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

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

Volume 5

KiwiSaver (Supplementary Order Papers)

Other matters

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

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KiwiSaver
(Supplementary Order Papers)

OVERVIEW

This section covers the following submissions on:

- Supplementary Order Paper No. 130 (Responsible Investment Disclosure);
- the administration of the member tax credit (including submissions received on Supplementary Order Paper No. 130);
- the vesting of contributions to existing superannuation schemes counting towards compulsory employer contributions; and
- minor technical issues.

MEMBER TAX CREDITS

Issue: Member tax credit eligibility, calculation and claim process

Submissions
(23 and 23A – Investment Savings & Insurance Association of NZ Inc, 47 – ING, 54 – ASB, 61 – KPMG, 91 and 91A – New Zealand Institute of Chartered Accountants, 71 – PricewaterhouseCoopers, 87 and 87A – ASFONZ)

The member tax credit calculation is based on the number of days of the tax year the member is eligible. It is impractical for providers to require this information from all members and to change their systems to record the required history of residency. Major systems changes would also be required to enable calculation based on a member's age and the number of days they are eligible. There is insufficient time for providers to make the required changes to their systems. These changes would also increase the complexity and cost of running KiwiSaver schemes. *(Investment Savings & Insurance Association of NZ Inc, ING)*

It is impractical to require providers to be "reasonably satisfied" about how many days during the credit year a person is eligible to receive the tax credit. Being "reasonably satisfied" is also open to interpretation. *(Investment Savings & Insurance Association of NZ Inc, ING, KPMG)*

The requirements that a provider be "reasonably satisfied" that a member meets the residence requirement and has "no knowledge that the person does not meet" the other requirements for claiming the tax credit create some uncertainty and also make compliance more difficult for fund providers. *(New Zealand Institute of Chartered Accountants)*

We support the clarification provided under the SOP in relation to the timing of eligibility for member tax credits. *(ASFONZ)*

Fund providers will need to set up additional systems to identify members who join before 1 October 2007 and contribute before 31 October from those who join before 1 October but do not contribute before 31 October. These systems will then become obsolete. The substantial additional administrative burden that this requirement will cause for fund providers is out of proportion to the benefit for the government of preventing a limited number of people from paying $1,042.86 in June 2008 and receiving member tax credits for a full year rather than one month. SOP No. 130 should be amended to create one rule for determining the member credit start date. *(Investment Savings & Insurance Association of NZ Inc)*

Eligibility should be based on the member's status on the last day of the tax credit year (30 June). *(Investment Savings & Insurance Association of NZ Inc, ING, ASB)*

Where a member has contributed $1,040 at any time over the year, the member should be entitled to the full tax credit of $1,040. Contributions should not be apportioned according to membership. The result will be that a person will not receive the full $1,040 in the year of joining or leaving KiwiSaver, despite contributing $1,040 or more. The full member tax credit should be available to all members in the year they join, irrespective of when in a member credit year they choose to join KiwiSaver. *(PricewaterhouseCoopers)*

Members should be required to inform fund providers that they meet the requirements of the member tax credit and providers should be able to rely on the information. *(New Zealand Institute of Chartered Accountants)*

Members should be required to advise providers of any change in eligibility and providers should be able to rely on the last advice received from members. *(Investment Savings & Insurance Association of NZ Inc, ING, ASB, KPMG)*

As Inland Revenue could potentially hold eligible contributions that have not yet been paid to the provider, some members will not receive their full credit if Inland Revenue does not consider the contributions they hold. *(Investment Savings & Insurance Association of NZ Inc, ING, ASB)*

Inland Revenue should be furnished with a statement detailing sufficient information to enable it to calculate the member's tax credit for the year (rather than the provider calculating it). This would include eligible contributions received directly by the provider, details and rules of any mortgage diversion facility in place for the member, the member's date of birth and the member's residency status as at 30 June. *(Investment Savings & Insurance Association of NZ Inc, ING, ASB)*

The calculation of the member tax credit should be undertaken by Inland Revenue rather than the fund provider. Accordingly, the provisions in SOP No. 130 regarding fund provider claims for member tax credits would be unnecessary. *(Investment Savings & Insurance Association of NZ Inc)*

The processes for fund providers to claim member tax credits are complex and costly to implement. The most efficient approach to determining claims across the whole KiwiSaver scheme is for the calculation process to be consolidated with Inland Revenue in its role as central administrator, and with providers supplying supporting information. *(Investment Savings & Insurance Association of NZ Inc)*

Comment

To be eligible for the member tax credit an individual must:

- be a member of KiwiSaver or a complying superannuation fund;
- be aged between 18 years and the age of eligibility for fund withdrawal (the age entitlement of New Zealand Superannuation – age 65 – or five years of membership, whichever is the later); and

- have their principal place of residence in New Zealand, unless he or she is an employee of the State services working outside New Zealand, or working overseas as a volunteer or for token payment for a charitable organisation named in the Student Loan Scheme (Charitable Organisations) Regulations.

In claiming the credit the provider must:

- be reasonably satisfied of the number of days in the member tax credit year[1] in which the person meets the residency requirement; and
- have no knowledge that the person does not meet the other requirements.

Officials' consider that providers will hold the information necessary to satisfy themselves that a member meets the requirements relating to membership, age and withdrawal of accumulated interest.

For providers to be satisfied as to the member's principal place of residence, the policy is that providers should rely on the information that they receive, or hold, in order to determine eligibility. This means providers should be able to rely on the last address they receive or hold for the member. If a member's principal place of residence is overseas, and the provider has not been informed, or does not hold any information that would indicate that the member is living overseas, the provider would be considered to have met the test. However, officials would envisage that when sending annual information to members, the provider would request whether the current address was the member's principal place of residency.

Because there is a risk that members will not inform providers that their permanent place of residence is no longer in New Zealand, the KiwiSaver Act requires that upon application for withdrawal, members are required to sign a statutory declaration stating the periods for which their principal place of abode is New Zealand. The member tax credit could then be clawed back if they have received it for a period for which they are not entitled.

The member tax credit is designed to encourage people to join KiwiSaver and establish a saving habit. The credit is based on a maximum of $20 per week of membership. Supplementary Order Paper No. 130 ensures that, for the purposes of the member tax credit, persons are treated as members of KiwiSaver from either the 1st of the month in which contributions are deducted from their salary or wages or the 1st of the month in which securities are allotted by a KiwiSaver scheme or a complying superannuation fund. A transitional rule will apply as a result of the legislative requirement that all contributions must be paid to Inland Revenue during the period 1 July to 30 September 2007. This transitional rule will treat membership as beginning on the 1st of the month in which a provider receives a valid membership application form if contributions are received by either Inland Revenue or the provider during the period 1 July to 31 October 2007.

[1] "Member credit year" means a year beginning on 1 July and ending on 30 June.

Extending the full member tax credit to all members in the year they join, irrespective of when in the year they join fundamentally alters the design of KiwiSaver. The design alters from one that encourages a person to be a member as soon as possible and develop a regular savings habit, to one where a person should join on the last day of the member tax credit year and make a lump sum payment, which is much more likely to favour those on higher incomes. Such a change would also result in a significant fiscal cost with little or no positive impact on individual or national savings levels.

To alleviate the administrative burden on KiwiSaver fund providers in identifying the membership start date for the purposes of calculating the member tax credit for each member, Inland Revenue will use information from employers and scheme providers to calculate the appropriate member tax credit start date for each member. This means that information held by Inland Revenue relating to contributions deducted and provided by fund providers (as part of the information they are required to forward to Inland Revenue when a person joins KiwiSaver directly) will be used for the purposes of the member tax credit.

The bill, as introduced, requires that contributions must have been received by the KiwiSaver scheme or complying fund provider in the member credit year (1 July to 30 June) to count towards calculation of the credit. (This provision will continue for complying superannuation funds as all contributions are made directly from the employer to the provider.) However, this would mean that contributions held by Inland Revenue but not received by the provider in that year would not count. Changes proposed in Supplementary Order Paper No. 130 will allow contributions received by Inland Revenue, but not paid to the provider until after the end of the member credit year, to be treated as contributions received by the provider in that year for the purposes of the member tax credit. Supplementary Order Paper No. 130 also allows supplementary claims for these contributions to be made by providers. This allows providers to claim for earlier periods if they obtain information needed to make a claim – either where no claim was previously lodged, or where less than the maximum eligible claim has previously been paid.

To minimise the need for supplementary claims, providers have indicated a preference to claim based on the contribution information they hold at 30 June and for Inland Revenue to then add any qualifying contributions held and calculate and pay the credit on the total.

Officials have met with provider representatives to develop the claim process further. Officials consider that a process can be developed along the following lines. Providers will be required to provide Inland Revenue with the necessary information, including information about residency, mortgage diversion, and payments received directly, so that Inland Revenue can compute the entitlement and make payment. This means that providers will not have to make supplementary claims. Officials consider the current wording of the legislation provides for this process as it requires that the claim must be "in the form prescribed by the Commissioner".

Money held in the Inland Revenue holding account that may be taken into account for the purposes of calculating a person's member tax credit will not be taken into account for the purposes of calculating the member tax credit until Inland Revenue has the necessary information in relation to mortgage diversion arrangements. To minimise delays, providers have indicated that they will provide information to Inland Revenue as soon as mortgage diversion arrangements are in place.

KiwiSaver scheme providers will not be required to make supplementary claims for qualifying contributions received after the end of the member credit year (as provided in SOP No. 130). Providers would still be able to make supplementary claims if the claim is made for an earlier credit year and the tax credit has not previously been claimed.

Because the process outlined above means that Inland Revenue will be collecting and storing member tax credit values paid, officials consider that this information will no longer be required to be sent by a provider to a new scheme on transfer. Details about the value of qualifying contributions received directly, mortgage diversion arrangements, any periods of ineligibility that are the result of residence outside New Zealand and the date on which a person first became a member of a KiwiSaver scheme will still need to be provided to another scheme on transfer.

Recommendation

That the submissions relating to contributions received and held by Inland Revenue but not on-paid to the provider until after the member credit year count as contributions for calculating the member tax credit for that year, be accepted. Note that the Supplementary Order Paper No. 130 allows contributions held by Inland Revenue to be counted in the calculation of member tax credits.

That the submissions relating to Inland Revenue calculating the member tax credit be accepted so that the process for claiming the member tax credit is as follows:

- Providers will forward necessary information regarding residency and mortgage diversion to Inland Revenue.
- Inland Revenue will calculate the member tax credit based on this information.
- Inland Revenue will make supplementary member tax credit payments as appropriate, when additional information is available in relation to money in the holding account.

That the KiwiSaver Act be amended so that KiwiSaver providers are no longer required to provide information about the amount of the member tax credit received or information about previous claims made by them to a new KiwiSaver provider.

That submissions to make the member tax credit available in full regardless of when in the year the member joins, provided the full qualifying contribution is made, be declined.

Issue: Member tax credit – timing of payment to providers and splitting of credit between providers

Submissions

(17 – Mercer Human Resource Consulting, 23 and 23A – Investment Savings & Insurance Association of NZ Inc, 45 – Chapman Tripp, 47 – ING, 54 – ASB, 61 – KPMG, 91 and 91A – New Zealand Institute of Chartered Accountants)

No timeframe is stated within which the payment needs to be made by Inland Revenue. There should be a timeframe in which the Commissioner must pay the credit to the provider. *(Investment Savings & Insurance Association of NZ Inc, ING, ASB, KPMG, New Zealand Institute of Chartered Accountants)*

The timing of the payment of a tax credit to one fund provider should not be determined by provision of information from all qualifying funds to which a member is contributing. A timeframe similar to the employer monthly schedule would ensure the member credit is delivered within the same timeframe as the proposed employer tax credit. *(ASB)*

The arrangements for claiming the tax credits are complex. Mercer Human Resource Consulting supports tax credits paid to providers on a first-come basis rather than a KiwiSaver scheme having priority over complying superannuation funds. *(Mercer Human Resource Consulting)*

Splitting between providers is impractical and will cause delays in payment, as Inland Revenue will wait to receive information from all providers. The member tax credit should first be paid to the member's KiwiSaver account if they have one. Any balance should be paid to the member's complying funds on a first-come basis until the annual limit is exhausted. *(Investment Savings & Insurance Association of NZ Inc, ING, Chapman Tripp)*

Comment

Officials have grouped together submissions relating to the timing of the payment to providers and the splitting of credit between providers as the issues are inter-related. The member tax credit will be calculated and claimed on an annual basis (30 June). There is no timeframe on the payment to be made by the Commissioner as that would require a time limit "due date" on providers in terms of providing this information to the Commissioner. While the legislation allows for the Commissioner to set a due date upon which the claim needs to be furnished to the Commissioner, no timeframe has been set. This was considered the most flexible approach given that providers would be required to develop systems by July 2008 to claim the credit. It allowed the Commissioner to determine a date based on whether providers were able to submit claims so all claims could be made at the same time to allow pro-rating between providers.

The rationale behind the pro-rata payment where a person has more than one fund provider was to treat all providers equally.

Officials accept that a timeframe would provide certainty for providers. Unlike the employer tax credit, the member tax credit is not linked to the PAYE remittance process. The employer tax credit is integrated with the PAYE remittance process to allow for the value of the credit to be given to employers at the same time the employer is required to remit the contributions to providers or Inland Revenue. The employer monthly schedule filing timeframes depend on the size of the employer. Requiring the member tax credit to be paid within the same timeframe as the employer tax credit would impose additional administrative costs on providers and Inland Revenue. We consider that an appropriate timeframe to process and pay the credit would be 30 working days after the Commissioner receives a claim from a provider (that is, 30 days after receipt of the necessary information to enable Inland Revenue to calculate the claim).

The legislation currently provides that fund providers must furnish the claim on a date determined by the Commissioner. The reason for the due date was to ensure that each provider had the same opportunity to claim the credit for members who contribute to more than one scheme. Removing the pro-rating of the credit between the providers removes the need for a due date other than after the end of the member credit year. For simplicity, officials consider the credit should be paid to providers on a first-come, first-served basis.

Furthermore, there should be no priority afforded to KiwiSaver over complying superannuation funds. To do so would require all claims by complying superannuation funds to be held pending the receipt of claims from KiwiSaver funds. Inland Revenue will ensure that a member's tax credit for the year is limited to the lesser of the contributions made or the maximum credit for one year.

Officials therefore recommend that the process for claiming and processing a member tax credit be as follows:

- Claims for a member credit year (1 July to 30 June) are to be filed after 30 June (being the end of the member tax year).
- Upon receipt of a claim, Inland Revenue has 30 working days to process and pay the claim to the provider.
- Member tax credits are paid on first-come basis (that is, paid to the provider, whether it is a KiwiSaver or complying superannuation fund that first makes a claim for a member tax credit).

Recommendation

That the submissions be accepted, so that the process for claiming a member tax credit is as follows:

- Claims for a member credit year (1 July to 30 June) are to be filed after 30 June (being the end of the member tax year).
- Upon receipt of a claim, Inland Revenue has 30 working days to process and pay the claim to the provider.

Member tax credits are paid on first-come basis.

Issue: Definition of "creditable membership"

Submission
(Matter raised by officials)

SOP No. 130 includes a proposed change to ensure that savers will be eligible for the member tax credit from the date they begin making contributions. A definition of "creditable membership" is proposed, which effectively provides the start dates for eligibility to receive the member tax credit. Officials have identified that individuals who join via their employer and who also make a voluntary contribution directly to Inland Revenue (before deductions from their salary or wages begin) will not be eligible for the member tax credit until the date deductions from salary or wages begin.

Comment

Officials recommend that the proposed definition of "creditable membership" be amended to provide that when a person joins via their employer, the period of eligibility begins from the earlier of the date the first deduction is made from salary and wages or the date a voluntary contribution is received by Inland Revenue.

Recommendation

That the submission be accepted.

VESTING

Submission
(87 and 87A – ASFONZ)

Two further options should be introduced to make the offset condition relating to the exclusion of specified superannuation contributions to existing superannuation schemes that are subject to vesting more equitable:

- a similar rule to that used in section 25 of the KiwiSaver Act for exempt employer criteria should be introduced, whereby vesting scales of up to five years are permitted; or
- paragraph (iv) should provide for an offset "to the extent that" specified superannuation contributions vest in the employee.

Comment

Officials have recommended a change to the vesting requirements in Volume 2 of the Officials' Report for the other contributions test. Specifically, officials recommended that employer contributions that vest within five years may count towards the compulsory rate. This approach is consistent with the rules for exemption from automatic enrolment (an employer can only get an exemption if their contributions to the scheme vest within five years).

The submission notes that an alternative approach may be to enable an offset, to the extent that the contribution vests within the employee. This approach would enable any employer contribution that is vested to count towards the compulsory rate (without requiring the full contribution to be vested). This approach aligns with the initial policy intent that vested contributions count towards the compulsory rate. Officials recommend that this approach be adopted for the proposed five-year vesting requirements, and that employer contributions to an existing superannuation scheme should count towards the compulsory rate, to the extent that the contributions are vested by the end of the fifth year.

Note that officials have previously recommended (Volume 2 of the Officials' Report, pages 39 and 40) that for the contribution to count towards the compulsory employer contribution it must vest within five years. The context of the comment was that *all* the contributions must be fully vested in their entirety within this time.

Recommendation

That the submission be accepted. That employer contributions to an existing superannuation scheme should count towards the compulsory rate, *to the extent that* the contributions are vested by the end of the fifth year.

That the Committee note that this recommendation replaces the recommendation on page 40, Volume 2 in relation to the issue of vesting.

SUPPLEMENTARY ORDER PAPER 139: RESPONSIBLE INVESTMENT DISCLOSURE

Issue: Section numbering

Submissions
(102 – Chapman Tripp, 87B – ASFONZ)

Section 205B should be renumbered as 205A, as there is precedent for a new section being inserted as an "A". *(Chapman Tripp, ASFONZ)*

The abovementioned provision maybe more appropriately included as section 209A, which is about the interface with Securities Law. *(ASFONZ)*

Comment

Officials agree that section 205B is more appropriately numbered as section 205A. Officials, however, consider that the provision fits more comfortably next to section 205 rather than section 209. This is because section 205 also requires information to be included in investment statements. Section 209, however, deals with potential liabilities under the Securities Act.

Recommendation

That the submission in relation to renumbering the provision as section 205A be accepted.

That the submission in relation to the placement in the KiwiSaver Act be declined.

Issue: "Activities" heading

Submission
(102 – Chapman Tripp, 87B – ASFONZ)

The words "under the 'Activities' heading" in subsection (3) of section 205B should be deleted, as there is no requirement in the regulations for such a heading in the investment statement. *(Chapman Tripp, ASFONZ)*

Comment

The purpose of section 205B(3) is to enable the provider of a KiwiSaver scheme to know where the requirement for such disclosure should fit into the investment statement. The Securities Regulations prescribe information that must be contained in the investment statement. They also prescribe a number of headings that must be included in those statements. Other headings used in the Securities Regulations are used for illustrative purposes, and do not necessarily have to be included in the

investment statement. The "Activities" heading is one of the optional headings that can be used. Officials agree that the words "under the "Activities" heading" should be deleted, as this may cause confusion with the application of the optional headings in the Securities Regulations.

Recommendation

That the submission be accepted.

Issue: Best financial interests of members

Submission
(102 – Chapman Tripp)

The proposed section 205B should be redrafted to enable schemes to adhere to their obligations to ensure that they are acting in the best interests of members. Proposed section 205B contained in the Supplementary Order Paper requires the inclusion in a scheme's investment statement of one of two possible statements. However, both statements, if unqualified, potentially expose the scheme trustee to breach of trust actions and/or review of investment decisions.

Comment

The submission suggests that this disclosure requirement could conflict with the fiduciary duties of trustees, to act in the best financial interests of the scheme members. The trustee has an overriding duty to act in the scheme members' best financial interests. When responsible investment considerations are relevant to the scheme's expected financial returns, the trustee will be required to take these matters into account. However other (financial) considerations may outweigh the desirability of choosing a particular "responsible" investment or "responsible" investment strategy, over one that does not have those features. Trustees need the ability to explain that the overriding consideration is financial interests of the members, but to explain how responsible investment considerations can be taken into account within that constraint.

It is argued that if unqualified, the prescribed statement may lead to potential breaches of trustee duties. Of the two statements set out in SOP No. 139 Chapman Tripp suggests that the statement in proposed subsection (2) must be qualified, while the statement in subsection (3) does not require qualification. However, it should be noted that a provider is always able to qualify this further in their investment statements if they choose to do so. Proposed section 205B only prescribes the minimum disclosure requirements. The requirement in subsection (2) is to allow providers to explain "the extent to which they take environmental, social and governance considerations into account". It does not prescribe that any particular level of extent is required.

Officials suggest that acting in the best financial interests of the members and responsible investment are not necessarily mutually incompatible. To this end, a provider may choose, for example, to explain that while it takes responsible investment into account when establishing its investment policies, those policies are secondary to acting in the best financial interests of members. As such, a provider may give effect to both the best financial interests of members and a responsible investment strategy at the same time. Alternatively, providers may establish funds where responsible investment is an integral component of the investment strategy.

It should also be noted that adopting either statement required by clause 205B would not expose a trustee to a breach of trust action, or at least put a trustee at risk of losing a breach of trust action as it is a good defence in law that the trustee acted in accordance with law. A provision of statute law imposing a duty on a trustee may in any event implicitly override any duty on a trustee imposed on him by the trust deed.

Recommendation

That the submission be declined.

Issue: The "tie breaker" principle

Submission
(102 – Chapman Tripp)

Chapman Tripp suggests that one approach to responsible investment open to trustees is to adopt the "tie breaker" principle. The approach involves the trustee recognising that responsible investment considerations are non-financial, but that in a situation where the trustee can choose between two particular investments or investment strategies, one being a "socially responsible" investment and the other not, and the expected financial performance from each is the same, the trustee can be influenced by responsible investment considerations. If this approach is adopted, that could be explained in the further explanation given on the scheme's website.

Comment

The current position in SOP No. 139 enables trustees to adopt this approach if they determine it is appropriate. Trustees may disclose in their investment statements that they have an approach to responsible investment, and refer members or potential members to their website for more information on how they implement the tie breaker approach.

Recommendation

That the submission be noted.

Issue: The ability to change approaches to responsible investment

Submission
(87B – ASFONZ)

The nature of the provision may create confusion about trustees' duty to act in the best interests of members. The proposed provision suggests that the decision in either direction about its investment policy is irrevocable and of indefinite application.

This issue may be addressed if issuers of KiwiSaver schemes were able to flag in their investment statements that the approach being adopted at any point was applicable "as at the date of the investment statement", and as such would enable the issuer to change their adopted approach.

This approach would be further facilitated if issuers were able to include the information in a supplementary document to the investment statement. This would ensure that as approaches to responsible investment changed, issuers would not be faced with the costs of reprinting their investment statements

Comment

The submission suggests that, as trustee law clearly requires trustees to act in the best interests of beneficiaries of the scheme at all times, this must include a regular review of whether responsible investment is taken into account at any time. The drafting of the proposed section may suggest that the approach to the policy is irrevocable.

ASFONZ suggests two possible remedies to this. They include enabling the issuer to include the relevant statements in a supplementary document to the investment statement or enabling the issuer to flag that the approach may be changed, by specifying that the approach was applicable "as at the date of the investment statement".

Officials agree that enabling the issuer to flag that the approach may be changed – by specifying that the approach was applicable "as at the date of the investment statement" – is desirable. However, officials do not consider that a supplementary document is appropriate. The primary reason for this is that the document would then fall outside the scope of the Securities Act and would not be subject to regulation by the Securities Commission.

Recommendation

That the submission be:

- accepted in relation to issuers being able to specify that the approach was applicable "as at the date of the investment statement"; and
- declined in relation to the use of supplementary documents.

Issue: Implementation date

Submission
(87B – ASFONZ)

If an investment statement is dated before 1 April but is provided to a member of the public after 1 April 2008 and is accompanied by a separate document containing the relevant information in section 205B, it should be compliant with the provisions in section 205B.

Similarly, if an application for subscription is made on the basis of an investment statement distributed before 1 April and does not comply with section 205B the subscription should be equally valid if a statement that is compliant with section 205B is sent to the investor within 14 days of subscription.

Comment

The submission has raised transitional issues relating to the introduction of the investment statement provisions in section 205B. The submission essentially enables schemes to maintain pre-existing investment statements, if the requirements in section 205B are included in a supplementary document. The current construction of the section provides flexibility for providers. The Securities Commission allows supplementary documents to be issued alongside their investment statements in certain instances. The proposed provision does not inhibit this discretion and continues to provide flexibility on the use of supplementary documents. It should also be noted that the Securities Commission will publish guidelines on how the relevant statements may be included in investment statements.

The submission also suggests that a subscription made before 1 April should be validated if the investment statement distributed did not contain a section 205B-compliant statement, if a subsequent supplementary statement was provided. Officials' view is that if the subscription is made before 1 April, then it is not bound to include the statement in section 205B.

Recommendation

That the submission be declined.

Issue: Application date

Submission
(87B – ASFONZ)

It is understood that the proposed section 205B will come into effect from 1 April 2008. However, this date is not reflected in the current wording of the section. ASFONZ believes it would be helpful for both subsections (1) and (2) of proposed section 205B to start with "From 1 April 2008".

Comment

Supplementary Order Paper No. 139 provides for a 1 April 2008 application date for the proposed new section 205B by amending clause 2 (16) of the bill which specifies the date that provisions in the bill come into effect, to include this provision. Clause 2 (16) deals with sections in the bill coming into force on 1 April 2008. Because of this officials consider it unnecessary to include the commencement date in the actual provision.

Recommendation

That the submission be declined.

Issue: The requirement for a website

Submission
(87B – ASFONZ)

There is no existing requirement for KiwiSaver scheme providers or complying superannuation fund providers to maintain a website. The effect of this provision may be to create such an obligation. The section should be re-drafted to recognise that a reference to the scheme website applies only if the scheme has a website.

It is further suggested that this is more appropriately addressed by removing the requirement in section 205B(1)(a) completely.

Comment

Officials agree that it is appropriate for the legislation to recognise that some schemes may not provide access to a website. In these instances, it should be sufficient for people to request the information from the issuer free of charge. However, officials do not consider it appropriate to remove the obligation to provide access online, if the provider already has a website.

Recommendation

That the submission be accepted in part, so that the obligation to provide a reference to a website applies only when the issuer has a website that can be referred to.

That the submission to remove the requirements of section 205B(1)(a) be declined.

Issue: Inclusion of the disclosure of responsible investment for all securities

Submission
(87B – ASFONZ)

Given the level of importance attached to responsible investment, the requirements in section 205B should not apply solely to KiwiSaver schemes, but rather to all securities. This may be achieved by amending the Securities Regulations 1983, rather than the KiwiSaver Act.

Comment

This is outside the scope of the bill. The government is currently examining the question in more detail and has established a Joint Working Party to develop some recommendations around responsible investment that have broader application.

Recommendation

That the submission be declined.

OTHER KIWISAVER TECHNICAL ISSUES

Issue: Redraft proposed section 66A and Schedule 4

Submissions
(33 – Corporate Taxpayers Group, 45 – Chapman Tripp, 61 – KPMG, 74 – Deloitte, 87 – The Association of Superannuation Funds of New Zealand, 91 – New Zealand Institute of Chartered Accountants)

Proposed section 66A and Schedule 4 require redrafting to enable their effective application. Apart from being difficult to interpret and requiring references to three different clauses of Schedule 4, the rules do not work properly.

Comment

Officials agree with the submissions that these provisions should be redrafted to enable them to work properly.

Recommendation

That the submissions be accepted.

Issue: Application date for the proposed rules for invalid enrolments

Submission
(Matter raised by officials)

In Volume 2 (KiwiSaver) of the Officials' Report on submissions on the Taxation (Annual Rates, Business Taxation, KiwiSaver, and Remedial Matters) Bill, officials recommended a number of amendments to the KiwiSaver Act to deal with invalid enrolments (see pages 81 and 82). The submission did not specifically cover the issue of the application date of the proposed amendments.

Comment

Officials consider that the following options exist as the most appropriate application date for these proposed amendments:

- date of assent of the bill; or
- 1 July 2007 (the date KiwiSaver came into effect).

The date of assent option is prospective but creates a gap in terms of the administration of invalid accounts identified during the period 1 July 2007 to the date of assent.

The proposed rules for invalid accounts will provide certainty for all the parties involved and will ensure that the person is put in the position that they would have been in if they had not been invalidly enrolled. Given this, officials consider that the proposed amendments apply from 1 July 2007, the date the KiwiSaver Act came into effect.

Recommendation

That the submission be accepted.

Issue: Provisions implying legislative terms into existing trust deeds

Submission
(Matter raised by officials)

The provisions in the KiwiSaver Act and the bill which have the effect of implying terms in the legislation into existing trust deeds should be amended to clarify their application.

Comment

The KiwiSaver Act and the bill contain provisions that imply terms relating to the member tax credit and compulsory employer contributions into existing trust deeds that establish KiwiSaver schemes and complying superannuation funds. In addition, as part of drafting the rules for invalid enrolments to back-date validation, the terms relating to the invalid account rules will be implied into existing trust deeds.

The provisions as drafted imply the respective law into the trust deed whereas it should be the terms (such as the definitions) used in the legislation. The relevant law will always apply despite any provisions in a trust deed.

Officials therefore recommend that the relevant provisions be amended to clarify that they imply the legislative terms into existing trust deeds rather than the law.

Recommendation

That the submission be accepted.

Issue: Notification to Government Actuary of subsequent payment

Submission
(Matter raised by officials)

Proposed section 101I of the KiwiSaver Act should be amended to require a complying superannuation fund to notify the Government Actuary once payment has been received following the issue of a notice to an employer of a non-payment of compulsory employer contributions to the complying superannuation fund.

Comment

Proposed section 101I of the KiwiSaver Act deals with the non-payment of compulsory employer contributions and the actions that the Government Actuary must undertake to establish the amount of non-payment and the issuing of notices to employers and Inland Revenue.

The current rules do not require a provider to notify the Government Actuary that a non-payment has been rectified following the issue of notice from the Government Actuary to an employer requiring the amount to be paid.

Officials therefore recommend that proposed section 101I be amended to require a provider to notify the Government Actuary that an amount owing has been paid.

Recommendation

That the submission be accepted.

Issue: Application date of proposed amendment to sections 215 and 216 to clarify which month the penalty applies from

Submission
(Matter raised by officials)

The proposed amendment to sections 215(3) and 216(3) should apply from date of assent.

Comment

In Volume 2 of the Officials' Report on submissions to Taxation (Annual Rates, Business Taxation, KiwiSaver, and Remedial Matters) Bill officials recommended that sections 215(3) and 216(3) be amended to clarify in which month the penalty is imposed (page 117).

Officials further recommended that the proposed amendments apply from 1 April 2008. This application date is incorrect and should have been from the date of assent.

Recommendation

That the submission be accepted.

Other matters

PIE RULES – AUCKLAND REGIONAL HOLDINGS

Submission
(Matter raised by officials)

The PIE rules should be amended to allow Auckland Regional Holdings (ARH) to wholly own a portfolio investment entity (PIE).

Comment

Officials consider that exceptions to the investor membership and investor interest size requirements in sections HL 6(1) and HL 9(4) respectively should be made to allow ARH to be the sole investor in a PIE and make an investment of any size into a PIE without jeopardising the PIE's status. This would have the effect of allowing ARH to wholly own a PIE.

The PIE rules allow other PIEs and collective investment vehicles to wholly own PIEs. Also, there are specific provisions that allow the New Zealand Superannuation Fund, the Earthquake Commission and the Accident Compensation Commission to wholly own a PIE. These specific exceptions were included because these entities are in-substance widely held, as their ultimate beneficiaries are the public. Auckland Regional Holdings is analogous as it was established by statute as an investment manager for the main purpose of providing funding for regional transport and stormwater programmes for the benefit of the Auckland public.

Recommendation

That the submission be accepted.

RETIREMENT SCHEME CONTRIBUTION WITHHOLDING TAX (RSCWT)

Issue: Definition of "retirement scheme contribution" too wide

Submission
(Matter raised by officials)

The definition of "retirement scheme contribution" should be amended so that it applies only to amounts that are assessable income.

Comment

The RSCWT is a final withholding tax to be imposed instead of income tax on retirement scheme contributions made by a retirement scheme to a retirement savings scheme. The definition of "retirement scheme contribution" as drafted includes both taxable and non-taxable amounts. The policy intention is not to impose RSCWT on amounts that would not have been taxable if the amount had of been received by the person rather than the retirement savings scheme. For example, a Māori authority can distribute to its members amounts that it earned in a company before becoming a Māori authority as a non-taxable Māori authority distribution. This is because tax has already been paid when that income was earned by the company.

It is recommended that the definition of "retirement scheme contribution" be amended so that it applies only to amounts that are assessable income.

Recommendation

That the submission be accepted.

Issue: That taxable Māori authority distributions that are retirement scheme contributions be excluded from the resident withholding tax rules

Submission
(Matter raised by officials)

The resident withholding tax rules should be amended to exclude taxable Māori authority distributions that are subject to the RSCWT so that these distributions are not subject to resident withholding tax as well as RSCWT.

Comment

At present, a taxable Māori authority distribution which is subject to the RSCWT is also subject to resident withholding tax if the distribution does not have sufficient Māori authority credits attached. Such distributions should be subject only to RSCWT.

It is recommended that the resident withholding tax rules be amended to exclude taxable Māori authority distributions that are subject to RSCWT.

Recommendation

That the submission be accepted.