

House of Representatives

Supplementary Order Paper

Tuesday, 29 August 2006

KiwiSaver Bill

Proposed amendments

Hon Dr Michael Cullen, in Committee, to move as follows:

Clause 4

To omit from the definition of **defined contribution scheme** “and members’ interests are fully funded at all times” (lines 5 and 6 on page 13).

To omit from the definition of **salary or wages** “as defined in section OB 1 of the Income Tax Act 2004” (line 9 on page 21) and substitute “as defined in paragraphs (a) to (c) of the definition of salary or wages in section OB 1 of the Income Tax Act 2004”.

To add to paragraph (b) of the definition of **trustee corporation** (line 17 on page 22) “that is guaranteed by the trustee corporation”.

Clause 4A(1)

To insert after “**provider**”, the second time it appears (line 15 on page 23), “, unless the context otherwise requires,”.

Clause 20

To omit this clause (line 5 on page 39 to line 14 on page 40) and substitute:

20 Eligibility to be exempt employer

- (1) An employer is eligible to be approved as an exempt employer if the Government Actuary is satisfied that the employer provides access to a superannuation scheme for its employees that complies with the following rules:
 - (a) every person who becomes, on or after the date of commencement of the automatic enrolment rules, a permanent employee (including a part-time employee) of that employer, and who is aged 18 or over but less than the New Zealand superannuation qualification age, must be eligible, in practice, at the time when the person so becomes an employee,—
 - (i) to become a member of the scheme; and

- (ii) to transfer to the scheme the member's accumulation in relation to other superannuation schemes (to the extent that transfers are available from those other superannuation schemes); and
 - (b) the scheme must be a registered superannuation scheme; and
 - (c) the trust deed of the scheme must have the effect that each member who satisfies the scheme's requirements for a withdrawal benefit, and who elects to withdraw from membership of the scheme, may transfer the member's accumulation to another registered superannuation scheme or KiwiSaver scheme (to the extent that transfers are available to those other schemes); and
 - (d) the trust deed of the scheme must provide for an amount equal to at least 4% of annual gross base salary or wages to be contributed to, or otherwise credited within, the scheme in respect of each person who becomes, on or after the date of commencement of the automatic enrolment rules, a permanent employee of that employer and a member of the scheme.
- (2) However, **subsection (1)(d)** does not apply—
- (a) to the extent that an employee is, in accordance with the terms of the scheme, temporarily relieved from contributions at that rate (for example, in the event of financial hardship); or
 - (b) if the scheme is a defined benefit scheme of a type that does not satisfy the 4% minimum amount rule in **subsection (1)(d)**, and if the actuary of the scheme certifies, to the satisfaction of the Government Actuary, that the value of each employee's accrued benefits to be provided by the scheme is, as a matter of fact, increasing, during each membership period, by an amount at least equivalent to such minimum amount that would otherwise be required by this section and **section 20AA**.
- (3) In this section,—
- defined benefit scheme** means a superannuation scheme that is not a defined contribution scheme
- permanent employees** means employees other than those employed in temporary employment within the meaning of **section 9A**.

Clause 39(1)

Paragraph (a): to omit *paragraph (a)* (lines 4 to 6 on page 56) and substitute the following paragraph:

- (a) by agreeing with the provider that the provider will provide access to the scheme for the employer's employees; and

Clause 42(4)

Paragraph (b): to omit “**section 41(1)(c), (d), (e), or (f)**” (lines 4 and 5 on page 61) and substitute “**section 41(4)**”.

Clause 56A

Paragraph (b): to omit “an amount equal to the contribution rate minus the gross amount of so much of any contribution—” (lines 32 and 33 on page 71) and substitute “an amount equal to the contribution rate, minus the gross amount of so much of any employer contribution—”.

Clause 57A

To add, as *subclause (4)* (after line 24 on page 73), the following subclause:

- (4) This section does not apply to permitted withdrawals.

Clause 69

Heading: to omit “**Refund**” (line 1 on page 79) and substitute “**Refund by Commissioner**”.

Clause 69A

Heading: to omit “**Refund**” (line 17 on page 79) and substitute “**Refund by provider**”.

Subclause (2): to omit “the amount” (line 24 on page 79) and substitute “the amount refunded under **subsection (1)**”.

Clause 99

Subclause (1): to insert, after paragraph (c) (after line 16 on page 95):

- (ca) the benefits provided by the scheme are fully funded as they accrue; and

Clause 102(2)

Paragraph (a): to omit “**section 150**” (line 9 on page 99) and substitute “**section 150** of this Act”.

Paragraph (b): to omit “**section 164**” (line 13 on page 99) and substitute “**section 164** of this Act”.

Clause 106(1)

To add, as paragraph (c) (after line 24 on page 106), the following paragraph:

- (c) may make decisions in accordance with any prescribed process.

Clause 117A(4)(b)

To insert before “any other” (line 10 on page 115) the words “have regard to”.

Clause 120

To omit *subclause (1)* (lines 22 to 25 on page 118) and substitute the following subclause:

- (1) The registration of a KiwiSaver scheme under **section 119** must be treated as having taken effect on the later of—
 - (a) the date on which the Government Actuary enters the scheme as a KiwiSaver scheme in the KiwiSaver schemes register; or

- (b) the date of commencement of the automatic enrolment rules.

Clause 135B

Subclause (4): to add after “section” (line 33 on page 131) “as soon as practicable after the automatic enrolment rules come into force (but not before)”.

To insert, as *subclause (4A)* (after line 33 on page 131), the following subclause:

- (4A) However, the trustees of the scheme may transfer any part of the member’s interest that consists of unvested employer contributions only to the extent that the relevant employer consents to the transfer of that amount.

Clause 158

To omit subclause (5) (lines 26 and 27 on page 141).

Clause 163

To omit this clause (line 28 on page 143 to line 21 on page 144) and substitute the following clause:

163 Power of High Court to act in respect of terms and conditions of appointment as default KiwiSaver scheme and regulations relating to default KiwiSaver schemes

- (1) This section applies if, on the application of the Crown, it appears to the High Court that a provider of a default KiwiSaver scheme appointed under **section 158** intends to engage, or is engaging, or has engaged, in conduct that constitutes, or would constitute,—
- (a) a breach of the terms and conditions of the instrument of appointment referred to in **section 158**; or
 - (b) a breach of regulations made under **section 194B**.
- (2) If this section applies, the High Court may make any orders on any terms and conditions that it thinks appropriate, including, without limitation,—
- (a) an order to—
 - (i) restrain the trustees of the default KiwiSaver scheme, or the provider of the scheme who has been appointed under **section 158** (if different from the trustees), or both, from engaging in conduct that constitutes, or would constitute, the breach;
 - (ii) require the trustees of the default KiwiSaver scheme, or the provider of the scheme who has been appointed under **section 158** (if different from the trustees), or both, to do a particular act or thing;
 - (iii) require the trustees of the default KiwiSaver scheme, or the provider of the scheme who has been appointed under **section 158** (if different from

the trustees), or both, to comply with the conditions of the instrument of appointment:

- (b) an interim order.
- (3) In any proceeding under this section, the Crown, on the order of the High Court, may obtain discovery and administer interrogatories.
- (4) The High Court may at any time rescind or vary an order made under this section.

New clauses 163A and 163B

To insert as *clauses 163A and 163B* (after line 21 on page 144), the following clauses:

163A Revocations, etc, of instruments of appointment

- (1) An instrument of appointment may provide for its renewal or variation or expiry or revocation by the Minister or the provider.
- (2) Despite any matter provided for in an instrument of appointment as to its expiry or revocation, the Minister may, by notice in writing to a provider, revoke an instrument of appointment if—
 - (a) the Government Actuary cancels the registration of the scheme as a KiwiSaver scheme under **section 149 or section 150**; or
 - (b) the Minister is satisfied that—
 - (i) the provider is not operating in accordance with the terms and conditions of the instrument of appointment; and
 - (ii) the failure to operate in accordance with the terms and conditions of the instrument of appointment is a significant breach as prescribed in regulations made under **section 194B**.
- (3) The appointment of the provider under **section 158** ceases on revocation of the instrument of appointment.
- (4) The Minister must notify the Government Actuary and the Commissioner as soon as practicable after an instrument of appointment is revoked.

163B Duration of obligations as default provider after terminating event

- (1) In this section,—

reporting obligations, in relation to a provider and the provider's scheme,—

 - (a) means any requirement for the provider to report to persons specified in an instrument of appointment; and
 - (b) any requirement for the provider to produce to any persons specified in an instrument of appointment, any papers, documents, records, or things in respect of the

scheme (and the power of any person to require production of those papers, document, records, or things)

terminating event means—

- (a) the revocation of an instrument of appointment by the provider or the Minister under the terms and conditions of the instrument of appointment; or
 - (b) the revocation of an instrument of appointment in accordance with **section 163A(2)**; or
 - (c) the expiry of the term of appointment (as specified in the instrument of appointment and in accordance with any renewal of the term of appointment).
- (2) Despite any terminating event,—
- (a) any terms and conditions of the instrument of appointment that relate to a provider’s reporting obligations in respect of the provider’s scheme continue to apply until the date when the term of appointment would have expired but for the terminating event; and
 - (b) regulations made under **section 194B** continue to apply in relation to the provider until the provider has completed every act or thing that the regulations require the provider to do following any terminating event.

Clause 184

Subclause (3): to omit this subclause (line 33 on page 158 to line 3 on page 159).

Clause 188B

Subclause (3): to omit “section 37A of” (line 21 on page 166).

New clauses 194A and 194B

To insert as *clauses 194A and 194B* (after line 31 on page 173), the following clauses:

194A Regulations relating to mortgage diversion facility

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister of Finance, make regulations providing for a mortgage diversion facility that allows contributions to be withdrawn from KiwiSaver schemes and applied towards the payment of amounts secured by mortgages.
- (2) The Minister of Finance may make a recommendation under **subsection (1)** only if the Minister is satisfied that the mortgage diversion facility that is provided for in the regulations will be consistent with the following principles:
 - (a) there is no compulsion on providers to provide a mortgage diversion facility;
 - (b) there is no compulsion on mortgagees to allow amounts secured by mortgages to be paid via KiwiSaver contributions;

- (c) the mortgage diversion facility is available in relation to a person at any time after 12 months have expired since the earlier of—
 - (i) the date that the Commissioner received the first contribution in respect of the person; or
 - (ii) the date that a provider received the first contribution in respect of that person's membership of a KiwiSaver scheme:
 - (d) the mortgage diversion is available only in relation to a mortgage over the person's principal residence (for example, the family home):
 - (e) the mortgage diversion may apply for the remainder of the term of the mortgage after the diversion is made available:
 - (f) after the total amount secured by the mortgage is paid, ongoing contributions are retained automatically in the person's KiwiSaver account:
 - (g) if the person chooses to cease the mortgage diversion facility before the amounts secured by the mortgage are fully paid, the contributions are redirected towards retirement savings:
 - (h) the provider, and not the Commissioner, is responsible for paying the amount diverted under the mortgage diversion facility:
 - (i) the diverted amount is capped at no more than half of the person's contribution rate and is a fixed dollar amount:
 - (j) employer contributions may not be diverted:
 - (k) the facility is available for new mortgages and existing mortgages.
- (3) The regulations may specify all or any of the terms and conditions that apply to the mortgage diversion facility, including,—
- (a) which types of mortgages qualify for participation in the diversion facility; and
 - (b) what a scheme must do to participate in the mortgage diversion facility (for example, in relation to notification); and
 - (c) how the regulations affect the trust deed (for example, whether all or any of the terms and conditions in the regulations are implied terms of the trust deed); and
 - (d) what happens if the scheme decides to terminate participation in the mortgage diversion facility; and
 - (e) whether payment via the mortgage diversion facility counts as payment by the mortgagor for the purpose of the terms of the mortgage; and
 - (f) any other matters.

- (4) If a provider chooses to participate in the mortgage diversion facility, any withdrawal made in accordance with those regulations must be treated as if it were a withdrawal that is permitted under the KiwiSaver scheme rules.

194B Regulations relating to default KiwiSaver providers

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations for the following purposes—
- (a) providing for matters that may be treated by the Minister as a significant breach of an instrument of appointment for the purposes of **section 163A(2)**:
 - (b) providing for procedures for the purpose of—
 - (i) the Minister notifying a default KiwiSaver provider that the Minister considers the provider is in breach of a term or condition of the instrument of appointment and the possible consequences:
 - (ii) facilitating resolution of any dispute between the Minister and a default KiwiSaver provider about whether the KiwiSaver provider is in breach of the instrument of appointment or the consequences that should apply:
 - (iii) setting out any procedures that will apply before revocation of an instrument of appointment by the Minister under **section 163A(2)**:
 - (c) requiring the provider of a scheme that is or was a scheme provided under an instrument of appointment to do any act or thing following any terminating event under **section 163B** including, without limitation,—
 - (i) requiring the members of the scheme to be notified of the terminating event or of any other matter and specifying time frames for notification to occur:
 - (ii) prescribing any advice, information, or documents that must accompany any notification given under **subparagraph (i)**:
 - (iii) requiring the provider to do any act or thing or carry out any prescribed procedures to facilitate or enable the transfer of members to another KiwiSaver scheme in accordance with this Act:
 - (iv) requiring the provider to report to any specified person or persons or to produce to any specified person or persons, any papers, documents, records, or things in respect of the scheme, at specified times or contingent on any specified events:
 - (d) requiring the provider of any new scheme to which members are or are to be transferred from a scheme that is subject to a terminating event under **section 163B** to do

any act or thing or to carry out any prescribed procedures to facilitate or enable the transfer of members to the provider's KiwiSaver scheme.

- (2) However, regulations made under **subsection (1)(c)(iii)** may not require a provider to report to any person or produce any papers, documents, records, after the provider's scheme no longer has any members who became members of the scheme under **section 43**.

Schedule 1

Clause 9(1): to omit "**clause 11C**" (line 7 on page 181) and substitute "**clause 11B**".

Clause 11(1)(g): to omit "is" (line 9 on page 183).

Clause 11A(1): to omit "**clause 11C**" (line 16 on page 183) and substitute "**clause 11B**".

Clause 11A(3): to omit *paragraph (a)* (lines 26 and 27 on page 183).

Clause 12(2): to omit "member's interest" (line 22 on page 184) and substitute "member's accumulation".

Clause 14: to add, as *subclause (3)* (after line 16 on page 185), the following subclause:

- (3) A member may, at any time during that person's membership of a KiwiSaver scheme, be transferred to another KiwiSaver scheme in the circumstances provided for in, and in accordance with, this Act.

Schedule 2

Part 2, clause 2: to omit "The commencement date" (line 31 on page 187) and substitute "The proposed commencement date".

Part 2, clause 3(a): to omit "company" in both places where it appears (line 4 on page 188) and substitute "corporate trustee".

Schedule 3: Income Tax Act 2004 (2004 No 35)

New item: to insert the following item, after the item relating to section NE 2(2)(a) (after line 13 on page 194):

Section NE 3: add:

- (2) Subsection (1), and whichever is applicable of sections NE 2(1), NE 2AA(2), NE 2AB, and NE 2A(2), do not apply to the specified superannuation contribution (the **current specified superannuation contribution**) to the extent to which it is:
- (a) a contribution to the employee's KiwiSaver scheme;
and
- (b) not more than the lesser of—
- (i) an amount calculated under **subsection (3)**;
- (ii) an amount calculated under **subsection (4)**.
- (3) In **subsection (2)(b)(i)** the amount is calculated using the formula—
- $$0.04 \times \text{total salary or wages} - \text{previous exempt contributions.}$$

- (4) In **subsection (2)(b)(ii)** the amount is calculated using the formula—
total KiwiSaver contributions – previous exempt contributions.
- (5) In the formulas,—
- (a) **total salary or wages** means the total salary or wages paid to the employee in the KiwiSaver calculation period, but excluding salary or wages for which there are no KiwiSaver contributions:
 - (b) **previous exempt contributions** means the total specified superannuation contributions for the employee, to the extent to which—
 - (i) those contributions are made in the KiwiSaver calculation period, but excluding the current specified superannuation contribution; and
 - (ii) **subsection (2)** applied to those contributions (excluding the current one):
 - (c) **total KiwiSaver contributions** means the total KiwiSaver contributions deducted from the salary or wages paid to the employee in the KiwiSaver calculation period.
- (6) In this section,—
- KiwiSaver calculation period** means, for the current specified superannuation contribution, a period—
- (a) beginning with the later of—
 - (i) 1 year before when the employer makes the current specified superannuation contribution;
 - (ii) when the employer is first required to deduct KiwiSaver contributions from the employee's salary or wages; and
 - (b) ending with when the employer makes the current specified superannuation contribution
- KiwiSaver contributions** means contributions required to be deducted under **Part 3, subpart 1 of the KiwiSaver Act 2006**
- KiwiSaver scheme** means a KiwiSaver scheme, as defined in **section 4 of the KiwiSaver Act 2006**
- salary or wages** means salary or wages, as defined in **section 4 of the KiwiSaver Act 2006**.

New item: to insert the following item, after the item relating to the definition of **exempt interest** in section OB 1 (after line 11 on page 195):

New definitions: insert, after the definition of **joint venture agreement** in section OB 1 the following definitions:

KiwiSaver calculation period is defined in **section NE 3(6)** (Specified superannuation contribution withholding tax to be deducted) for the purposes of that section

KiwiSaver contributions is defined in **section NE 3(6)** (Specified superannuation contribution withholding tax to be deducted) for the purposes of that section

KiwiSaver scheme is defined in **section NE 3(6)** (Specified superannuation contribution withholding tax to be deducted) for the purposes of that section

New item: to insert the following item, after the item relating to paragraph (g) of the definition of **remittance certificate** in section OB 1 (after line 22 on page 195):

Add to the definition of **salary or wages** in section OB 1 as paragraph (d):

- (d) is defined in **section NE 3(6)** (Specified superannuation contribution withholding tax to be deducted) for the purposes of that section

Schedule 3: Superannuation Schemes Act 1989 (1989 No 10)

New section 9BAA(4)(a): to omit “; or” (line 30 on page 199) and substitute “; and”.

New section 9BAA(4)(b): to insert before “any other matter” (line 31 on page 199) the words “have regard to”.

New section 9BAB(1): to omit this subclause (lines 2 to 7 on page 200) and substitute:

- (1) The Government Actuary may accept an application for approval under **section 9BAA** that is made by all or any of the trustees of the old scheme, the trustees of the new scheme, or a relevant employer, provided that the Government Actuary is satisfied that—
- (a) it is reasonable in all of the circumstances of the case that the person have standing to make the application; and
- (b) the person falls within a class specified in any guidelines published by the Government Actuary (if any) for the purposes of this subsection.

Explanatory note

This Supplementary Order Paper contains amendments to the KiwiSaver Bill to—

- provide for a mortgage diversion scheme;
- introduce a capped exemption from specified superannuation contribution withholding tax (**SSCWT**), for employer contributions to KiwiSaver schemes, as explained further below;
- set out the circumstances in which an instrument of appointment appointing a default provider can be revoked;

- set out the ongoing obligations that may continue to apply after an instrument of appointment appointing a default provider has been revoked:
- provide for the power for regulations to be made, on the recommendation of the Minister after consultation with default providers, that set out procedures that must be followed and obligations that still apply after an instrument of appointment appointing a default provider is revoked:
- remove some restrictions that may otherwise prevent employers from becoming exempt employers:
- make various technical amendments of a tidy-up nature.

The amendments to *Schedule 3: Income Tax Act 2004 (2004 No 35)* introduce changes to sections NE 3 and OB 1 of the Income Tax Act 2004. The changes to the Income Tax Act 2004 exempt specified superannuation contributions from SSCWT, if the amount of contribution is paid by an employer to an employee's KiwiSaver scheme and it does not exceed the cap provided. The cap is the lesser of the employee's KiwiSaver contributions or 4 percent of the employee's gross salary or wages. The cap is adjusted for previously exempted amounts and for how long the employer has been deducting KiwiSaver contributions from the employee's salary or wages.
