within the scope of KiwiSaver if they so elect, by either deducting KiwiSaver contributions from an employee's salary or wages and/or making employer contributions.

As such employers will be entitled to the employer tax credit in respect of employer contributions, it is recommended that an employer, for the purposes of the employer tax credit, be linked to the definition of employer for KiwiSaver purposes.

The amendments should apply from 1 April 2008.

Recommendation

That the submission be accepted.

Issue: Reference in proposed section KJ 5 to period should be to PAYE period

Submission
(95 – New Zealand Law Society)

Reference in proposed section KJ 5 to "period" should be amended to refer to "PAYE period".

Comment

Proposed section KJ 5 addresses several situations where the tax credit has been used and subsequently an unpaid amount or shortfall is identified. References in those clauses to "period" are presumably intended to refer to "PAYE period", as the tax credits arise in each PAYE period. The type of period should be clarified.

Recommendation

That the submission be accepted.

Issue: Private domestic workers

Submission
(Matter raised by officials)

Private domestic workers should have the option of electing to make compulsory employer contributions. If they choose to do so, they should also receive the employer tax credit.

Comment

Under the PAYE rules, the employer of a private domestic worker (defined term) is not required to deduct PAYE. Instead, private domestic workers are required to deduct their own PAYE. If they contribute to KiwiSaver from their "salary or wages", the question arises as to whether they should be required to make compulsory employer contributions and receive the employer tax credit.

As private domestic workers will be required to fund both the employee and employer contribution, officials recommend that compulsory employer contributions be at the election of the worker. If they make employer contributions, they will receive the employer tax credit.

It is recommended that the amendment apply from 1 April 2008.

Recommendation

That the submission be accepted.

GENERAL TAX CREDIT ISSUES

Issue: Inflation indexation of employer/member tax credits

Submission
(26 – Hospitality Association, 30 – NZ Public Service Association, 66 – Business New Zealand, 78 – Council of Trade Unions, 76 – New Zealand Nurses Organisation)

The government should provide for inflation adjustments to employer and member tax credits for contributions.

Comment

It is acknowledged that the value of the tax credits will reduce in real terms over time. However, indexation would add significantly to the fiscal costs of KiwiSaver and add to the complexity and administration of the scheme as values would change by very small amounts each year.

Recommendation

That the submission be declined.

Issue: Pro-rating across investment products

Submissions
(23 – ISI, 24 – AMP, 45 – Chapman Tripp, 47 – ING, 54 – ASB, 91 – New Zealand Institute of Chartered Accountants)

The provider must credit each instalment of the fee subsidy and member credit on a pro rata basis across the investment products of the KiwiSaver scheme to which the member has subscribed or been allocated. It is not clear whether the means the contribution splits elected by the member or whether it must be based on the current investment account balances.

Many provider systems are set up to pro rata base on the member's current contribution instructions. It should be clarified that the reference to pro rata basis across investment products means the current investment allocation splits that the member has elected or the investment allocation to which the member has been allocated. *(Investment Savings and Insurance Association, ING, New Zealand Institute of Chartered Accountants)*

It should be clarified that member tax credits and fee subsidies should be applied pro rata on a prescribed basis. The preference is for the member's contribution split instructions. *(Chapman Tripp)*

The credit should be split according to the contribution strategy selected by the member, not the current balance across all funds. This is much easier administratively as the methodology is already provided for in the registry systems. *(ASB)*

Comment

Officials agree that clarity is needed in relation to the rules dealing with the allocation of the member tax credit and fee subsidy. It should be clarified that reference to pro rata basis across investment products means the current investment allocation instructions the member has elected or the investment allocation to which the member has been allocated (if a default scheme).

Officials consider that the rules dealing with the pro-rating of the kick-start contribution of $1,000 and the compulsory employer contributions should be pro-rated on the same basis to ensure consistency.

Recommendation

That the submissions be accepted and sections 226(2), proposed section 101G(1) and clause 20(4) of the KiwiSaver Regulations 2006 also be amended on the same basis.

Issue: Generosity of the tax credits over tax cuts

Submission
(84 – NZ Chambers of Commerce)

A smaller subsidy (tax credit) and some personal tax cuts are preferred so that people have more choice as to how much they put into KiwiSaver and how much they spend otherwise. The Budget 2007 changes have shifted the balance too far towards "future" as opposed to "current" spending.

Comment

New Zealand's saving rate has been on the decline for a number of years. The proposed tax credits aim to incentivise 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 of their pre-retirement.

On recent evidence, personal tax cuts are more likely to be spent than saved. At this time, that would generate further domestic demand and place further pressure on inflation, interest rates and the exchange rate.

Recommendation

That the submission be declined.

INVALID ENROLMENTS

Submissions
(24 – AMP, 23 – ISI, 47 – ING, 87 – ASFONZ)

The treatment of invalid enrolments should be expressly prescribed in the KiwiSaver Act as not all invalid enrolments will necessarily be void. *(AMP)*

There is merit in the legislation prescribing that a person is deemed to have validly prescribed for membership of the relevant scheme for the period until his or her membership is terminated as the result of ineligibility. *(AMP, ISI, ING)*

There needs to be prescription in the legislation regarding treatment of a member's membership when the invalid enrolment is due to the member not meeting the eligibility criteria where at a future date the member meets the criteria, such as when a person becomes a permanent resident. *(AMP)*

Refunds should be based on current investment values; otherwise other members of the scheme may be unjustly enriched as a consequence. The securities have been issued in good faith and any gain or loss should be borne by the person who held the securities regardless of their ineligibility under the KiwiSaver Act. Contributions should be refunded at current market value. *(AMP, ISI, ING)*

Inland Revenue should manage the refund process. The refund of any contributions received by the provider should be refunded to Inland Revenue, who will then refund the balance to the original payer of the contribution after claiming the Crown contributions. *(AMP, ISI, ING)*

A new provision should be inserted that allows a withdrawal benefit to be paid in respect of invalid enrolments, to be refunded via the Commissioner, notwithstanding the KiwiSaver rules or provisions of the relevant trust deed. (*ASFONZ)*

Comment

Invalid KiwiSaver enrolments can occur in a range of circumstances. For example, someone who is not entitled to join KiwiSaver, maybe because she does not meet residence requirements, might "opt in" or, alternatively, someone might be automatically enroled, but the enrolment is invalid, maybe because he is under 18 or over the New Zealand superannuation qualification age.

While it is expected that cases of invalid enrolment will be occasional, officials agree that certainty is needed as to how contributions and accumulations from invalid enrolments are to be treated and that this should be expressly provided in the KiwiSaver legislation. Prescribing how those invalid enrolments should be treated will enable consistency across providers and between the various types of invalid enrolment.

Officials also agree with submissions that the legislation should be amended to enable providers to treat enrolments that have been identified as invalid as if they were valid in as far as the administration of the fund is concerned.

Officials recommend adopting the following set of rules, which would accommodate all invalid enrolments and, for certainty's sake, should apply irrespective of the reason for the invalid enrolment occurring. These rules reflect the concerns raised in submissions. The recommended rules are as follows:

- At the discretion of the Commissioner of Inland Revenue, enrolments can be subsequently validated when employees subsequently meet the criteria – for example, if they subsequently meet the residence requirements in the KiwiSaver Act or the requirements relating to automatic enrolment.
- Refunds can occur when a person's membership cannot be validated as he or she does not meet the requisite criteria.
- The legislation should be amended to ensure the opt-out mechanism can apply to those who are not eligible to be members. This would ensure that those automatically enroled and identified as ineligible to join can use the normal KiwiSaver opt-out process to cease being a member. The Commissioner's discretion to accept late opt-out notices will also apply. When an invalid enrolment cannot be validated and a member cannot opt out, a refund process needs to apply. Inland Revenue will manage the refund process to individuals, employers and other third parties.
- When a refund is to occur, providers will be required to refund the value of the investment to Inland Revenue, along with details of contributions received and any amount diverted under the mortgage diversion facility. This means that any gains or losses between the investment values and contributions paid out will be borne by the Crown.
- Inland Revenue will make refunds to individuals on the basis of contributions received (paid to providers) with interest – not on investment values. Regarding employer contributions, individual circumstances are likely to vary. Some employer contributions may represent income the employee would otherwise have received, while some will constitute an additional cost that the employer is not legally required to bear. (As the employee is not entitled to be a KiwiSaver member, the employer is not legally required to make contributions.) Inland Revenue will refund employer contributions to the employer so that the employer and employee can resolve the matter.
- A Permanent Legislative Authority will be established to allow Inland Revenue to make a refund, including interest to a KiwiSaver member if the contributions and interest payable on those contributions is more than the value of the investment returned to Inland Revenue by the provider in respect of that member.

Interest should be payable on amounts refunded, set at the current rate payable under KiwiSaver Act for money in holding account. The rate is subject to change but currently set at 6.66%.

Recommendation

That the submissions be accepted and that the rules outlined above apply.

Issue: Housing deposit subsidy and house prices

Submission
(84 – NZ Chambers of Commerce)

The KiwiSaver housing deposit subsidy is likely to increase house prices (that is, benefit the seller) rather than benefit first-time home buyers.

Comment

The impact of the first-home deposit subsidy on the housing market is unlikely to be significant.

First, the subsidy offers limited assistance (up to $5,000 per borrower) and is confined to people who meet specific criteria.

Second, the subsidy will not become available in practice until July 2010. This is because members have to show that they have been contributing regularly around 4% of their income for at least three years. If someone joined KiwiSaver at its inception (July 2007) they will be able to apply from July 2010 and will be eligible for the $3,000 subsidy (since the subsidy is based on the number of years a member has been saving and it is capped at $5,000).

Third, there are strict eligibility criteria applying to the first-home deposit subsidy. To be eligible a borrower must:

- be a first-home buyer (in general terms, not have previously owned a home);
- be a member of KiwiSaver, a scheme that is exempt from KiwiSaver automatic enrolment rules, or a complying superannuation fund;
- live in the home they buy for at least six months following the purchase;
- have gross (before tax) household income of less than $100,000 per year (for one or two borrowers), or less than $140,000 per year (for three or more borrowers); and
- be purchasing a lower-quartile priced home.

(The income and house price caps are subject to review in 2009.)

Overall, these eligibility requirements ensure that the subsidy is targeted in such a way that house prices are unlikely to increase as a result.

Recommendation

That the submission be noted.

Issue: Regulations relating to mortgage diversion

Submissions
(23 – ISI, 47 – ING, 84 – New Zealand Chambers of Commerce)

The amount that can be diverted to a mortgage is "half of the person's contribution rate for their KiwiSaver scheme." A provider does not know the member's salary or wages and does not know the member's contribution rate. It is assumed that the contribution compliance (of salary and contribution rate) is completed by the central administrator. This clause should be reworded to be half of the amount received by a provider as an employee contribution via Inland Revenue. *(ISI, ING)*

The mortgage diversion is supported. *(New Zealand Chambers of Commerce)*

Comment

Officials agree that, for administrative simplicity, the amount that can be diverted under mortgage diversion should be expressed as no more than half the member contribution amount received by a provider. This would include both member contributions (including contributions deducted from salary or wages) paid via Inland Revenue and member contributions received directly from the member.

Recommendation

That the submissions be accepted.

Issue: First-home deposit – withdrawing employer contributions

Submission
(45 – Chapman Tripp)

Clause 8(8) in schedule 1 of the KiwiSaver Act should be deleted as it creates an unnecessary complication for KiwiSaver scheme administration.

Clause 8(8) in schedule 1 of the KiwiSaver Act introduces the concept that a participation agreement may provide that monies contributed by the employer and held by the scheme could be withheld on a withdrawal for a first home. In a fully vested compulsory environment, the employer contribution is more akin to a member contribution than a true employer subsidy. This makes it unfair at a member level to allow the employer to withhold the employer contribution. Further, it will also unduly complicate the administration of the scheme.

Comment

It would be possible to limit this to additional voluntary contributions made by the employer over the compulsory rate, although this is still likely to cause some administrative difficulty.

This provision is permissive. It allows employers to add conditions to their contribution as they choose to, thus increasing the scope for flexibility within KiwiSaver. Subject to the terms of the participation, an employer may impose conditions on voluntary contributions made to the scheme. The agreement documenting these conditions would have to be agreed to by both the trustees of the scheme and the employer. If such a provision was to add increased complexity to the administration of the scheme, the trustees of the scheme may refuse to offer such a facility.

Recommendation

That the submission be partially accepted, and clause 8(8) be clarified to provide that only voluntary contributions may be withheld in such a manner.

Issue: Level of first-home buyer subsidy

Submission
(78 – Council of Trade Unions, 96 – New Zealand Nurses Organisation)

The $5,000 matching for first-home buyers is too low and instead a 2:1 subsidy should be offered by the government (up to $10,000).

Comment

Increasing the first-home subsidy of 2:1 (up to $10,000) would have a significant fiscal cost and is not necessary to support first-home buyers entering the housing market.

Eligibility for the first-home subsidy is restricted to household income (before tax) of less than $100,000 per year (for one or two people), and to the purchase of a lower-quartile priced home.

The current KiwiSaver savings scheme would enable a couple earning a combined income of $60,000 to have a deposit of $30,400 after five years (consisting of $20,400 of KiwiSaver savings and a deposit subsidy of $10,000).

A deposit of $30,400 would provide a 10% deposit on a $300,000 house, which is the maximum lower-quartile house price for most of New Zealand (excluding Auckland City, North Shore City and Queenstown Lakes).

Other government policies such as the Welcome Home Loan and Shared Equity Scheme (a pilot in development) provide further assistance to first-home buyers.

Recommendation

That the submissions be declined.

Issue: Second-chance buyers

Submission
(Matter raised by officials)

An amendment should be made to clause 8 of schedule 1 of the KiwiSaver Act 2006 to include within the eligibility for the first home ownership withdrawal second-chance buyers that have a determination from Housing New Zealand that they are in the same financial situation as first home buyers.

Comment

The government agreed in June 2006 that eligibility for the KiwiSaver first home deposit subsidy and the first home ownership withdrawal should be broadened to include previous home owners who are in the same financial situation as first home buyers in terms of income and assets. Such second-chance home buyers will apply to Housing New Zealand for a determination on whether they are in the same financial situation as a first home buyer.

Clause 8 of schedule 1 of the KiwiSaver Act concerns withdrawals for the purpose of the purchase of a first home, and describes the circumstances in which a withdrawal may be made. In particular, the clause notes that the member must not have held an interest in land. Accordingly, officials recommend that an amendment be made so that second-chance buyers who have a determination from Housing New Zealand that they are in the same financial situation as a first home buyer are not excluded from the first home ownership withdrawal.

Recommendation

That the submission be accepted.

Issue: Mortgage diversion – extending to complying superannuation funds

Submission
(Matter raised by officials)

The KiwiSaver Regulations 2006 should be amended to ensure that they extend to complying superannuation funds.

Comment

The KiwiSaver Amendment Regulations 2007 (which amended the KiwiSaver Regulations 2006) concern the administration of the annual fee subsidy and the mortgage diversion facility. As the regulations needed to be enacted to ensure that providers, banks and members had detailed information about the fee subsidy and mortgage diversion facility when KiwiSaver started, on 1 July 2007, the regulations applied only to KiwiSaver schemes.

As the bill extends the application of the mortgage diversion to complying superannuation funds, officials recommend that an amendment be made to the KiwiSaver Regulations 2006 to ensure that they extend to complying superannuation funds in respect of the mortgage diversion.

It is recommended that the amendment apply from the date of assent.

Recommendation

That the submission be accepted.

Issue: Principal place of residence

Submission
(Matter raised by officials)

Section 229 of the KiwiSaver Act 2006 should be amended so that the mortgage diversion will apply for the remainder of the term of the loan after the diversion is made available, but only in relation to a mortgage over the person's principal residence.

Comment

The KiwiSaver Act 2006 provides that mortgage diversion is available only in relation to a mortgage over a person's principal residence, providing the example of the family home. However, section 229(2)(e) states that the mortgage diversion may apply for the remainder of the term of the mortgage after the diversion is made available. As this subsection does not specify that the mortgage diversion can apply only in relation to a mortgage over the person's principal residence, the policy intention behind the mortgage diversion facility has the potential to be undermined. For example, if someone decides to rent out what was their principal residence and purchases another property, under the current wording in section 229(2)(e) the mortgage diversion may be applicable for the remainder of the term of the mortgage over the rental property, even though it is no longer the principal place of residence of the purchaser.

Officials accordingly recommend that an amendment be made to section 229 of the KiwiSaver Act 2006 so that the mortgage diversion will apply for the remainder of the term of the loan after the diversion is made available, but only in relation to a mortgage over the person's principal residence.

It is recommended that the amendment apply from the date of assent.

Recommendation

That the submission be accepted.

Issue: Unitisation

Submissions
(4 – Gareth Morgan, 78 – Council of Trade Unions, 23 – Investment Savings and Insurance Association)

The practice of unitisation and unit pricing should be prohibited in KiwiSaver, as this practice prevents savers being able to see what they own. This barrier to information also facilitates mis-pricing errors, which are often in favour the scheme provider. *(Gareth Morgan, Council of Trade Unions)*

The inference that there are concerns with unit pricing does not stand scrutiny. This issue has been the subject of reviews conducted by both the Australian Securities and Investments Commission and the Securities Commission in New Zealand. Both reviews found no evidence of unit pricing concerns. *(Investment Savings and Insurances Association)*

Comment

Unitisation also allows for the possibility of investors with a relatively minor input to have the same advantages of investors with a relatively greater input of investment money such as minimised risk through a diversified investment portfolio, the benefit of expert investment management giving greater sophistication to investment strategies and minimisation of administration costs. In the KiwiSaver environment, the benefits of pooling are likely to be especially significant. People able to contribute smaller amounts to their retirement savings are likely to have increased access to a variety of securities through the pooling process. This is especially appropriate as a long-term savings strategy. Unitisation of KiwiSaver schemes allows providers an efficient and cost-effective means of accomplishing this.

Unitisation is an industry standard, and thus there is a wide variety of choices for prospective investors. Prospective investors can make these choices by considering the regularly published unit prices, allowing consumers to compare and contrast the performance of schemes and calculate their own balances if they have already invested.

There is no evidence to suggest that there is a problem of mis-pricing in New Zealand. Reviews undertaken in both Australia and New Zealand have supported these views.

Recommendation

That submissions 4 and 78 be declined and submission 23 be noted.

Issue: Disclosed but unquantified expenses

Submissions
(4 – Gareth Morgan, 78 – Council of Trade Unions, 23 – Investment Savings and Insurance Association)

Providers should be prohibited from being able to charge unquantified expenses to scheme members, as this will enable members to know all the costs that are being charged upfront. Expenses should be covered within their declared fees. *(Gareth Morgan, Council of Trade Unions)*

All KiwiSaver funds are governed by strict regulations that place considerable onus on the trustees to manage the funds in the best interests of the investors. The fees charged by all KiwiSaver fees are reviewed by the Government Actuary on registration to ensure that all charges are fully disclosed and not unreasonable. The Securities Act and regulations coupled with the KiwiSaver process require full disclosure of all charges and fees. The suggestion that the industry will apply hidden fees suggests that the Government Actuary Approval process, the Securities Act and the Securities Commission will all be ineffective in their purpose and conduct of responsibilities. *(Investment Savings and Insurance Association)*

Comment

The KiwiSaver Act ensures that all fees charged are not to be unreasonable. Where such a fee is brought to the attention of the Government Actuary, he may direct the trustee to remove that fee or de-register the scheme if he believes it to be appropriate. Any person may bring such fees to the attention of the Government Actuary. As such, all fees will be subject to scrutiny by the regulator and subject to the protections in the KiwiSaver Act.

Some fees can be charged directly to the fund and these are likely to be subject to a guideline issued by the Government Actuary. This draft guideline is currently with providers for comment and will be peer reviewed shortly by a panel of experts. The release of this draft guideline has given some further clarification of unreasonable fees.

Recommendation

That submissions 4 and 78 be declined and submission 23 be noted.

Issue: Reserves

Submissions

(4 – Gareth Morgan, 78 – Council of Trade Unions, 23 – Investment Savings and Insurance Association)

Reserving should be completely prohibited because the creation of reserves puts the ownership of funds into question. Specifically, the practice of reserving for tax changes, expense changes and smoothing of returns should be prohibited to ensure that savers are not separated from their funds. *(Gareth Morgan, Council of Trade Unions)*

Reserving in the manner suggested does not occur. Reserve accounts occur within employer-sponsored superannuation funds within very specific circumstances involving unvested employer contributions. Further, as the portfolio investment entities (PIE) taxation regime will fully allocate fund earnings to scheme members, the reserving for other purposes would be inconsistent. *(Investment, Savings and Insurance Association)*

Comment

The practice of reserving for tax changes, expense changes and smoothing of returns will not occur in the KiwiSaver environment and it is inconsistent with the PIE taxation rules. However, it is important to ensure that employer reserve accounts can still be operated to ensure that employers may continue to apply vesting scales to their voluntary contributions. In many existing employer superannuation schemes, employer contributions only vest in the employee after a specified period of time. This practice allows employers to use their superannuation arrangements as a means of encouraging retention of staff.

In our view, it is desirable for employers to be able to use superannuation arrangements to encourage staff retention. In the KiwiSaver environment, the use of vesting scales is permitted for any voluntary employer contribution. As such, the KiwiSaver Act does not prohibit the creation of reserve accounts to hold unvested employer contributions. The funds held in these accounts are generally distributed equitably on a regular basis. It should also be noted that all compulsory employer contributions to KiwiSaver schemes will have to vest immediately.

Recommendation

That submissions 4 and 78 be declined and submission 23 be noted.

Issue: Discretionary trusts

Submissions
(4 – Gareth Morgan, 78 – Council of Trade Unions)

Remove the practice of having trusts operate as an intermediary between the saver and the investment of the fund. This approach compromises a member's sovereignty over his or her own savings. The problem is further exacerbated as fund managers will continue to use this trust structure to circumvent any legislative restrictions to further its own commercial benefit.

The preferred approach is to have a bare trust approach, where the beneficiary is sovereign. This approach would need a regulatory overlay to ensure that the KiwiSaver rules are adhered to.

Comment

All KiwiSaver schemes are required to be established as trusts for the principal purpose of providing retirement benefits. As a consequence, the appointed trustees have a direct fiduciary obligation to members that cannot be avoided. Nonetheless, trustees may outsource the investment and administration management functions to third parties who may not automatically owe a fiduciary duty to members of the scheme. Should these administration or investment management firms engage in unfair or fraudulent conduct, it is likely that the member will have a claim against the trustee for the consequent breach of its fiduciary obligation to the member in failing to appropriately monitor these firms.

Recommendation

That the submissions be declined.

Issue: Principles-based regulation

Submissions
(4 – Gareth Morgan, 78 – Council of Trade Unions, 96 – New Zealand Nurses Organisation)

The regulatory regime for KiwiSaver should operate within a principles-based framework, rather than within the rules-based framework. In a principles-based framework, the principle would take precedence over the rules.

A principle of fairness should be enshrined in the legislation. This would be implemented by requiring KiwiSaver providers to make a statutory declaration on an annual basis that they have not done anything to enhance their commercial position at the expense of the customer. If they do not make such a declaration, the provider would automatically be liable. This would ensure that trustees and directors of providers take their obligations to members far more seriously.

Comment

This issue is outside the scope of this bill. It should be noted that the Ministry of Economic Development is currently undertaking a Review of Financial Products and Providers that will be examining the regulatory framework for Superannuation, KiwiSaver and other Collective Investment Schemes more generally. It is more appropriate for the regulatory framework for KiwiSaver to be examined in that environment.

It should also be noted that the existing regulatory environment for KiwiSaver operates in a framework that blends both principles-based regulations with rules-based regulation. Notable examples include the application of principles-based fiduciary obligations by trustees to act in the best interests of members and rules-based requirements for trustees to diversify their investments.

Recommendation

That the submission be declined.

Issue: Definition of superannuation scheme

Submission
(Matter raised by officials)

The definition of "superannuation scheme" in section OB 1 of the Income Tax Act 2004 should be amended to remove the explicit reference to "a KiwiSaver scheme".

Comment

An amendment was made to the definition of "superannuation scheme" in section OB 1 of the Income Tax Act 2004 to include a KiwiSaver scheme that is registered under the KiwiSaver Act 2006. However, the amendment was not needed as a KiwiSaver scheme is already covered by the definition of a superannuation scheme in subsection (a)(i), being a trust established by its trust deed mainly for the purposes of providing retirement benefits to beneficiaries who are natural persons or paying benefits to superannuation funds. Subsection (a)(ib) is therefore redundant, and officials recommend that this subsection be repealed.

It is recommended that the amendment apply from the date of assent.

Recommendation

That the submission be accepted.

DEFAULT SELECTION PROCESS

Submission
(28 – ANZ National Bank)

The existing KiwiSaver legislation should be amended so that contributions from people joining KiwiSaver default to a balanced fund to maximise the returns for members who are otherwise inert towards managing their investment options. It is believed that a balanced fund generates a better return than a conservative fund over the longer term. This has been supported by a review of their existing superannuation arrangements.

Comment

This issue is outside the scope of this bill, as the selection of default KiwiSaver providers and the provision of a default investment profile is a power that has been conferred on the Ministers of Finance and Commerce. As such, the KiwiSaver Act does not specify any specific investment portfolio that a member should be automatically enroled into. This ensures that, should a need to amend the default portfolio arise, such amendments may be made efficiently without the need for legislative intervention.

It is also useful to note that in selecting a default investment profile for the default providers, it was necessary to cater to the most conservative risk appetites of employees that may be automatically enroled into KiwiSaver. The purpose of the selection was to ensure that the contributions made by members were protected. While a higher risk portfolio may have yielded better returns in the long run, such an investment may not have been appropriate for members reaching retirement. It should also be noted that members are able to switch between various product profiles should they believe that the conservative product is not appropriate for them.

The government will review the appointment of default providers regularly and will be undertaking a comprehensive evaluation of KiwiSaver in the coming years. These reviews may identify a need to re-examine the default investment portfolio as a result of the changing demographics of employees that are being automatically enroled.

Recommendation

That the submission be declined.

Issue: Default enrolment

Submission
(91 – New Zealand Institute of Chartered Accountants)

Employees who are automatically enroled into KiwiSaver but have not elected to contract with a scheme provider will be put into their employer's chosen scheme, if one exists. This may not always be in the employee's best interest. Section 48 of the KiwiSaver Act should be amended to allow a member to opt to invest into one of the default Inland Revenue schemes.

Comment

Employees who begin new employment and are automatically enroled into KiwiSaver are able to choose their own KiwiSaver scheme. If they do not choose their own scheme, they will be allocated to their employer's preferred scheme if the employer has one. (Employers are able to choose a KiwiSaver scheme for their employees provided that the scheme meets certain criteria.) However, this does not displace the employee choice, as section 45 of the KiwiSaver Act 2006 specifies that employees always retain the right to select their own provider at any time. Accordingly, no amendment is needed to section 48 of the KiwiSaver Act.

Recommendation

That the submission be declined.

Issue: Section 50(1)

Submission
(91 – New Zealand Institute of Chartered Accountants)

Section 50(1), as proposed, only applies when an automatic enrolment or opt-in notice is received from the employer to the Commissioner. Clarification needs to be provided as to whether this applies when the Commissioner receives notices directly from the scheme provider or the intermediary.

Comment

Section 50 of the KiwiSaver Act 2006 deals with the provisional allocation of employees to a default KiwiSaver scheme who are subject to automatic enrolment or opt-in via their employer.

The submission raises two issues:

- whether this section should apply to enrolments via a scheme provider; and
- whether this section should apply to opt-in via a PAYE intermediary.

In relation to the first, a person is able to join a KiwiSaver scheme by contracting directly with the provider. As such, section 50 does not need to apply as the person becomes a member on joining.

In relation to the second, officials accept that the legislation should be clarified that for the purposes of section 23 and the opt-in rules, a PAYE intermediary can be treated as an employer. Clause 204 of the bill allows a PAYE intermediary to be treated as employer for the purposes of the opt-out rules.

Recommendation

That the submission be accepted in part in relation to a PAYE intermediary.

DISCLOSURE BY SCHEMES

Submissions
(30 – Public Service Association, 78 – Council of Trade Unions, 96 – New Zealand Nurses Organisation)

The requirement for KiwiSaver providers to disclose their approach to responsible investment from 1 April 2008 is supported. This should include considerations about labour standards, in addition to consideration for tobacco, armaments or environmentally damaging companies. *(Public Service Association)*

If not, the Committee should require that funds disclose whether they have a responsible investment policy and if so, describe it. *(Council of Trade Unions)*

The need for ethical investment rules is supported. It is recognised that any investment fund will always seek maximum returns, subject to the design of the fund. However, as the government is providing a significant level of funding, it is appropriate for the government to set certain standards of ethical investment. *(Council of Trade Unions and New Zealand Nurses Organisation)*

Comment

Supplementary Order Paper No 139 establishes a disclosure regime for responsible investment. The Responsible Investment disclosure requirements will be established within the KiwiSaver Act, which will prescribe information that is to be included in KiwiSaver scheme and complying superannuation fund investment statements. This will require KiwiSaver and complying superannuation funds to disclose and describe the extent to which responsible investment, including environmental, social and governance considerations, is taken into account in the investment policies and procedures of the scheme. The proposed provisions will leverage off the existing legal framework for disclosure set out in the Securities Regulations 1983.

Officials consider that it is not appropriate for the government to specify which investments are ethical or not. The approach adopted provides information to the investor so that he or she can make an informed decision.

The provisions give a scheme provider the flexibility to adopt or not to adopt a responsible investment policy. This will ensure that the providers are able to respond to the demands in the market as required. Regulatory standards will circumscribe providers' ability to respond to those changing demands as time progresses. Such flexibility is seen to be especially crucial in the area of responsible investment, as concepts of responsible investment are likely to change over time.

Recommendation

That the submissions be noted.

Issue: Member statements

Submission

(Matter raised by officials)

All KiwiSaver and complying superannuation scheme providers should be required to supply members with a personalised statement of their investment holding, on at least an annual basis. At a minimum, all member statements should provide information on:

- the level of contributions made by the member, employer and Crown in the period since the last member statement; and
- the total value of the member's interest in the scheme.

Comment

The current legislation requires KiwiSaver providers to publish annual reports on fund performance and asset values at an aggregate level. At present, there is no requirement for providers to supply members with individualised statements in respect of the value of their own investments, notwithstanding that the provision of personalised member statements is a widespread practice across the retirement savings industry.

Given the new incentives and the expected increase in both the level and duration of financial contributions, it is recommended that all KiwiSaver and complying superannuation scheme providers be required to supply members with a personalised statement of their investment holding, on at least an annual basis. The information may be sent to members electronically if members agree to receive it electronically. On request from the member, or if there is no agreement with the member, the scheme must provide any member with a hard copy of the relevant member statement. The member statement may be sent, at the provider's choice, either on the anniversary of the member's subscription or at the scheme balance date.

The primary objective of this requirement is to mandate regular personalised disclosure of the value of an individual's holding. We recommend that at a minimum all member statements provide information on:

- the level of contributions made by the member, employer and Crown in the period since the last member statement; and
- the total value of the member's interest in the scheme.

Given current industry practice and the option to use electronic communication, this is anticipated to be a relatively low-cost intervention that will enable members to make informed decisions about the performance of their provider, and whether to switch providers or to cease or reduce contributions.

In so doing it reinforces a competitive marketplace for retirement savings, underpins personal responsibility and facilitates choice. It also has the benefit of aligning with the government's wider goal to promote financial literacy.

Recommendation

That the submission be accepted.

EMPLOYERS NOT INVESTMENT BROKERS

Submissions
(24 – AMP, 87 – Association of Superannuation Funds of New Zealand)

The legislation should clarify that employers are not investment brokers for the purposes of the Investment Advisers (Disclosure) Act 1996 or the Securities Markets Act 1988 simply by complying with the requirements in the KiwiSaver Act.

Comment

Officials recommend adding the terms “Investment broker” and “Broker” to the relevant provision (section 206 of the KiwiSaver Act 2006). Although section 206 does give an exemption from the Investment Advisors (Disclosure) Act 1996, where the definition of Broker is found, the section does not go further to specify that an “Investment broker” and “Broker” are exempt. The rationale for adding these terms is that those reading the KiwiSaver Act 2006 do not need to go further than section 206 and are not confused by the exception of the terms “Investment broker” and “Broker”. This is particularly relevant where the Crown or persons operating under the KiwiSaver Act 2006 may function as a broker in one or more transactions.

It should also be noted that the Investment Advisers (Disclosure) Act 1996 requirements on advisers and brokers has been amended and moved to the Securities Markets Act 1988. It is important to ensure that the provisions in the KiwiSaver Act 2006 referring to the Investment Advisers (Disclosure) Act 1996 should be amended to refer to the appropriate provisions in the Securities Markets Act 1988.

Recommendation

That the submissions be accepted.

IMPACTS ON SMALL BUSINESSES

Issue: Costs on small businesses

Submissions
(84 – New Zealand Chamber of Commerce, 12 – Employers and Manufacturers Association (Northern) Inc)

While the provision of employer tax credits is likely to partially offset the compulsory employer contribution, the provision of such a contribution is likely to increase compliance costs in the process. This is a significant concern. The scheme's introduction has been rushed and employers have not had enough time to prepare for it. Small businesses in particular will be disadvantaged as they lack the resources to adequately deal with the additional obligations. This is likely to result in adverse consequences for their productivity and efficiency. *(New Zealand Chamber of Commerce)*

The employer contributions aspect of KiwiSaver in this bill should not proceed because the complexities arising from some employees joining while others do not, together with the short implementation timeframe, means it will be an added cost to business. *(Employers and Manufacturers Association (Northern) Inc)*

The benefits to business and the economy of the company tax rate reduction will be partially offset by the compulsory employer contributions to the extent they exceed the offsetting tax credits. *(New Zealand Chamber of Commerce)*

Comment

The introduction of KiwiSaver and the 2007 Budget proposals have been accompanied by a significant communications campaign on the implementation aspects of the scheme. There has been particular awareness of the challenges being faced by small and medium-sized enterprises. As such, the communications campaign has focussed on ensuring that such businesses are given sufficient information to implement their new obligations under the proposals.

Officials note that it is government policy to seek to minimise the compliance costs arising from the introduction of new government measures as far as possible. When that is not possible, compliance costs can often be offset in other ways.

Small employers, those with up to five employees, have recourse to the new subsidy for using payroll agents to take on payroll-related work. There is no reason that payroll work could not cover activities relevant to KiwiSaver.

The design of the employer tax credits has focused on minimising employer compliance costs. This is done by building off existing processes, such as employer tax credits being paid through the PAYE system by offsetting the credit against the employer's contribution and other PAYE liabilities. This not only minimises compliance costs but also reduces any cash flow impacts.

The amount of the compulsory employer contribution will be phased in over four years, starting at 1% on 1 April 2008 and reaching 4% of gross salary or wages from 1 April 2011.

The employer tax credit was introduced to assist employers with the contributions that they will be required to make to their employees' KiwiSaver scheme or complying superannuation fund. The tax credit reimburses employers for contributions that they are required to make, up to a maximum of $20 a week for each employee. The following table shows the maximum annual gross salary or wages covered by the tax credit:

From	Compulsory employer contribution as a percentage of gross salary or wages	Annual gross salary or wages completely offset by the value of the employer tax credit
1 April 2008	1%	$104,000
1 April 2009	2%	$52,000
1 April 2010	3%	$34,667
1 April 2011	4%	$26,000

Accordingly, the employer tax credit will cover the cost to employers for the majority of their employees in the first year, while allowing employers time to plan, and allow for compulsory employer contributions to be taken into account in wage bargaining.

The employer tax credit will apply only in respect of contributions made to employees that are 18 years of age and over and under the age of eligibility to withdraw their funds.

Employers do not have to pay income tax in order to receive the tax credit. Accordingly, charities and other tax-exempt organisations that make employer contributions to KiwiSaver schemes will be eligible for the employer tax credit.

Improving savings habits will offer many benefits to New Zealanders through a stronger economy resulting from reduced pressure on inflation and the current account deficit and further boosting financial market development. On the other hand, the company tax rate reduction has been aimed at improving the international competitiveness to ensure New Zealand becomes a much more attractive place to invest and do business.

The Specified Superannuation Contribution Withholding Tax (SSCWT) exemption means that employers can provide a larger benefit to staff through KiwiSaver contributions than through other remuneration, at the same cost to the employer.

The KiwiSaver and the Business Tax Review proposals will affect each business differently depending on the particular circumstances of each business (such as its structure and the taxable income and how many staff choose to become KiwiSaver members) and also on its salary negotiations with employees. In some cases the impact on the compulsory employer contributions will offset the impact of the company rate reduction, although this will not always be the case. The employer tax credit will help to reduce some of the impact of the employer compulsory contributions.

Recommendation

That the submissions be noted.

Issue: Definition of "independent" trustee – employer contributors

Submission
(58A – Trustees Corporations Association)

The KiwiSaver Act requires the directors of trustee corporations to be independent from any employer contributor in KiwiSaver. The introduction of compulsory employer contributions would effectively mean that many trustees are likely to be excluded from the definition of independent trustees. Many trustees also hold a number of positions as directors of other organisations. This could effectively result in that trustee ceasing to meet the definition of independence if an employer actively elects to join the scheme that the trustee is an independent trustee for.

Accordingly, the definition of independence should be amended to exclude employer contributors from the definition

Comment

This submission would ensure that when a trustee inadvertently becomes an employer contributor, the independence of that trustee is not compromised. The definition would still encapsulate employers that are intentionally more heavily involved in the provision of the relevant scheme. They are likely to include employers that offer an employer-based KiwiSaver scheme or that enter into a participation agreement with a KiwiSaver provider. In such instances, the employer is likely to be instrumental in designing the offer of the scheme for its employees and is likely to fall under the definition of "promoter" (and, as such, will not meet the definition of "independence").

Recommendation

That the submission be accepted.

Issue: Trustee corporations

Submission
(58A – Trustees Corporations Association)

Trustee Corporations are governed by their own Acts of Parliament and subject to specific legislative duties and obligations. It should also be noted that all default KiwiSaver schemes must have at least one trustee that is a trustee corporation. The requirement that all directors of trustee corporations meet the requirements of independence creates a number of difficulties for trustee corporations. This requirement also imposes a more onerous obligation in comparison to the decision that KiwiSaver schemes only need to have one independent trustee at a minimum.

The submission recommends that one director of a trustee corporation should be required to meet the independence requirements established in the KiwiSaver Act.

Comment

This submission would ensure that trustee corporations are not overly burdened with an obligation to ensure the independence of every director of its organisation. It would continue to provide a sufficient level of protection for members as the independent director would provide a check on the decision of the trustee as a whole.

An amendment to the definition of "independent trustee" in the KiwiSaver Act is required to give effect to this submission.

Recommendation

That the submission be accepted.

Issue: Independent trustee – administration managers and investment managers

Submission
(58A – Trustees Corporations Association)

The KiwiSaver Act provides that the independent KiwiSaver trustee must be independent from the administration and investment managers of the scheme. The submission argues that administration and investment management are matters for which a trustee is, by definition, legally responsible. As such, it impracticable to require independence from administration or investment managers. The submission recommends that there should be no prohibition on a trustee corporation performing administration or investment management services.

Comment

KiwiSaver schemes are offered by trustees to members. For the purposes of the Securities Act, the trustee of a KiwiSaver scheme is the issuer of securities. As such, the trustee bears primary responsibility for all roles related to the offering of a KiwiSaver scheme. The implied requirement for a trustee to be responsible for all aspects of the offering of the scheme is in conflict with the requirement that a trustee be independent of the administration manager or the investment manager. The difficulty, however, arises only if those functions are not outsourced.

Accordingly, officials recommend that the definition of "independence" be amended to require independence from the administration or investment manager only where the trustee is not performing the administration or investment management functions itself.

This approach would ensure that where trustees are performing either the administration or investment functions themselves, they will not have to establish an artificial separation between the various arms of the organisations undertaking the various functions.

Recommendation

That officials' recommendation be accepted.

Issue: Liability for good faith employer and employee KiwiSaver discussions

Submissions

(12 – Employer & Manufacturers Association (Northern), 66 – Business NZ)

Submissions were received for and against extending immunity to employers for good faith discussions that employers hold with employees in relation to KiwiSaver.

Employers should be able to discuss with employees the merits of superannuation and other savings options, including KiwiSaver, and section 206 of the KiwiSaver Act, which excludes certain investment from the ambit of the Investment Advisers (Disclosure) Act 1996, should be extended to cover such discussions. *(Employers & Manufacturers Association (Northern))*

Business New Zealand recommends that section 41 stand. It covers what information is contained in the information pack and requires an employee to seek financial advice from a professional financial adviser rather than an employer. Furthermore, there should be no amendment to include good faith discussions between an employer and employee(s) involving any and all superannuation policies.

Comment

Under securities legislation, employers do not have any liability if they merely provide general savings or KiwiSaver information. This does not extend to financial advice, including whether or not employees should enter KiwiSaver.

Because of the employment relationship, the employer is not an impartial, independent adviser. In particular, a conflict of interest would arise from employers advising employees on a component of their remuneration. This conflict is particularly acute as employers potentially benefit from employees not joining KiwiSaver (and hence employers not being required to provide compulsory employer contributions).

Recommendation

That submission 12 be declined and submission 66 be noted.

Issue: Further information requested by the Committee

Submissions on the original KiwiSaver Act also raised the issue of the need for a good faith requirement, as submissions both supporting and opposing the need for a good faith requirement were received.

As part of their initial review of the submissions, the Committee requested and received the following advice. The submission requesting the insertion of a good faith requirement was subsequently declined.

KiwiSaver: Good Faith Requirement

The Committee has asked for a confirmation that employment law requires employers to act in good faith in respect of KiwiSaver. The Committee has also requested that officials refer the Committee to the relevant provisions of the Employment Relations Act 2000 and to indicate whether there are any penalties for a breach of such a requirement.

Section 4 of the Employment Relations Act 2000 requires that the parties to an employment relationship deal with each other in good faith. The good faith requirement is not confined to the provisions in the employment contract, it applies to the totality of the employment relationship, including interactions between an employer and an employee in respect of KiwiSaver. Good faith applies to both individual and collective employment relationships, and requires the parties to those relationships to be open and honest in all their dealings and communications with each other. For example, in an individual bargaining context, good faith requires the parties to give genuine consideration to each other's views.

Part 6 of the Employment Relations Act 2000 also provides a number of protections for new employees entering employment, under the umbrella of the good faith obligation. The following protections minimise the potential for an employer to pressure an employee not to join KiwiSaver in the context of wage negotiations.

If there is a collective employment agreement covering the work the employee will undertake, the employee is automatically given the terms of the collective agreement for the first 30 days of employment, after which the conditions can only be changed by agreement. The employee must also be given information about being able to join the union (and if they choose to join, they remain covered by the collective agreement).

If there is no collective agreement, the employer must:

– give the employee a copy of the intended individual employment agreement;
– tell the employee that he or she is entitled to seek independent advice and give the employee a reasonable opportunity to seek that advice, and
– consider any issues the employee raises.

An individual employment agreement must contain the wages or salary, and must not contain anything contrary to law.

These provisions help avoid any "take it or leave it" approach to bargaining in relation to wages and the employee's entitlement to choose to remain in KiwiSaver.

The Act provides that a party to an employment relationship who fails to comply with the duty of good faith is liable to a penalty under the Act if the failure was deliberate, serious, and sustained or the failure was intended to undermine an employment relationship. The Act also provides that an employer will be liable for a penalty of up to $10,000 for a breach of this provision.

Officials have discussed the matter with officials from the Department of Labour who have confirmed that this interpretation is accurate.

Submission
(86 – Employers and Manufacturers Association (Central) Incorporated)

For the sake of consistency, clause 275 of the bill needs amending to also exclude KiwiSaver contributions from the Holidays Act 2003 definitions of "ordinary weekly pay" and "relevant daily pay".

Comment

Clause 275 excludes employer contributions to a superannuation scheme from the definition of "gross earnings" under the Holidays Act 2003.

While there is an existing Court decision which produces the same effect in relation to the other definitions, officials agree that in order to provide clarity and consistency and avoid any doubt, employer contributions to a superannuation scheme should also be explicitly excluded from the definition of "relevant daily pay" and "ordinary weekly pay" in the Holidays Act 2003.

Recommendation

That the submission be accepted.

Issue: Clarifying that the employer tax credit is treated as contributions received by the Commissioner under section 74 of the KiwiSaver Act 2006

Submission

(Matter raised by officials)

Section KJ 4(3) of the Income Tax Act 2004 should be amended to clarify that the employer tax credit is treated as contributions received by the Commissioner under section 74 of the KiwiSaver Act 2006.

Comment

The bill provides for Inland Revenue to on-pay the value of an employer tax credit (the lesser of $20 per week or the required compulsory employer contribution) to KiwiSaver members if their employer does not make the required compulsory employer contribution. For Inland Revenue to be able to do this the employer tax credit must be deemed a contribution received by the Commissioner. Clause 143 of the bill amends section KJ 4(3) of the Income Tax Act 2004 to allow the employer tax credit to be used for the short payment to be treated as a compulsory employer contribution received by the Commissioner for the purposes of calculating the amount of short payment under Part 3, subpart 3 of the KiwiSaver Act 2006. Officials believe it will be clearer if section KJ 4(3) also states that the employer tax credit is treated as contributions received under section 74 of the KiwiSaver Act 2006.

Compulsory employer contributions are contributions received by the Commissioner under section 74 of the KiwiSaver Act 2006, and, as provided by section 74(4), are trust money for the purposes of sections 66 to 68 of the Public Finance Act 1989. As compulsory employer contributions are contributions received by the Commissioner under section 74, similarly, any employer tax credit that is used to pay the short payment of compulsory employer contributions should also be treated as contributions received by the Commissioner under that section. The amendment will make it clear that any employer tax credit that is used to pay the short payment of compulsory contributions is “trust money” received by the Commissioner under section 74 of the KiwiSaver Act 2006.

Recommendation

That the submission be accepted.

Issue: Successor funds – provision of investment statements when making a compulsory transfer

Submission

(Matter raised by officials)

An amendment should be made to sections 9BAA and 9BAB of the Superannuation Schemes Act, which deem an offer of subscription to have been made to a new superannuation or KiwiSaver scheme where a transfer is effected under those provisions.

Comment

Sections 9BAA and 9BAB allow the Government Actuary to consent to a transfer of members from one superannuation or KiwiSaver scheme to another where the terms and conditions of the new scheme are no less favourable than the terms of the current scheme and the transfer is otherwise reasonable. The member does not have to consent to the transfer. The primary objective of these provisions was to overcome the consent issues, so that the wind-up risk could be mitigated.

All memberships of superannuation or KiwiSaver schemes are defined as securities under the Securities Act. As such, any offering of membership in a scheme must be made in conjunction with the provision of an investment statement. The securities transaction is subsequently completed once the member has signed the investment statement and made an offer to purchase and the provider has accepted and allocated the security. The requirements of the Securities Act essentially put schemes back in a position where consent from members will be required, as investment statements will need to be provided to members and signed by members. This is tantamount to requiring members to consent to the transfer.

Officials recommend that a provision be included in the Superannuation Schemes Act that deems an offer to have been made where an application under section 9BAA has been approved by the Government Actuary. This would validate the transfer of members. Further, it would also retain the obligation on the new provider to send investment statements to all relevant members.

Recommendation

That the submission be accepted

CROWN CONTRIBUTION

Issue: Initial contributions in holding account and the Crown contribution

Submission
(Matter raised by officials)

Section 75 of the KiwiSaver Act 2006 should be amended so that the Commissioner holds contributions for a person in the Inland Revenue holding account only for three months after receiving the first contribution or receiving notice that the person is a member of a KiwiSaver scheme.

Comment

Under section 75 of the KiwiSaver Act, when a person first becomes a KiwiSaver member the Commissioner must hold all contributions (including the $1,000 kick-start) for that person in the holding account for three months after the first contribution was received.

Under section 226 of the KiwiSaver Act, the Crown must pay a contribution to the first KiwiSaver scheme of which a person is a member:

- as soon as practicable three months after the Commissioner receives the first contribution for that person (for a person who is required to have deductions of contributions from salary or wages); or
- as soon as practicable three months after the Commissioner is given notice that the person is a member of a KiwiSaver scheme for any other case (for example, non-employees such as a self-employed person or a beneficiary who contract directly with a scheme provider).

Reading these two sections together means that for KiwiSaver members who have deductions made from their salary or wages, the Crown contribution and any contributions made during the first three months of their membership will be released from the Inland Revenue holding account three months after their first contribution was made. This generally occurs around the time of new employment (automatic enrolment), opting in (via an employer), or forming a contract directly with a provider as an employee, in which case Inland Revenue, on receipt of advice from the provider, notifies the named employers to start making deductions from their employees' salary or wages.

However, a problem arises for those members who do not have deductions made from their salary or wages and have joined KiwiSaver by contracting directly with a provider. If they make their contributions directly to their provider rather than through the Inland Revenue holding account they may have to wait a further three months before the Crown contribution will be released from the holding account as the Crown contribution may be treated as the first contribution received by the Commissioner into the holding account.

Officials accordingly recommend that an amendment be made to section 75 that the Commissioner holds contributions for a person in the Inland Revenue holding account only for three months after receiving the first contribution or receiving notice that the person is a member of a KiwiSaver scheme.

It is recommended that the amendment apply from 1 July 2007.

Recommendation

That the submission be accepted.

Issue: Payment of the Crown contribution

Submission
(Matter raised by officials)

Section 226(1) of the KiwiSaver Act should be amended to provide flexibility around when the Crown contribution (the $1,000 kick-start contribution) must be paid to employees and members transferring from a complying superannuation fund to a KiwiSaver scheme.

Comment

Section 226(1) of the KiwiSaver Act specifies that the Crown must pay the Crown contribution ($1,000) as soon as practicable three months after a person becomes a KiwiSaver "member". That must occur either by the Commissioner receiving contributions for those for whom deductions are made, or receiving notice of "membership" for those who have opted in by contracting directly with a provider.

The bill amends section 226(1)(b) to provide flexibility for the payment of the Crown contribution in situations where someone opts in to KiwiSaver by contracting directly with a scheme provider. Flexibility for the payment of the Crown contribution is also needed for those members who have deductions made from their salary or wages or who are transferred from a complying superannuation fund to a KiwiSaver scheme.

Officials accordingly recommend that section 226(1) of the KiwiSaver Act be amended so that:

- in the case of members who have deductions made from their salary and wages, the Crown must pay the contribution as soon as practicable after three months after the earlier of the Commissioner receiving the first contribution in respect of a member, or the Commissioner being given notice that the person is a member of the KiwiSaver scheme; and
- if a person who has been a member of a complying superannuation fund for more than three months transfers to a KiwiSaver scheme (and the person is not already a KiwiSaver member), the Crown must pay the Crown contribution as soon as practicable after the transfer occurs.

It is recommended that the amendment apply from 1 July 2007.

Recommendation

That the submission be accepted.

Issue: Vesting of the Crown contribution

Submission
(Matter raised by officials)

Section 226 of the KiwiSaver Act 2006 should be amended so that the Crown contribution is paid only into an account that is fully vested in the member.

Comment

The Act requires the Crown to pay a contribution of $1,000 to the first KiwiSaver scheme that a member joins. There is, however, no requirement that the account that the contribution is paid into be fully vested in the member. This may result in a member losing the contribution or part of it if he or she leaves that scheme and the contribution is credited to the employer account. Officials recommend that an amendment be made so that the Crown contribution is paid only into an account that is fully vested in the member.

It is recommended that the amendment apply from 1 July 2007.

Recommendation

That the submission be accepted.

Issue: Disclosure of fee subsidy and Crown contribution in annual reports

Submission
(Matter raised by officials)

Section 123(5) of the KiwiSaver Act 2006 should be amended so that all Crown contributions are disclosed in the annual reports.

Comment

The Act is silent on the need to disclose the amount of Crown contributions that are made to member accounts. This may result in some scheme providers failing to disclose that the Crown contribution has been made.

Officials recommend that an amendment be made to require disclosure of the total amount of the Crown contribution and the total amount of fee subsidy paid to schemes in their annual report and the number of members that those contributions have been applied to.

It is recommended that the amendment apply from 1 July 2007.

Recommendation

That the submission be accepted.

PENALTIES

Issue: Section 214(2) of the KiwiSaver Act 2006

Submission
(Matter raised by officials)

Section 214(2) of the KiwiSaver Act 2006 should be repealed as a consequence of repealing section 216, and the references in the Tax Administration Act 1994 to section 216 should be consequentially repealed as well.

Comment

Section 215 of the KiwiSaver Act 2006 sets out the penalties for employers who fail to provide information, and section 216 sets out the penalties for employers who fail to make a deduction or make deductions incorrectly. The bill proposes the repeal of section 216.

Section 214(2) states that if sections 215 or 216 of the Act apply, the following provisions in the Tax Administration Act will not apply:

- Part 7 (which relates to interest);
- section 139B (which relates to late payment penalties); and
- sections 141 to 141L (which relate to tax shortfalls).

The exclusion set out in section 214(2) was originally designed to allow a lenient approach to be taken when enforcing compliance with KiwiSaver obligations. In reality, the sections of the Tax Administration Act 1994 excluded would have applied only to situations covered by section 216, so the reference to section 215 in section 214(2) was always unnecessary. With the repeal of section 216, however, the reference to section 215 will become a major impediment to the intended compliance regime in respect of KiwiSaver contributions.

Accordingly, officials recommend that section 214(2) of the KiwiSaver Act 2006 be repealed as a consequence of repealing section 216. Furthermore, officials also recommend that the references in the Tax Administration Act 1994 to section 216, be consequentially repealed.

It is recommended that the amendments apply from 1 April 2008.

Recommendation

That the submission be accepted.

Issue: Month that penalty applies from

Submission
(Matter raised by officials)

Sections 215(3) and 216(3) should be amended to clarify in which month the penalty is imposed.

Comment

Sections 215(3) and 216(3) both state:

> "However, an employer is not liable for more than one penalty per month to which an employer monthly schedule relates."

The month to which the employer monthly schedule relates is the month in which KiwiSaver deductions are required to be made. However, some obligations relate to the provision of employer information by a due date, and many relate to more than one employer monthly schedule. This adds confusion as to when a penalty should be applied and to which month it relates. In order to avoid confusion, officials recommend that sections 215(3) and 216(3) be amended to remove the reference to an employer monthly schedule.

It is recommended that the amendment apply from 1 April 2008.

Recommendation

That the submission be accepted.

Issue: Penalties and collection powers

Submission
(Matter raised by officials)

The bill amends the definition of "tax" in the Tax Administration Act 1994 to include compulsory employer contributions to KiwiSaver and complying superannuation funds. This is to allow the Commissioner to impose penalties and use existing collection powers. Sections 143A and 157 of the Tax Administration Act 1994 should also apply.

Section 143A concerns knowledge offences, which include knowingly failing to provide information (including tax returns and forms), knowingly providing false, incomplete or misleading information and knowingly failing to make a deduction or withholding of tax as required by law. Section 157 applies to situations where a taxpayer has defaulted in the payment of income tax, the Commissioner of Inland Revenue may send a written notice (an attachment notice requiring a person to deduct from any amount payable (or to become payable to the taxpayer) an amount and pay it to Inland Revenue.

Comment

To enable the Commissioner to collect unpaid employer contributions, sections 143A and 157 of the Tax Administration Act should apply.

Both sections should apply where the employer fails to pay the compulsory contribution to a KiwiSaver scheme.

Section 157 should apply to employer contributions not paid to complying superannuation funds (when Inland Revenue receives a notice from the Government Actuary to collect them).

The effect of this recommendation is that penalties in the Tax Administration Act 1994 will apply to employers who fail to make deductions or who deduct an incorrect amount. The new graduated penalty will apply when an employer files an employer monthly schedule but does not pay the associated PAYE, and employers will be liable for use-of-money interest, shortfall penalties and late payment penalties.

Recommendation

That the recommendation be accepted.

Issue: KiwiSaver should provide a non-locked-in section

Submission
(70A – Simpson Grierson)

The bill should be amended to allow KiwiSaver schemes the option to provide a non-locked-in section for amounts transferred from existing employment based schemes or for lump sum voluntary contributions. Providing a non-locked-in facility within KiwiSaver supports the KiwiSaver initiative (namely, to encourage long-term retirement savings for New Zealanders).

Comment

The submission indicates that over the next few years many employers are likely to wind up their existing superannuation schemes owing to the difficulties of continuing to operate those schemes alongside KiwiSaver, and it will be unrealistic to expect members to transfer existing accumulations to a KiwiSaver scheme where it will be locked in as provided for under the KiwiSaver Act 2006. The submission expresses concern that when existing schemes are wound up the members of those schemes will have their accumulations paid out, usually as a cash lump sum. As a consequence there is a real risk that a large amount of money currently invested in employment-based superannuation schemes will either be spent by members or invested in non-superannuation based investments.

An existing provider cannot change the benefits payable to members if the change will be detrimental without the agreement of all members. Requiring existing accumulations to be transferred to a KiwiSaver scheme would mean that employees would have to be able to access their funds as currently provided for in the existing scheme for the Government Actuary to approve such as requirement. Section 9BAA of the Superannuation Scheme Act 1989 allows employers or trustees to effect the transfer if the terms of the non-locked-in section are no less favourable than the old scheme.

Officials consider that allowing KiwiSaver providers to provide a non-locked-in section would add complexity to KiwiSaver for very little gain in terms of increased retirement savings. As such accumulations can be withdrawn on the winding-up of the existing scheme, the transfer to a KiwiSaver scheme would have to be at the option of the member. Furthermore, the member is likely to require flexibility around access to those funds on an ongoing basis to ensure that the terms are no less favourable than the old scheme.

Recommendation

That the submission be declined.

INTEREST

Issue: Interest on trust monies

Submission
(Matter raised by officials)

It should be clarified that section 68(2) of the Public Finance Act 1989 does not apply in respect of returns on the investment of Holding Account money (section 72 of the KiwiSaver Act 2006) and that interest earned from 1 July 2007 is public money.

Comment

Section 84 of the KiwiSaver Act 2006 provides that a specified interest rate is payable by Inland Revenue on money in the Holding Account (in accordance with sections 85 to 91 of the KiwiSaver Act). On this basis the policy aim was to set a level of interest payable by Inland Revenue on contributions received, or treated as received, into the Holding Account by the Commissioner under the KiwiSaver Act.

Further, section 84(2) of the KiwiSaver Act provides that section 69 of the Public Finance Act does not apply to the Holding Account (meaning that returns on investment of Holding Account funds do not have to be paid to the relevant depositor or entitled person). In addition, section 82 of the KiwiSaver Act provides that the investment rules in Part 2 of the Trustee Act do not apply to money in the KiwiSaver Holding Account. This indicates that the policy aim was that the normal rules that would have applied to investment of trust money and the returns earned would not apply. Instead, a specified interest rate is payable on that money by Inland Revenue.

However, the KiwiSaver Act 2006 gives full effect to the policy aim detailed above only in relation to money entered into the KiwiSaver Holding Account through section 73 (deductions from salary or wages), which are considered public money, and not in relation to money entered into the KiwiSaver Holding Account through section 74 (deductions other than those made through salary or wages), which are considered trust money. Although other provisions regarding trust money do not apply, section 68(2) of the Public Finance Act still deems the returns on the investment of trust money in the KiwiSaver Holding Account to be trust money.

As there is no policy reason why the returns earned on money entered in the KiwiSaver Holding Account under section 74 of the KiwiSaver Act 2006 should be treated differently from Holding Account money entered under section 73, officials recommend that changes should be made to section 84 of the KiwiSaver Act to clarify that:

- Section 68(2) of the Public Finance Act does not apply in respect of the investment of Holding Account trust money.
- Returns on the investment of Holding Account money are deemed to be public money and that this applies for returns earned from 1 July 2007.

It is recommended that the amendment apply from 1 July 2007.

Recommendation

That the submission be accepted.

Issue: Payment of interest to Muslims

Submission
(Matter raised by officials)

A concern has been raised with officials regarding the application of KiwiSaver to Muslims. The concern relates to the payment of interest on contributions held in the Inland Revenue holding account and interest being paid on refunds of contributions to an employee or an employer. To deal with the concern, officials recommend that the KiwiSaver Act be amended to allow a person to notify the Commissioner that he or she does not wish to be paid interest on contributions held by Inland Revenue or on a refund.

Comment

A concern has been raised that as interest is payable in respect of contributions held by Inland Revenue, Muslims will be prevented from joining KiwiSaver. This is because, for religious reasons, Muslims are not permitted to receive the payment of interest. In the 2006 census, 36,000 people in New Zealand identified themselves as Muslim.

To deal with this issue, officials consider that a person should be able to elect not to receive interest on contributions held in the holding account (or on a refund). However, Inland Revenue will not be able to implement this recommended change until 1 April 2009 owing to the need to implement the Budget 2007 enhancements first. In the interim, if interest is paid with a refund, the recipient has the option of paying the interest to a charitable organisation. Officials understand that this mechanism is sometimes used by Muslims when interest is received.

This issue does not arise in respect of the investment of contributions by a provider as such contributions can be invested in equity rather than debt instruments.

The recommended amendment should apply from 1 April 2009.

Recommendation

That the submission be accepted.

Issue: Start date for calculation of interest on employer contributions

Submission

(Matter raised by officials)

An amendment should be made to the KiwiSaver Act 2006 so that, for the purposes of the calculation of interest on employer contributions held in the Inland Revenue holding account, the start date is the first day of the month in which contributions were received by Inland Revenue. This will also apply in respect of the contributions received to which the employer tax credit applies.

Comment

Under the KiwiSaver Act 2006, for the purpose of the payment of interest, every amount of contribution that is deducted from salary or wages is treated as received by the Commissioner on the 15th day of the month in which the deduction is made. However, for other contributions, such as employer contributions, the start date is the date that the contribution was received by Inland Revenue.

The KiwiSaver Act 2006 mandates that all employer contributions to a KiwiSaver scheme be paid via Inland Revenue using the PAYE process. With the introduction of compulsory employer contributions and the employer tax credit, this process makes the start date for the calculation of interest on employer contributions (including contributions offset by the employer tax credit) held in the holding account difficult to apply. This is because large employers pay employer contributions and claim the employer tax credit twice a month. However, information relating to the amounts contributed for each employee by large employers is received only once a month. Furthermore, the employer tax credit is treated as being received on the due date, which may not necessarily be the date that the employer contributions are received.

Accordingly, officials recommend that an amendment be made to the KiwiSaver Act 2006 so that, for the purposes of the calculation of interest on employer contributions held in the Inland Revenue holding account, the start date is the first day of the month in which contributions were received by Inland Revenue. This will also apply in respect of the contributions received to which the employer tax credit applies.

It is recommended that the amendment apply from 1 April 2008.

Recommendation

That the submission be accepted.

SCHEME WITHDRAWALS

Issue: Beneficiaries

Submissions
(78 – Council of Trade Unions, 96 – New Zealand Nurses Organisation)

The CTU and New Zealand Nurses Organisation note that assurances were made on 5 June 2007 that the Social Security Amendment Act will not require that a person needs to withdraw retirement savings before becoming eligible for a benefit, but this needs to be confirmed.

Comment

Officials understand that funds held in KiwiSaver and other retirement scheme accounts do not have to be withdrawn prior to becoming eligible for a benefit.

Recommendation

That the submissions be noted.

Issue: Serious illness withdrawal

Submission
(91 – New Zealand Institute of Chartered Accountants)

Amendments to clause 12(2) and 12(3) of the KiwiSaver scheme rules (schedule 1 of the KiwiSaver Act 2006) will ensure that the serious illness withdrawal facility applies only when the member is permanently and totally disabled or when death is imminent. The member will then be able to withdraw the $1,000 Crown contribution. An amendment to clause 13 of the KiwiSaver scheme rules also ensures that applications for withdrawal on the grounds of serious illness can be made without the need to complete a statutory declaration of the assets and liabilities of the applicant.

The Institute agrees that in the case of serious illness, the member should be able to apply for refund of the Crown contribution. However, the amended criteria in schedule 1 part 12(3) are too harsh. The requirement that a member is "totally and permanently unable to work" is too hard a test to pass.

If there are concerns regarding the Crown money, the Crown contributions should be excluded from the amount that could be withdrawn (similar to the significant financial hardship provisions).

The amendment to KiwiSaver Act 2006, schedule 1 part 12(3) is appropriate.

Comment

The threshold for serious illness has been set high as KiwiSaver is primarily designed to encourage saving for retirement. Provision has already been made to allow withdrawal of members' funds where there is significant financial hardship which could be bought about, for example, by an illness temporarily reducing a member's ability to work. However, in this instance, when the member recovered, he or she would then be in a position to continue to contribute to KiwiSaver – and enjoy the value of contributions and the accumulated tax credits on retirement.

Recommendation

That the submission be declined.

Issue: Renaming of scheme and withdrawals

Submission
(69R – BKR Walker Wayland)

The fund should be relabelled "KiwiSaver Retirement Income Fund" and withdrawal should not be allowed as a lump sum in entirety.

Comment

KiwiSaver is a programme 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 of pre-retirement. The KiwiSaver Act allows the establishment of KiwiSaver schemes to facilitate savings. There is no one, single fund, and therefore the suggested name is misleading.

Clause 5 of schedule 1 of the KiwiSaver Act requires a provider, at the request of the member, to make a withdrawal as a lump sum. However, this requirement does not prevent a member purchasing an annuity or a pension. Furthermore, it does not prevent a member withdrawing regular amounts.

Recommendation

That the submission be declined.

Issue: Significant financial hardship rules

Submission

(Matter raised by officials)

In respect of applications for a refund of initial contributions held in the Inland Revenue holding account on the grounds of significant financial hardship, the Commissioner should have the authority to consider whether alternative sources of funding having been explored, and be able to limit the amount withdrawn.

Comment

Section 113 of the KiwiSaver Act 2006 allows a KiwiSaver member to apply to the Commissioner for a refund of initial contributions held in the Inland Revenue holding account if the person is suffering, or likely to suffer, significant financial hardship or if he or she is suffering serious illness, as defined in schedule 1 of the Act.

If a KiwiSaver member makes an application for a significant financial hardship withdrawal, the trustees of the scheme must be reasonably satisfied that reasonable alternative sources of funding have been explored and have been exhausted, and may direct that the amount withdrawn be limited to a specified amount that, in the trustee's opinion, is required to alleviate the particular hardship. However, there is no equivalent provision for Inland Revenue. It therefore has no authority to consider whether alternative sources of funding have been explored and have been exhausted, or to limit the amount withdrawn when a KiwiSaver member makes an application for refund of initial contributions on the grounds of significant financial hardship. Instead, it is limited to considering whether the person is suffering, or likely to suffer, significant financial hardship or is suffering serious illness.

Officials therefore recommend that an amendment be made so that, in respect of applications for a refund of initial contributions held in the Inland Revenue holding account on the grounds of significant financial hardship, the Commissioner should have the authority to consider whether alternative sources of funding have been explored, and to limit the amount withdrawn. This will ensure consistency in the application of such requests.

It is recommended that the amendment apply from the date of assent.

Recommendation

That the submission be accepted.

OTHER MATTERS

Issue: Refunds of contributions

Submission
(91 – New Zealand Institute of Chartered Accountants)

Once the Commissioner has given approval for a refund of contributions under section 221, the refund of contributions should be able to be made directly from the scheme provider.

Comment

The administrative design of KiwiSaver provides that all refunds of contribution will be made by Inland Revenue as part of its role as the central administrator for KiwiSaver. ISI, AMP, ING and ASFONZ, in their submissions on invalid enrolments, stated that amounts should be refunded to Inland Revenue, which should be responsible for the distribution to members, employers and the Crown.

Recommendation

That the submission be declined.

Issue: Information packs

Submission
(91 – New Zealand Institute of Chartered Accountants)

Under section 40, there is an onus on employers to supply KiwiSaver information packs to employees within seven days, therefore the Commissioner needs to ensure that the packs are supplied on a regular basis.

The amendments to section 40 are not required, as the Commissioner should ensure that the packs are supplied on a regular, ongoing basis, and the Commissioner should supply all requests for packs, without applying a "reasonableness" test.

Comment

The KiwiSaver Act 2006 requires Inland Revenue to provide each employer with the number of information packs that it believes will be sufficient to enable the employer to meet its obligations.

There should be no inference that Inland Revenue will, on an ongoing basis, forecast the number of information packs employers would need and issue them automatically.

After the initial mail-out of information packs which occurred in May to June of this year, Inland Revenue will send information packs to employers only upon request.

Inland Revenue does not provide employer packs on an ongoing basis because of difficulties in estimating the numbers required and possible wastage.

Recommendation

That the submission be declined.

Issue: Refund of employer contribution by provider

Submission
(Matter raised by officials)

Section 101(2) of the KiwiSaver Act 2006 should be repealed and section 101(1) should be consequentially amended.

Comment

The provider of a KiwiSaver scheme may refund to Inland Revenue any amount of employer contribution that it paid to the provider in excess of the amount it was required to on-pay. The provider is not, however, required to make a refund if that refund would reduce the amount of the employee's contribution below the minimum employee contribution rate required under the KiwiSaver Act.

As the provider does not have the employee employment income information needed, the provider will always refund any amount requested by Inland Revenue, even if it would breach the minimum employee contribution rate required under the KiwiSaver Act.

Officials accordingly recommend that section 101(2) of the KiwiSaver Act 2006 be repealed and section 101(1) be consequentially amended to require that the provider of a KiwiSaver scheme refund to the Commissioner any amount of employer contribution that was paid by the Commissioner in excess of the amount of the employer contribution that the Act requires. It is recommended that the amendment apply from the date of assent.

Recommendation

That the submission be accepted.

Issue: Notification of transfers and requirement to transfer funds and information

Submission
(Matter raised by officials)

Section 56 of the KiwiSaver Act should be amended to require that when a KiwiSaver scheme member transfers to a new scheme, the provider of the old scheme must notify the new provider as to whether the Crown contribution (the $1,000 kick-start contribution) is part of the member's accumulated interest that is to be transferred.

Comment

When a KiwiSaver member transfers to another KiwiSaver scheme, section 56 of the KiwiSaver Act 2006 specifies, among other things, the information that the provider of the old scheme must give to the provider of the new scheme.

The $1,000 initial Crown contribution cannot be withdrawn in respect of particular requests for withdrawal (such as significant financial hardship). Accordingly, when a member transfers to a new scheme provider, that provider will need to know whether the $1,000 Crown contribution is part of the member's accumulated interest to be transferred under the old KiwiSaver scheme, as this amount may need to be ring-fenced by the new provider.

Officials therefore recommend that an amendment be made to section 56 of the KiwiSaver Act 2006 to require that when a member of a KiwiSaver scheme has transferred to a new scheme, the provider of the old scheme must give notice to the new provider as to whether the Crown contribution (the $1,000) is part of the member's accumulated interest.

It is recommended that the amendment apply from the date of assent.

Recommendation

That the submission be accepted.

Issue: Consent to electronic transactions

Submission
(Matter raised by officials)

Section 219 of the KiwiSaver Act 2006 should be amended to exclude the Commissioner of Inland Revenue from the deemed consent provided for in that section.

Comment

Section 219 of the KiwiSaver Act provides that where a person's electronic address has been given to any other person, the former is treated as having consented to the use of electronic communication under the Electronic Transactions Act 2002.

Inland Revenue has provided both a telephone number and an email address to the public in respect of KiwiSaver, which may mean that it has consented to receive and send notices via these mediums. However, Inland Revenue is not operationally capable of such receipt or issuance and has not yet determined if these media are functionally equivalent to writing.

Officials therefore recommended that section 219 of the KiwiSaver be amended to exclude the Commissioner from the deemed consent provided for in that section.

It is recommended that the amendment apply from 1 July 2007.

Recommendation

That the submission be accepted.

Issue: Permanent legislative authority for on-paying contributions received through section 73

Submission
(Matter raised by officials)

Section 73 of the KiwiSaver Act 2006 should be amended so that a permanent legislative authority is established to allow Inland Revenue to on-pay deductions from salary or wages entered in the holding amount by inserting the words "without further authority than this section". Because the relevant part of section 73 is also subject to the on-payment requirements of sections 75 (initial contributions) and 77 (small contributions), consistent amendments are required to sections 75 and 77 of the KiwiSaver Act.

Comment

It was originally envisaged that a permanent legislative authority would be established through the KiwiSaver Act 2006 which would allow Inland Revenue to on-pay contributions received from salary or wages to the provider of the relevant KiwiSaver scheme. However, the legislation, as it was drafted, did not give effect to a permanent legislative authority.

Officials therefore recommend that the appropriate wording changes are made to give effect to a permanent legislative authority for on-payment of money received by Inland Revenue under section 73.

It is recommended that the amendment apply from the date of assent.

Recommendation

That the submission be accepted.

Issue: Employer exemptions with master trusts

Submission
(Matter raised by officials)

Section 28 of the KiwiSaver Act 2006 should be amended so that an employer using a Master Trust scheme as a vehicle for an exemption can use any other evidence to demonstrate compliance with the exempt employer criteria.

Comment

For an employer to become an exempt employer it must exhibit to the Government Actuary that, in practice, the KiwiSaver scheme is open to all new employees. This provision was intended to enable the employer to prove that it met the criteria, without necessarily relying on solely the trust deed to establish compliance. However, where an employer uses a Master Trust scheme as a vehicle for an exemption, the Government Actuary can consider only the parts of the master trust deed that applies to the employer and any relevant participation agreement. This effectively undermines the intention of the provision. It is recommended that an amendment be made so that an employer using a Master Trust scheme as a vehicle for an exemption can use any other evidence to demonstrate compliance.

It is recommended that the amendment apply from the date of assent.

Recommendation

That the submission be accepted.