

10 November 2010

Clerk of the Committee
Commerce Select Committee
Select Committee Office
Room 10.04, Bowen House
Parliament Buildings
WELLINGTON

To the Chair of the Select Committee,

Submission on the Financial Markets (Regulators and KiwiSaver) Bill

We wish to submit the attached in response to the Financial Markets (Regulators and KiwiSaver) Bill (the Bill).

Workplace Savings NZ is a national, not-for-profit, apolitical membership organisation. Our current membership comprises around 100 major workplace superannuation and KiwiSaver schemes and another 50 organisations and individuals representing the various product and service providers for workplace savings arrangements. We have recently reviewed the principal goals and objectives of our organisation and changed name from ASFONZ to better reflect our objectives.

From the perspective of assets under management, the membership of Workplace Savings NZ covers around 90% of retirement savings held through workplace retirement saving arrangements (i.e. Corporate and Master Trust superannuation schemes and KiwiSaver).

Workplace Savings NZ's objective is to be the Voice of Workplace Savings; advancing the sustainable, effective, and efficient delivery of workplace savings outcomes for all involved – including the core workplace superannuation scheme members who remain at the heart of the organisation. We do this through:

- Advocating – advancing legislative and public policy initiatives beneficial to workplace savings and participation in the workplace savings industry, making submissions, engaging with policy-makers and officials and issuing media commentary to advance those causes.
- Education – promoting trustee, employer and member financial and regulatory education through dedicated training programmes, newsletters and special interest seminars.
- Networking – providing trustees, employers and service providers involved in workplace superannuation with a regular forum for sharing ideas and information on industry matters.

- Promotion – publicising the benefits of workplace savings, and helping to improve public confidence in workplace savings.

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I would be pleased to discuss our comments or answer any queries in relation to the submission. Both myself and the chair of Workplace Savings NZ, David Ireland, a partner at law firm Kensington Swan, would like to appear before the Committee in support of the submission.

Thank you for the opportunity to make this submission.

Yours sincerely



Bruce Kerr
Executive Director

Workplace Savings NZ

Submission to the

Commerce Select Committee

on the

**Financial Markets (Regulators and KiwiSaver) Bill
("the Bill")**

November 2010

The Workplace Savings NZ Submission

Introduction

Workplace Savings NZ confirms general support of the measures introduced covering:

- 1. Establishment of the Financial Markets Authority (FMA);**
- 2. KiwiSaver:**

Our submission focuses on some issues that are of interest to our members. We have, however, where we believe that it would be helpful and is appropriate, made suggestions that are of a general nature.

We have commented on a number of aspects of the Bill in relation to the topics mentioned above where we feel that clarification of wording or some minor changes would enhance the workability of the resulting legislation. Our comments are aimed at removing possible uncertainty for providers and consumers.

The Submission

1. Establishment of the Financial Markets Authority (FMA)

1.1. Introduction

- 1.1.1. In general terms, Workplace Savings NZ welcomes the establishment of the FMA as a single regulator focused on financial market issues. We see this as a valuable step forward in improving the regulatory environment and one which has the potential to help in restoring public confidence in financial markets.
- 1.1.2. We note that the functions of a number of existing bodies will be taken over by the FMA to enable it to regulate the markets effectively. We view this positively and as an essential move.

1.2. Office of the Government Actuary

- 1.2.1. One of the bodies that it is proposed to incorporate into the FMA is the office of the Government Actuary (GA). Again we view this positively, although we are concerned that the disestablishment of the position of Government Actuary within the FMA may leave a specialist skill gap in the FMA.
- 1.2.2. Many of the functions carried out by the GA do not need to be performed by a qualified actuary. However, the service provided by the GA's office (to both the industry and to the public) has benefited from having such a person dedicated to a narrowly defined set of functions. This has led to consistency of interpretation that would not be a feature of an outsourced service.
- 1.2.3. We believe that it is noticeable that issues impacting adversely on the confidence of the public in financial services are not generally related to the

operation of registered superannuation schemes, which includes KiwiSaver schemes. In our view this reflects the active part played by the GA as regulator of this sector and that the GA's office has been staffed by people with appropriate skills.

- 1.2.4. We submit that it would be preferable for the position of Government Actuary, as it is now, to be retained under the framework of the FMA, or at least have the functions currently carried out by that office specifically noted as one of the divisions contemplated under clause 14 of the Bill.

1.3. Financial Literacy

- 1.3.1. It is noted that one of the functions of the FMA will be the promotion of financial literacy (clause 9(1)(c)). Workplace Savings NZ has been a major supporter of the work done in this area by, in particular, the Retirement Commission.
- 1.3.2. We believe that a higher level of financial literacy will be one of the most important factors in improving confidence in financial markets over time – but that it will take time. Initiatives undertaken by other agencies may be impeded if the work of the FMA in this area cuts across those initiatives, which would be unfortunate. We submit that the efforts of Government Departments must be coordinated to ensure that appropriate programmes are made available to the public, and that this obligation be incorporated into clause 9(1)(f) of the Bill alongside the requirement to co-operate with other law enforcement or regulatory agencies.

1.4. Revised Process for Registering a Prospectus

- 1.4.1. We note that clause 97 of the Bill replaces the current process for the registration of a prospectus or prospectus amendment. The proposed basis is potentially problematic for a number of our members and, we suspect, for collective investment vehicles (CIVs) in general.
- 1.4.2. The recently circulated MED discussion paper relating to the review of securities law has, amongst other things, proposed that the current prospectus regime be discontinued. We believe that the proposed alternative disclosure regime has found general favour and anticipate that a new regime will be introduced for CIVs when the securities legislation is amended. This is expected to be effective in (around) 2013.
- 1.4.3. We submit that, in respect of CIVs, there is no evidence supporting a change in the current process, merely to face another change about a year later.
- 1.4.4. More significantly, the proposed suspension of offerings for 5-10 working days after a prospectus is registered (proposed new s43D of the Securities Act 1978) is unworkable and highly problematic for continuous offers, such as most superannuation and KiwiSaver scheme offerings. In particular, default KiwiSaver schemes who are under a regulatory obligation to remain open at all times will be unable to comply with an automatic suspension period. This mechanism causes undue disruption to the marketplace and is not warranted. The possible relief under the proposed s43E is too uncertain to be relied upon as addressing this concern.
- 1.4.5. We submit that the proposed s43D be deleted. If it is considered that a mechanism is necessary to enable the FMA time to review prospectus documentation, then a requirement to submit a draft prospectus no less than

5 working days prior to registration could be inserted as an alternative. However, in our view the current process of an informal pre-registration review provided by the Companies Office is working adequately. Our strong preference would be to retain the status quo, without hardcoding mandatory review or suspension periods. Issuers are responsible for the compliance of documentation lodged for registration with the risk of non-compliant documentation being deregistered, and this is appropriate.

1.5. Proposed Levies

1.5.1. We note that clause 63 of the Bill allows for an additional levy on financial market participants to fund the cost of establishing the FMA or the Rulings Panel and disestablishing the Securities Commission, as well as the costs of the FMA performing its functions, powers and duties under the Act;

1.5.2. Workplace Savings NZ does not support this suggested approach;

1.5.3. Clause 8 of the Bill states that the FMA's main objective is to promote fair, efficient and transparent financial markets. These activities are for the public good. As such, in our view, the functions of the FMA should be publicly funded. In particular, it is inappropriate to pass regulatory restructuring costs on to remaining market participants. This is a cost that should be borne solely by the Crown as part of its core functions of maintaining regulatory frameworks. Any costs imposed on the industry will inevitably need to be passed on to consumers and scheme members in some fashion, which will do little to enhance public confidence in the system.

2. **KiwiSaver**

2.1. Introduction

2.1.1. Workplace Savings NZ supports the concept of making the KiwiSaver Act 'self supporting' in removing the direct links and references currently found to the Superannuation Schemes Act 1989. This makes reading the KiwiSaver Act 2006 (the Act) much easier.

2.1.2. We have a few comments, as below, relating to the detail of the changes now proposed.

2.2. Restricted KiwiSaver Schemes (restricted scheme)

2.2.1. The Explanatory notes to the Bill outline the purpose of the Bill. One of the prime purposes is to split the governance responsibilities of KiwiSaver schemes such that trustees will have a principally supervisory role and managers have a principally operative role, in much the same way as unit trusts operate.

2.2.1.1. For most KiwiSaver schemes this reflects the way in which they have been established, which is in contrast to traditional superannuation schemes.

2.2.1.2. The Explanatory notes also acknowledge that there are some KiwiSaver schemes that have been established for specific groups of people, commonly employees of an employer, where the trustee has "a more hands-on role." For example, in these schemes, scheme members

or company officers may become trustees and/or trustees may be known personally to the employer's employees.

2.2.1.3. For this reason it has been proposed to introduce a concept of a "restricted KiwiSaver scheme" so as to continue to allow the relationships that these schemes display.

2.2.1.4. We support the creation of a specific class of KiwiSaver scheme that allows existing structures to continue in particular cases, and see this as an essential feature of the reforms.

2.2.2. Clause 173 introduces a new section 116A in to the Act outlining the requirements of a restricted scheme. Section 116A(1)(d) requires membership to be restricted to employees of a particular employer.

2.2.2.1. It is fairly common for workplace based superannuation arrangements to cover groups of associated employers under a single scheme. It would be desirable to clearly acknowledge this practice by allowing employees of associated employers to meet the requirements of this section;

2.2.2.2. We submit that the criteria for restricted KiwiSaver schemes be expanded to membership to extend to employees of groups of associated employers.

2.2.3. The proposed Section 116A(2) to the KiwiSaver Act is, in our view, excessively restrictive.

2.2.3.1. Future commercial activity, such as merger or acquisition activity, may necessitate a change or lead to an expansion of a restricted scheme's restricted membership (for example, by introducing a new employer into the mix, or replacing). This could well result in the scheme's membership rules failing to meet the criteria laid down in section 116A(1)(d);

2.2.3.2. Where the membership rules, as amended, would have been acceptable under the restricted scheme definition, there seems little logic in prohibiting the change being made;

2.2.3.3. We submit that the FMA should be given the powers, such that if it is satisfied that a change does not prevent the scheme continuing to meet the criteria for acceptance as a restricted scheme, the scheme may continue as a restricted scheme rather than having its designation removed. Alternatively, statutory relief should be provided for changes that do not impact.

2.2.4. Clause 210, under the Transitional provisions, requires the Registrar of KiwiSaver schemes to register certain schemes as restricted schemes.

2.2.4.1. Clauses 211 and 212 list those schemes that are to be registered as restricted schemes;

2.2.4.2. No schemes are able to be identified as restricted schemes, implying that no other schemes can become restricted schemes;

2.2.4.3. Given that the special nature of this type of scheme has been acknowledged in the Explanatory notes, it is not clear why there is no

provision for the identification of any other restricted schemes that may exist.

2.2.4.4. We submit that, in the circumstances, provision should be made for the identification of further restricted schemes that meet the criteria laid down in new section 116A, and that the proposed section 210(2) be amended accordingly.

2.3. Transitional measures

2.3.1. The change in structure for KiwiSaver schemes (other than restricted KiwiSaver schemes) represents a fundamental change for Securities Act purposes, as the manager will become the issuer.

2.3.1.1. There appears to be no transitional provisions in the Bill to help manage the technical consequences of this change.

2.3.1.2. In particular, with a change in issuer occurring, all existing members will need to receive a new investment statement that reflects the new structure. This is expensive and, in our view, may create confusion for members unless accompanied by a clear explanation of the reason for them receiving the replacement documentation.

2.3.1.3. We submit that specific relief from Securities Act requirements the flow as a consequence of the change in structure be included, similar to s236 of the KiwiSaver Act. This relief could be made subject to a requirement from the scheme manager sending notification to members explaining the changes. We believe this would allow a far more cost effective approach to be taken in relation to disclosure obligations.

2.3.1.4. We also submit that managers should be allowed to continue to use existing advertising material and other collateral approved by the current scheme trustee and issued prior to the restructuring, to limit transitional costs that would otherwise be incurred in relation to updating or re-certifying that material, provided that material has not become materially false or misleading. Existing statutory mechanisms prohibiting false or misleading statements provide sufficient protection against providers using material that is no longer appropriate in light of the scheme restructuring.

2.4. General comments

2.4.1. Clause 173 introduces section 116B relating to trustees of KiwiSaver schemes.

2.4.1.1. We note that Section 116B(1) requires that the property and investments of the scheme must be vested in the trustee;

2.4.1.2. It is also noted that the seemingly equivalent section of the Unit Trusts Act 1960 (section 3(3)) provides for investments and property of a trust to alternatively be vested in a nominee of the trustee;

2.4.1.3. We believe that it is common practice at the moment for KiwiSaver scheme trustees to use nominees;

2.4.1.4. In the circumstances we submit that section 116B of the Act should be extended to allow investments and property to be vested in nominees of the trustee.

2.4.2. Clause 177 substitutes a new section 119(F), covering information required in case of a transfer under section 119D.

2.4.2.1. We find the wording of this section lacks sufficient clarity to give certainty as to its requirements. For example:

2.4.2.1.1. Paragraph (a) of Section 119(F)(1) refers to the member giving information to "the trustees". However in a transfer situation there will always be two trustees, one for the 'old' scheme and one for the 'new' scheme. We believe that it should be made clear which trustee (or both) the information is to be given to;

2.4.2.1.2. Paragraph (b) of the same section refers to the trustee of the old scheme providing to the satisfaction of the FMA evidence that the trustee has provided to the Commissioner the information set out in paragraph (a) in respect of each member (where they have the information). However, there does not appear to be any requirement for the trustee to provide the information to the Commissioner and we believe that this should be specifically required if that is what is intended;

2.4.2.1.3. We would add that if the trustee of the old scheme is required to provide the information to the Commissioner, it would seem to be logical for the trustee to provide the information to the new scheme trustee, rather than requiring the member to do so. In reality it is most unlikely that the member would be able to supply some of the information required in any case (in particular, for sub-paragraphs (iii) and (v)).

2.4.3. Additionally, clause 177 substitutes a new section 119G relating to approvals under section 119D.

2.4.3.1. Section 119(G)(2), which is carried over from the equivalent section in the Superannuation Schemes Act 1989, provides for section 119G to, in effect, override any provision in the trust deed that is contrary to this section;

2.4.3.2. New section 119J(1) appears to provide for any of sections 119A to 119I to override trust deed provisions that are contrary to any of these sections;

2.4.3.3. Section 119(G)(2), therefore appears to be superfluous and we submit it should be deleted.

2.4.4. Finally, we note that the term trustees (plural) is used in some sections of the Bill and trustee (singular) is used in others. While inconsequential, the singular version is generally correct as the sections concerned are not referring to restricted schemes which are the only ones to be allowed to have more than one trustee. For the sake of clarity and certainty we believe that the term should be correctly used as circumstances dictate.

Submission Ends