

TAX INFORMATION BULLETIN

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This *Tax Information Bulletin* is also available on the internet in PDF. Our website is at **www.ird.govt.nz**

The website has other Inland Revenue information that you may find useful, including any draft binding rulings and interpretation statements that are available.

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THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

Inland Revenue produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents.

Because we are keen to produce items that accurately and fairly reflect taxation legislation, and are useful in practical situations, your input into the process—as perhaps a “user” of that legislation—is highly valued.

The following draft item is available for review/comment this month, having a deadline of 28 February 2007.

| Ref. | Draft type | Description |
|-------------|-----------------------------|--|
| ED 0093 | Standard practice statement | Notification of a pending audit or investigation |

Please see page 50 for details on how to obtain a copy.

The following draft items are available for review/comment this month, having a deadline of 31 March 2007.

| Ref. | Draft type | Description |
|-------------|---------------------------|---|
| QB0057 | Question we've been asked | Aircraft overhaul reserves—deductibility |
| IS0064 | Interpretation statement | Residential rental properties—depreciation of items of depreciable property |

Please see page 50 for details on how to obtain a copy.

LEGISLATION AND DETERMINATIONS

This section of the TIB covers items such as recent tax legislation and depreciation determinations, livestock values and changes in FBT and GST interest rates.

TAX DEPRECIATION RATES GENERAL DEPRECIATION DETERMINATION DEP60

This determination may be cited as “Determination DEP60: Tax Depreciation Rates General Determination Number 60”.

1. Application

This determination applies to taxpayers who own the asset class listed below.

This determination applies to “depreciable property” other than “excluded depreciable property” for the 2006/2007 and subsequent income years.

2. Determination

Pursuant to section 91AAF of the Tax Administration Act 1994 I hereby amend Determination DEP 1: Tax Depreciation Rates General Determination Number 1 (as previously amended).

- Inserting into the “Contractors, builders, and quarrying” industry category the general asset class, estimated useful life, and diminishing value and straight-line depreciation rate listed below:

| Contractors, building and quarrying | Estimated useful life (years) | DV banded dep'n rate (%) | SL equivalent banded dep'n rate (%) |
|-------------------------------------|-------------------------------|--------------------------|-------------------------------------|
| Builders' planks (wooden) | 3 | 67 | 67 |

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Tax Administration Act 1994 and the Income Tax Act 2004.

This determination is signed by me on the 20th day of November 2006.

Susan Price
Senior Tax Counsel

NEW LEGISLATION

KIWISAVER ACT 2006

The KiwiSaver Bill was introduced into Parliament on 28 February 2006. It received its first reading on 2 March 2006, its second reading on 24 August 2006, and its third reading on 30 August. The KiwiSaver Act 2006 resulted. The Act received Royal assent on 6 September 2006.

The Act amends the Accident Compensation Act 1982, Accident Rehabilitation and Compensation Insurance Act 1992, Companies Act 1993, Financial Transactions Reporting Act 1996, Income Tax Act 2004, Injury Prevention, Rehabilitation, and Compensation Act 2001, Insolvency Act 1967, Social Security Act 1964, Superannuation Schemes Act 1989 and Tax Administration Act 1994.

Introduction

The KiwiSaver Act 2006 establishes KiwiSaver, a government-sponsored, work-based savings scheme. The purpose of KiwiSaver is 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 in pre-retirement. KiwiSaver is aimed at increasing individuals' wellbeing and financial independence, particularly in retirement, and to provide retirement benefits.

Background

KiwiSaver is part of a package of government initiatives designed to increase the level of savings by New Zealand households and support New Zealanders in retirement. Other initiatives include the introduction of the State Sector Retirement Savings Scheme and the establishment of the New Zealand Superannuation Fund. The latter is aimed at pre-funding the cost to the government of New Zealand Superannuation. KiwiSaver was announced in Budget 2005 and builds on the recommendations of the Savings Product Working Group.

Key features

KiwiSaver will be implemented from 1 July 2007. It has implications for five broad groups:

- savers;
- employers;
- scheme providers;
- existing registered superannuation schemes; and
- government.

Savers

Participation in KiwiSaver will not be compulsory and will be open for individuals to join provided they are entitled to be in New Zealand indefinitely, up until the age of eligibility for New Zealand superannuation (currently 65). To overcome inertia, which prevents some people from saving, the Act requires employees starting new employment to be automatically enrolled in KiwiSaver with the right to opt out.

Employees automatically enrolled will have KiwiSaver contributions deducted from their salary or wages from their first pay. Employees can opt out of KiwiSaver by notifying Inland Revenue or their employer from the end of week two to the end of week eight after starting employment. Existing employees can opt into KiwiSaver through their employer or by contracting directly with a provider.

People who are not employees, such as the self-employed and unemployment benefit recipients, can opt into KiwiSaver by contracting directly with a provider and can make contributions based on the contract with the scheme provider.

Employees who are under 18 will not be subject to automatic enrolment but can opt in by contracting directly with a provider.

The Act gives KiwiSaver members the ability to:

- choose their own KiwiSaver scheme and investment risk-profile (for example, conservative, balanced or growth), but employees will be allocated to a default scheme with a default investment product if no choice is made;
- transfer between KiwiSaver schemes at any time;
- contribute at either 4% or 8% of the gross salary or wages paid by the employer (the 4% rate will be the default rate unless the higher rate has been elected by the employee);
- make voluntary contributions (in addition to contributions deducted from their salary or wages) directly to the provider or via Inland Revenue;
- cease contributions by applying to Inland Revenue for a contributions holiday after an initial membership period of 12 months. The contributions holiday will be for a period of between three months and five years and can be renewed at the end of the period.

Contributions will be locked in until the age of eligibility for New Zealand Superannuation or five years after the first contribution, whichever is later, with the following exceptions:

- withdrawal to assist with the purchase of a first home after at least three years membership;
- significant financial hardship;
- serious illness; or
- permanent emigration.

An upfront government contribution of \$1,000 will be credited to a member's KiwiSaver account when contributions are first paid by Inland Revenue to the provider. This upfront contribution cannot be withdrawn to purchase a first home, or in cases of significant financial hardship or serious illness. The \$1,000 contribution can be withdrawn if the member permanently emigrates and will be paid to the member's estate upon death.

There is no Crown guarantee of KiwiSaver schemes or products.

Employers

The Act requires employers to:

- advise Inland Revenue of the name, tax file number and address of new employees subject to automatic enrolment;
- provide all new employees subject to automatic enrolment with an information pack, supplied by Inland Revenue. This pack will contain information about KiwiSaver, an opt-out form and information about default providers and schemes;
- make deductions of KiwiSaver contributions from the gross salary or wages paid to employees who are automatically enrolled and pay this amount along with PAYE, student loan deductions or other tax obligations to Inland Revenue.

The Act allows employers to:

- have a chosen KiwiSaver scheme for their employees who do not select their own scheme;
- apply to the Government Actuary for an exemption from the automatic enrolment rules if they provide access to an approved registered superannuation scheme. Employees whose employer is exempt from the automatic enrolment provisions will still be able to join KiwiSaver (by opting in).

The Act ensures that if an employer is merely acting as a conduit or passing on information about KiwiSaver to its employees the employer will not be liable as an investment adviser or promoter under the investment advisers and securities legislation.

Scheme providers

The Act establishes that KiwiSaver schemes will be governed by trust deeds and regulated similarly to registered superannuation schemes. All KiwiSaver schemes must be registered by the Government Actuary. The Act provides for default schemes to be appointed

for those who do not select their own scheme. Other providers will be able to offer schemes if they meet a minimum set of criteria, including having fees that are not unreasonable.

Registered providers will receive contributions direct from KiwiSaver members and via Inland Revenue and will invest those contributions on behalf of members.

Existing registered superannuation schemes

The Act provides three broad options for existing registered superannuation schemes that meet certain criteria:

- converting to a KiwiSaver scheme. Members of the registered superannuation scheme will become KiwiSaver members (with the consent of all members);
- establishing a KiwiSaver scheme within an existing registered superannuation scheme, under the existing trust deed. Members of the registered superannuation scheme can decide to become a KiwiSaver member at individual level; or
- continue to operate independently of KiwiSaver.

Government

The Act establishes Inland Revenue as the central administrator of KiwiSaver. This role includes:

- providing information about KiwiSaver to employers for distribution to employees;
- allocating new employees to a default scheme and sending the employee an investment statement for that scheme;
- receiving contributions from employers and others and on-paying these to providers (with interest); and
- administering contributions "holidays" and opt-out requests.

The Act requires the Government Actuary to:

- register KiwiSaver schemes, including registered superannuation schemes that convert;
- set up and maintain a register of KiwiSaver schemes;
- approve employer exemptions from the automatic enrolment provisions; and
- undertake the ongoing regulation of providers.

Detailed analysis

Part 1 – Preliminary provisions

Purpose

Section 3 sets out the purpose of the Act, which is 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 in pre-retirement. The Act aims to increase individuals'

wellbeing and financial independence, particularly in retirement, and to provide retirement benefits.

Who the Act applies to

Section 6 sets out who is eligible to be a KiwiSaver member. The Act only applies to natural persons – and only New Zealand citizens and those eligible to be in New Zealand indefinitely in terms of the Immigration Act 1987 can join KiwiSaver. The effect is that New Zealand citizens, Australian citizens, and people who hold either a New Zealand or Australian-residence permit can be KiwiSaver members. People who hold temporary, visitor or student permits cannot.

The Act only applies to people who are, or normally are, personally present in New Zealand at the time they become subject to automatic enrolment or opt in. Government employees can, however, become KiwiSaver members at any stage, including government employees living overseas. However, they must still meet the test above.

The Act applies to employers who are New Zealand-resident or who carry on business from a fixed establishment in New Zealand. An employer is a person who pays, or who is liable to pay, salary or wages. In the case of state schools or integrated schools, the relevant Board of Trustees is considered to be the employer.

Part 2 – Membership of KiwiSaver

Subpart 1 – Becoming members of KiwiSaver

Subpart 1 contains the rules for individuals to become KiwiSaver members by automatic enrolment when they begin new employment or by opting in.

Automatic enrolment

The automatic enrolment rules generally apply to employees who start new employment if:

- they meet the residency requirements (as outlined under “Who the Act applies to”);
- their new employer is not an exempt employer;
- they are 18 years or over, but less than the New Zealand superannuation qualification age (currently 65) when they start that employment;
- they are not already a member of a KiwiSaver scheme.

New employment

Section 11 defines “new employment”. It means employment that is started on or after the date the automatic enrolment rules begin (1 July 2007), but does not include:

- temporary employment;
- employment where the employee remains on the same payroll that they were on immediately before starting the new employment (except in the case of schools); and

- employment with an employer that carries on the same business as was undertaken immediately before the new employment began (provided the employer gives the required notice to the Commissioner of Inland Revenue).

Temporary employment

“Temporary employment” is defined under section 12 as employment that is as a casual agricultural worker¹ or employment that is under a contract of service for a period of 28 continuous days or less. Temporary employment ceases and the automatic enrolment rules apply (as if the person started new employment) if the person ceases to be a casual agricultural worker or if the employment is extended beyond 28 days.

The intention of the 28-day rule is to ensure that people in temporary employment are not subject to the automatic enrolment rules if the period of employment is 28 days or less.

Employment in schools

Section 13 provides that if an employee begins a new job at a state school or integrated school, they are treated as starting new employment, despite staying on the same payroll.

Same business

“Same business” is defined under section 11 as a business that in substance carries on the same or a similar role, regardless of whether the legal entity carries on the business changes. Same business includes:

- a company that results from, or continues after, an amalgamation under the Companies Act, involving the company that employed the person immediately before new employment was started;
- a business that takes over as a going concern the business that employed the person immediately before they started new employment; and
- creation of a new partnership as a result of a partner joining or exiting a business.

Example one

Company A buys a business owned by Company B. As part of the purchase agreement, the employees of Company B become employees of Company A. Company A provides the requisite notice to the Commissioner and the employees are not subject to automatic enrolment. If Company A did not provide the requisite notice, the employees would be subject to the automatic enrolment rules.

Other situations when automatic enrolment rules do not apply

Under section 14 the following situations are not considered new employment and the automatic enrolment rules do not apply if:

¹ As defined in section OB 1 of the Income Tax Act.

- the person is an employee only because he or she receives one of the following:
 - payments to working partners;
 - parental leave payments; and
 - certain ACC payments²
- the new employment is as an election-day worker or a private domestic worker;³ or
- the employee is not required to have tax deductions made from his or her salary or wages under the PAYE rules.

Beneficiaries are not subject to automatic enrolment

Example one

On 1 April 2007 Maria begins working full-time for K&S Ltd on a permanent contract. The automatic enrolment rules do not apply because they have not yet commenced.

Example two

On 1 October 2007 Scott begins working full-time for ABC Ltd on a permanent contract. Scott is 40 years old and is a New Zealand citizen. The automatic enrolment rules apply to Scott.

Example three

On 30 August 2007 Hamish begins a part-time job working for his local supermarket. Hamish is 15 years old and is a New Zealand citizen. The automatic enrolment rules do not apply because Hamish is under 18 years old.

Example four

Tama has been working for a local plumbing firm for the past five years in the same role. The firm is expanding and on 1 September 2007 it amalgamates with another plumbing firm. Because Tama's employer provided Inland Revenue with the required information to show that the same business was being carried on, the automatic enrolment rules do not apply to Tama because he has not started new employment.

Example five

On 1 January 2008 Steve begins new employment at a bank. The bank has been approved as an exempt employer because it provides employees access to a registered superannuation scheme that has been approved by the Government Actuary. The automatic enrolment rules do not apply to Steve because his employer is an exempt employer.

Example six

Neil, an Australian citizen aged 30, starts working for an accountancy firm on 1 October 2007. His contract is short-term and is due to expire on 11 October 2007. The automatic enrolment rules do not apply because Neil is a temporary worker. If Neil's contract was extended beyond 28 October 2007, the automatic enrolment rules would apply from 29 October 2007.

Example seven

Matthew is from Los Angeles, is studying in New Zealand and is in the country on a student's visa. On 1 December 2007 Matthew begins a part-time job to help meet his living costs. Because Matthew is not entitled to be in New Zealand indefinitely in terms of the Immigration Act, the KiwiSaver Act does not apply to him and therefore the automatic enrolment rules do not apply.

Example eight

On 10 July 2007 Mark begins working at the local library. Mark is a New Zealand citizen and is 70 years old. Because Mark is older than the New Zealand Superannuation qualification age, the automatic enrolment rules do not apply.

Example nine

Trevor is already a member of a KiwiSaver scheme. On 10 June 2008 Trevor begins working permanently for a computer sales company. Because Trevor is already a member of KiwiSaver, the automatic enrolment rules do not apply to him.

Example ten

Bronwyn is a teacher working permanently for Wadestown School and in January 2008 will begin working at Karori Normal on a permanent contract. Despite staying on the Ministry of Education payroll, the automatic enrolment rules apply to Bronwyn when she begins her new job.

Example eleven

Fran is a member of RetireEzy, a registered superannuation scheme (that is not a KiwiSaver scheme). Fran's bank provides access to the scheme and her employer is not affiliated to the scheme (or any other scheme) in any way. Fran begins a new job and is subject to the automatic enrolment rules. Although she is a member of an existing registered superannuation scheme, this does not affect the fact that she is subject to automatic enrolment (because her employer is not an exempt employer).

Example twelve

Andrew injures himself at work and begins receiving earnings compensation from ACC. The automatic enrolment rules do not apply to Andrew.

² As referred to in paragraphs (b)(iii), (b)(x) and (b)(xii)–(xvi) respectively in the definition of salary and wages in section OB 1 of the Income Tax Act.

³ As defined in section OB 1 of the Income Tax Act.

Example thirteen

Bob becomes unemployed and starts receiving a benefit payment. He is not subject to automatic enrolment.

Opting out

How employees can opt out

Sections 16 to 21 allow employees who have been automatically enrolled in KiwiSaver to opt out. Employees can opt out by giving an opt-out notice to Inland Revenue or to their employer. Opt-out notices will be included in the information packs that employers must provide to their employees but can also be given in any other form and manner permitted by the Commissioner.

An opt-out notice takes effect on the later of:

- day 14 of the employment that triggered the automatic enrolment rules (the end of week two);
- the date on which the opt-out notice is:
 - accepted by the Commissioner, in the case of a notice given to the Commissioner; or
 - received by the employer, in the case of a notice given to the employer.

An employer who receives an opt-out notice must notify the Commissioner no later than the time that they are required to deliver the next employer monthly schedule to the Commissioner.⁴

Time limit for opting out

Employees who are subject to automatic enrolment can opt out of KiwiSaver in the period beginning on the end of week two after beginning employment (day 14) and ending on the end of week eight after beginning employment (day 56).

Extension of opt-out period

The Commissioner may accept a late opt-out notice if one or more of the following applies:

- the employer did not supply the employee with an information pack within seven days of new employment starting with that employer;
- the Commissioner did not send an investment statement for the default KiwiSaver scheme that the employee was provisionally allocated to;
- the employer did not supply an investment statement for their chosen KiwiSaver scheme (if the employer's choice of KiwiSaver scheme is effective);
- events outside the control of the employee meant that the opt-out notice could not be given within the time limit for opting out and, in the opinion of the Commissioner, it is reasonable that a late opt-out notice be accepted.

The Commissioner may accept a late opt-out notice up to three months after the date on which the Commissioner receives the first contribution for an employee. If the Commissioner receives a late opt-out notice and does not exercise his discretion to accept it, the Commissioner must treat the notice as if it were an application for a contributions holiday, if the person was eligible to apply for a contributions holiday.

Commissioner must give notice to employer if employee opts out

If the Commissioner accepts an opt-out notice from an employee the Commissioner must, as soon as practicable, give notice to the employer stating that:

- the employee has opted out; and
- the employer must not make any further deductions of contributions from that employee, from the effective date of the opt-out.

Effect of opting out

From the date on which an opt-out takes effect, an employee ceases to be a member of any KiwiSaver scheme that the employee may have become a member of. The employer must stop making deductions of contributions from the employee's salary or wages, with effect on the next payment of salary or wages that the employer calculates. An opt-out notice only applies to the employment that triggered the automatic enrolment rules and does not apply to any other new employment that the employee may later begin.

Employers may refund any contributions deducted from the employee's salary or wage directly to the employee who has opted out or they can pay it to the Commissioner (who will refund it to the employee).

Example one

On 1 April 2008 Mike begins a new job and the automatic enrolment rules apply. On 15 May 2008 Mike opts out of KiwiSaver by giving an opt-out notice to his employer. His employer must cease making deductions of contributions from the next pay calculated after receiving the opt-out notice.

Example two

On 10 October 2007 Tracey begins a new job and the automatic enrolment rules apply. Tracey wants to opt out that day. However, Tracey cannot opt out until 23 October 2007.

Example three

On 5 November 2007 Renee begins a new job and the automatic enrolment rules apply. Ten weeks later, Renee decides she wants to opt out and sends an opt-out notice to the Commissioner. Because none of the circumstances for accepting late opt-out notices applied, the Commissioner declined the opt-out. Renee cannot opt out.

⁴ This is a requirement even if the next return due is a nil return.

Example four

On 13 January 2008 Sam begins a new job and the automatic enrolment rules apply. Nine weeks later, Sam sends an opt-out notice to the Commissioner. Because Sam had been in hospital for the past seven weeks, the Commissioner considers it reasonable that a late opt-out notice is accepted. The Commissioner gives notice to Sam's employer stating that Sam has opted out and that deductions of contributions must cease. The Commissioner direct credits to Sam's bank account a refund of contributions deducted.

Example five

Carol works part-time and gets a second part-time job somewhere else. Carol was automatically enrolled in KiwiSaver for her first job, but is not a member, because she opted out. She is automatically enrolled again for the second job. She must opt out again for the second job if she does not want to be a KiwiSaver member.

Opting in

Sections 33 to 37 contain the rules for people to opt into KiwiSaver.

Who can opt in?

A person can opt into KiwiSaver at any time, provided they:

- meet the residency requirements (as outlined earlier under "Who the Act applies to");
- are under the New Zealand superannuation qualification age;
- are not already a member of a KiwiSaver scheme; and
- are not subject to the automatic enrolment rules.

How to opt in

An individual can opt in by contracting directly with the provider of a KiwiSaver scheme or, if the person is an employee, by giving his or her employer a notice requiring deductions of contributions to be made from his or her salary or wages.

Persons aged under 18 may only opt in by contracting directly with a provider. If a provider of a KiwiSaver scheme accepts a person who is aged under 18 as a member of their scheme, the contract between the provider and the person must be treated for the purposes of the Minors' Contracts Act 1969 as if the person were aged 18 years.

Effect of opting in

Employees who opt in become liable to deductions of contributions from their salary or wages paid by the employer that the opt-in relates to, and from salary or wages paid as part of any other employment that the employee starts after opting in.

A person who has opted in cannot opt out.

Example one

Jean is working full-time and approaches her employer about opting into KiwiSaver. Because Jean is 67 years old, which is older than the current New Zealand superannuation qualification age, she is not eligible to join KiwiSaver.

Example two

Ashley, a 40-year old New Zealand citizen, has been working with the same firm for 20 years and wants to join KiwiSaver. He advises his employer that he wants to opt in to KiwiSaver and provides his employer with a notice requiring deductions of contributions. Ashley is subject to deductions of contributions from his next payment of wages. Ashley gets a second job so he can save for an overseas holiday. He is also subject to deductions of contributions from his new job.

Example three

Chloe is a 15-year old, New Zealand permanent resident who wishes to join KiwiSaver. She advises her employer that she wishes to opt in. Chloe cannot opt in via her employer (because she is under 18 years) but must contract directly with a provider of a KiwiSaver scheme. The scheme will notify Inland Revenue that Chloe is a member and Inland Revenue will advise her employer to start making deductions of contributions from her pay.

Example four

Mary has been on ACC for the past two years and wishes to join KiwiSaver. She can opt in by giving ACC notice that she wants deductions of contributions from her ACC payments.

Exempt employer

Sections 24 to 32 contain the rules allowing certain employers to be exempt from the requirement to automatically enrol their new employees in KiwiSaver.

Purpose of being an exempt employer

Employers can apply to the Government Actuary for approval for their employees to be exempt from the automatic enrolment rules if they provide access to an approved registered superannuation scheme which complies with specified criteria. A person who starts new employment with an exempt employer or who is an existing employee of an exempt employer is still able to opt in. In addition, a person who is already a member of a KiwiSaver scheme and who begins new employment with an exempt employer is still subject to automatic deductions of contributions from the salary or wages paid by that employer.

Criteria to become an exempt employer

For an employer to become an exempt employer it must provide access to a scheme that meets certain criteria. The key criteria that must be met are:

- the scheme is, in practice, open to all new employees;
- the scheme is a registered superannuation scheme;
- the member's interest in the scheme must be portable;
- if the scheme is a defined contribution scheme, the minimum amount that the employee must contribute combined with the maximum amount that an employee can compel the employer to contribute must be at least 4% of gross base salary or wages;
- any employer contributions that count towards the 4% must vest within the employee within five years;
- if the scheme is a defined benefit scheme, the actuary of the scheme must certify to the satisfaction of the Government Actuary that the value of each employee's accrued benefits are increasing at an amount equivalent to at least 4% of gross base salary or wages.

Employers who provide a scheme for their employees under a master trust arrangement are eligible to seek an exemption and an employer who provides their employees with access to more than one scheme can also seek an exemption if, when taken as a whole, the scheme would comply with the criteria.

How to become an exempt employer

A person may apply to the Government Actuary for approval of an employer as an exempt employer. The information must be accompanied by:

- information that satisfies the Government Actuary that the scheme complies with the required rules;
- the names, addresses, and tax file numbers of each employer for whom the application is made; and
- details of the names, addresses, tax file numbers, and payroll arrangements of any other members of the group that the Government Actuary may request if the application is made in respect of an employer that is part of a group of companies.

Within 28 days of receiving an application for approval of an employer as an exempt employer the Government Actuary must:

- consider whether he or she is satisfied that the employer is eligible to be approved as an exempt employer; and
- if he or she is satisfied, approve the employer as an exempt employer and register the employer on the register of exempt employers.

The Government Actuary must give notice to the employer as soon as practicable after approving or not approving the employer as an exempt employer. For those employers who have been approved, the notice

must specify an effective date after which employees who start new employment with the employer will be exempt from the automatic enrolment rules.

The Government Actuary must give notice to the Commissioner as soon as practicable after an employer is approved as an exempt employer.

Revocation of exempt employer approval

The Government Actuary may revoke an exempt employer approval if:

- the Government Actuary has given at least 28 days notice to the employer that he or she is considering whether to revoke the approval; and
- the Government Actuary is satisfied on reasonable grounds that the employer no longer provides access to a scheme that complies with the requirements outlined above.

A revocation may be on application from the employer or on the Government Actuary's initiative. The Government Actuary must:

- give notice to the employer as soon as practicable after revoking the approval;
- specify in that notice an effective revocation date after which employees who start new employment with the employer will be subject to the automatic enrolment rules (unless those rules do not otherwise apply);
- remove the employer from the register of exempt employers; and
- give notice to the Commissioner as soon as practicable after an employer is revoked as an exempt employer.

Register of exempt employers

Sections 156 and 161 establish a register containing the names of employers who are exempt employers.

Example one

Widgets Ltd applies to the Government Actuary for approval as an exempt employer because it offers its employees access to a registered superannuation scheme. On 16 July 2007 the Government Actuary approves Widgets Ltd as an exempt employer effective from that date. On 17 July 2007 Jeff is employed on a part-time, permanent basis. Jeff, although a New Zealand citizen who is over 18 years old and under the New Zealand superannuation qualification age, is not subject to automatic enrolment. If Jeff opted into KiwiSaver, Widgets Ltd would be required to make deductions of contributions from his salary.

Example two

Sarah is a KiwiSaver member and begins a new job. Sarah's new employer has been approved as an exempt employer. Because Sarah is already a KiwiSaver member, the

employer is still required to make deductions of KiwiSaver contributions from Sarah's wages.

Example three

Frank & Williams Ltd was approved as an exempt employer. It receives notification from the Government Actuary that from 1 April 2008 it has been revoked as an exempt employer because it no longer meets the requisite criteria. From that date, employees who begin new employment with Frank & Williams Ltd are subject to the automatic enrolment rules (to the extent that they apply).

Effect of membership of KiwiSaver

The effect of automatic enrolment or opting in is that:

- an employee will have automatic deductions of contributions made from his or her salary or wages. Deductions start from the next pay calculated after the new employment begins or the person opts in;
- an employee must continue to have deductions made from his or her salary or wages paid in respect of any new employment; and
- the person will become a member of a KiwiSaver scheme.

A person who is subject to automatic enrolment or who opts in will be a KiwiSaver member until the earliest of:

- an opt-out notice taking effect (this only applies to people who are subject to automatic enrolment);
- the New Zealand superannuation qualification age being reached or five years of membership, whichever is later;
- the provider terminating the employee's membership of a KiwiSaver scheme because the balance in all of their accounts reaches zero (at the option of the provider); or
- the date of withdrawal or transfer to a foreign scheme in the case of permanent emigration.

Employees will continue to be liable for deductions of contributions until the earliest of:

- ceasing to be a KiwiSaver member;
- the date on which the employer is given notice that they are taking a contributions holiday; or
- the employee is not required to have tax deductions made from his or her salary or wages under the PAYE rules.

While members who reach the age at which withdrawal is permitted or who permanently emigrate will be able to

access their funds in whole and cease to be a KiwiSaver member, it is not a requirement that they do so.

Example one

Betty opts in to KiwiSaver at age 62. Betty continues to contribute to KiwiSaver and remains in New Zealand. She will continue to be a member until at least age 67. At age 67, Betty decides that she does not want to access her funds. Betty continues contributing to KiwiSaver and is still a KiwiSaver member.

Example two

Peter is a KiwiSaver member and moves to Australia permanently. After being overseas for one year Peter withdraws all of his funds (under the permanent emigration rules in Schedule 1 of the Act) and ceases to be a KiwiSaver member.

Example three

Nathan has been automatically enrolled in KiwiSaver and successfully opts out on 7 January 2008. Nathan ceases to be a member as at that date.

Information requirements

Sections 22, 23, 34, 38 and 39 require information about individuals who are automatically enrolled or who opt in to be provided to employers and to the Commissioner.

Employees who begin new employment or who opt in via their employer

Every person who starts new employment must give notice to their employer of:

- his or her name and address;
- his or her tax file number; and
- whether or not he or she is already a member of a KiwiSaver scheme and, if they are a member, must either:
 - give their employer a notice requiring deductions of contributions from their salary or wages; or
 - give or show to their employer a copy of a notice from the Commissioner stating that he or she has been granted a contributions holiday.

The information must be given as soon as practicable after the person starts the new employment. Employers are required to give notice to the Commissioner of the information that the employee provides them, if the employer is satisfied that the employee is subject to the automatic enrolment rules.

Persons who opt in via their employer must provide their employer with their name, address and tax file number. Employers are required to give notice to the

Commissioner of the information that the employee provides them, if the employer is satisfied that the employee is eligible to opt in.

Employers must provide the above information no later than the time they are next required to deliver an employer monthly schedule to the Commissioner.

Example one

NW Inc. is satisfied that their new employee, James, is subject to the automatic enrolment rules. James only provides NW Inc with his name and tax file number (James does not provide his address). NW Inc. is required to give the information that James supplied to the Commissioner no later than the time it is next required to deliver an employer monthly schedule to the Commissioner. NW Inc. is not required to provide James's address to the Commissioner.

Providers who contract directly with a person to be a member of its scheme

People who are under 18 or who are not an employee (for example, the self-employed) may opt into KiwiSaver by contracting directly with a provider. Providers who contract directly with a person to be a member of its KiwiSaver scheme must give notice to the Commissioner of that fact as soon as practicable after entering into the contract. The notice must contain the following information:

- the person's name and address;
- the person's tax file number;
- the date of the first contribution received by the provider for the person (if any);
- if the person is an employee, the name and address of each of the person's employers where deductions of contributions are to be made from salary or wages and the contribution rate in relation to each of those employers;
- the name, address and tax file number of both the provider and the scheme; and
- any other information that the Commissioner requires.

If the Commissioner receives notice from a provider that an employee has opted in, the Commissioner must, as soon as practicable, give notice to each of the person's employers to whom the opt-in notice relates stating:

- that the employer must start to make deductions of contributions from each payment of the person's salary or wages that is calculated after the date the employer receives the notice from the Commissioner;
- the contribution rate; and
- the person's name and tax file number.

Example one

Isabel generally works for herself but is also an employee of the local council, where she works "as and when required". Isabel contracts directly with Super Ltd, a KiwiSaver scheme provider and names the council as her employer. Super Ltd must provide the Commissioner the required information about Isabel. The Commissioner is required to inform the local council to begin making deductions of contributions from wages paid to Isabel.

Example two

Jenna is 16 years old and has two part-time jobs. She contracts directly with a KiwiSaver scheme provider and names only Employer A to have deductions of contributions from her wages. Employer A receives notice from the Commissioner to begin making deductions of contributions from Jenna's wages. The Commissioner does not receive any information from Jenna's KiwiSaver scheme provider about Employer B and does not send any notice to Employer B.

Information packs

Under section 40 the Commissioner must supply information packs about KiwiSaver to employers. The Commissioner must also supply information packs to any person on request. Section 41 provides that information packs must contain the following information:

- a description of KiwiSaver;
- a statement that membership of KiwiSaver, and of any individual KiwiSaver scheme, is at the member's own risk;
- a summary of what could happen under the default allocation rules or if an employer has a chosen KiwiSaver scheme;
- a description of how to access information about KiwiSaver schemes;
- a statement that people should seek financial advice from a professional financial advisor (rather than an employer) if they want information in relation to:
 - their personal financial circumstances;
 - deciding whether to opt in or opt out or not;
 - choosing a KiwiSaver scheme or investment product of a KiwiSaver scheme; or
 - KiwiSaver or its financial concepts.
- an opt-out notice form;
- a statement about collection of personal information that complies with principle 3 in the Privacy Act 1993 (which relates to the collection of information from a subject); and
- any other prescribed information.

Section 42 requires employers to supply an information pack to employees who:

- are subject to the automatic enrolment rules (within seven days of the new employment beginning);
- opt in by giving their employer a notice that requires deductions of contributions (within seven days of the notice being given to the employer); and
- request an information pack in contemplation of opting in.

Example one

Mio begins a new job on 5 September 2007 and is subject to the automatic enrolment rules. Mio's employer must give her an information pack no later than 11 September 2007.

Example two

Julie tells her employer that she is thinking about joining KiwiSaver and would like an information pack. Her employer is required to give her one. This alone does not mean that Julie has joined, or is required to join, KiwiSaver.

Employers may be liable for a penalty for failure to supply an information pack. However, employers are not liable for such a penalty if the employer proves that:

- failure of the employer to supply the information pack was caused by the fact that the Commissioner had not given the employer enough information packs to enable the employer to meet its obligations; and
- the employer notified the Commissioner that it needed more information packs as soon as practicable after realising it did not have enough.

Further information on penalties that are to apply for KiwiSaver purposes is outlined below (under Part 5).

Example one

MA Ltd employs five new staff members and all of them are subject to automatic enrolment. MA Ltd only has four information packs left and is therefore unable to provide one of the new employees an information pack within seven days of employment beginning. Because MA Ltd notified the Commissioner that it needed more information packs as soon as realising it would not have enough, MA Ltd will not be penalised for failing to supply an information pack within the required seven-day period.

Employers who have a chosen KiwiSaver scheme

Section 43 requires that employers who have chosen a KiwiSaver scheme for their employees must also, at the time the information pack is supplied to the employee, supply:

- an investment statement for that scheme (if that choice of KiwiSaver scheme is effective); and
- a statement that, if the employee does not choose his or her own KiwiSaver scheme, the employee will be allocated to the employer's chosen KiwiSaver scheme (and not to one of the default KiwiSaver schemes by the Commissioner).

Example one

Stanley & Sons has chosen KAB Ltd scheme for its employees. Stanley & Sons' new staff member is subject to automatic enrolment. At the same time as an information pack is given to the new employee, an investment statement for KAB Ltd scheme must be given to the employee. The employee must also be given a statement that they will be allocated to that scheme if they do not choose their own scheme.

Subpart 2 – Allocating people to KiwiSaver schemes

Subpart 2 allows the allocation of people to individual KiwiSaver schemes. Section 53 specifies that a person may be a member of only one KiwiSaver scheme at a time, but can have more than one account or investment product of any one scheme. There are three ways that a person can become a member of a KiwiSaver scheme:

People may choose their own KiwiSaver scheme

Section 45 allows a person to choose their own KiwiSaver scheme at any time by contracting directly with the provider of the scheme to become a member. This choice overrides an employer choice of KiwiSaver scheme or an allocation to a default KiwiSaver scheme by the Commissioner.

Employer choice of KiwiSaver scheme

Sections 46 to 49 allow employers to choose a KiwiSaver scheme for their employees. If they do, any employees who start new employment will then become members of that scheme if the employees do not choose their own KiwiSaver scheme.

An employer may choose a KiwiSaver scheme only if all new permanent employees of the employer are eligible to be members of the scheme and the KiwiSaver Act applies to the employees. "Permanent employees" are employees other than those employed in temporary employment (as defined earlier).

The way in which an employer may choose a KiwiSaver scheme is:

- by agreement with a provider to give access to the scheme for its employees; and
- by giving notice to the Commissioner of the name, address and tax file number of the employer, the provider and the chosen KiwiSaver scheme.

An employer's choice of KiwiSaver scheme is effective:

- from the date on which the notice is accepted by the Commissioner, or on any later date specified in the notice; and
- until the effective date of the earliest of any of the following notices:
 - notice given by the employer to the Commissioner of an alternative choice of KiwiSaver scheme;
 - notice given by the employer to the Commissioner stating that the employer no longer has a chosen KiwiSaver scheme; or
 - notice given by the Commissioner to the employer stating that the employer's choice of KiwiSaver scheme has been revoked by the Commissioner on the grounds that the Commissioner is not satisfied that the scheme is eligible to be the employer's chosen KiwiSaver scheme.

While an employer's choice of KiwiSaver scheme is effective:

- three months after the Commissioner receives the first contribution for an employee who has been automatically enrolled or who has opted in via their employer, the person is treated, on that date:
 - as having offered to become a member of the employer's chosen KiwiSaver scheme; and
 - as having subscribed for securities in that scheme;
- the provider of the employer's chosen KiwiSaver scheme must accept that offer and allot those securities;
- the membership contract of the KiwiSaver scheme is binding on the employee and the provider, and is enforceable as if it were a contract that was freely and voluntarily entered into;
- the contract may be amended, replaced or terminated, and the allotment of any securities relating to the contract may be voided, in the same way as if the contract were freely and voluntarily entered into; and
- the Commissioner must, as soon as practicable, give notice to the provider of the scheme the employee's name, address, date of birth (if known to the Commissioner), tax file number, and any other personal information that the Commissioner considers relevant.

If an employer's choice of KiwiSaver scheme ceases or changes, the cessation or change does not affect any person who became a member while the scheme was the employer's chosen KiwiSaver scheme.⁵

Default KiwiSaver schemes

In cases where the employee does not choose their own KiwiSaver scheme or if their employer does not have a chosen KiwiSaver scheme, sections 50 to 52 provide for the employee to be allocated to a default KiwiSaver scheme by the Commissioner.

When the Commissioner is notified that a person has been automatically enrolled or has opted in via their employer, the Commissioner will provisionally allocate the person to a default KiwiSaver scheme, except where:

- the person is an employee of an employer whose chosen KiwiSaver scheme is effective;
- the person has opted out; or
- the Commissioner has been notified by a provider that the person has become a member of a KiwiSaver scheme.

After notification, the Commissioner must as soon as practicable:

- provisionally allocate the person (on a sequential basis) to a default investment product of a default KiwiSaver scheme;
- give notice to the person of that allocation, including the name and address of the scheme provider they have been provisionally allocated to;
- send the person the investment statement relating to that product in that scheme; and
- give notice to the person of what will happen if the person does not choose his or her own KiwiSaver scheme.

People who are provisionally allocated have three months from the time the Commissioner receives the first contribution for the person to choose a KiwiSaver scheme if they wish. Otherwise, the person is treated as having offered to become a member of the scheme to which they were provisionally allocated. The Commissioner is required to notify the person that the allocation has been completed as per the provisional allocation and notify the provider of the default KiwiSaver scheme that the person has been allocated to. The Commissioner is required to give the person's name, address, date of birth (if known), tax file number and any other personal information the Commissioner considers relevant, to the provider.

However, if a dispute is underway on the date which would normally be the final allocation date, the final allocation date is the effective date of the notice given by the Commissioner stating that the dispute has been resolved or otherwise terminated.

At the point of final allocation the person becomes a member of the KiwiSaver scheme, the contributions to be paid via the Commissioner must be held on trust by the provider and the provider must allot the relevant securities. The Act deems the membership contract to

⁵ This does not limit an amendment made to the Superannuation Schemes Act 1989 which provides for transfers without consent in certain circumstances (this is discussed further below).

be as enforceable, and otherwise the same, as if it were a contract freely entered into.

Example one

Frank opts in to KiwiSaver by contracting directly with XYZ Ltd and becomes a member of its scheme. The Commissioner is not required to allocate Frank to a default scheme.

Example two

Lana is automatically enrolled in KiwiSaver. Her employer has chosen ABC Ltd as its chosen KiwiSaver scheme. She does not choose her own scheme and three months after the Commissioner receives the first contribution for Lana, she is treated as having offered to become a member of ABC Ltd scheme. The Commissioner must give notice to ABC Ltd of Lana's details.

Example three

Suna is automatically enrolled in KiwiSaver. Because Suna has not chosen her own scheme and her employer does not have a chosen KiwiSaver scheme, the Commissioner provisionally allocates her to RetireEzy scheme (a default scheme). The Commissioner gives notice to Suna that she has been provisionally allocated to RetireEzy, sends her the relevant investment statement and informs her that if she does not choose her own scheme she will become a member of RetireEzy. The Commissioner does not hear from Suna and three months after receiving the first contribution final allocation occurs to RetireEzy. The Commissioner sends her notice that the allocation has been completed and informs RetireEzy that Suna has become a member of its scheme.

Example four

Arti is automatically enrolled and is provisionally allocated to BI Ltd default scheme by the Commissioner. Two weeks later, Arti contracts with Retire4Life to be a member of its scheme. Arti becomes a member of Retire4Life's scheme.

Subpart 3 – Transfers between KiwiSaver schemes

Subpart 3 allows a person to transfer between individual KiwiSaver schemes.

Voluntary transfers

Section 55 allows a KiwiSaver member to transfer to another KiwiSaver scheme at any time by contracting directly with the provider of the new KiwiSaver scheme to become a member of that scheme (provided that person is eligible to be a member of the scheme).

The provider of the new scheme must, as soon as practicable, give notice:

- To the Commissioner:
 - that the person has transferred to the new scheme;
 - the person's name, address, date of birth and tax file number.
- To the provider of the old scheme:
 - that the person has ceased to be a member of the old scheme and the effective date of the transfer;
 - the new scheme's name and address; and
 - the funds and information that is required to be transferred.

The provider of the new scheme must give notice to the provider of the old scheme that the member wishes to transfer to the new scheme.

The provider of the old scheme must, within 35 days of receiving notice of the transfer (or any longer period agreed between the providers of the old and new schemes):

- transfer the member's accumulated funds to the new scheme;⁶
- give notice to the member of the amount transferred;
- give notice to the provider of the new scheme:
 - of the date on which the member first became a member of a KiwiSaver scheme;
 - whether the member has made a withdrawal for the purchase of a first home; and
 - of any contributions holidays in force.

Involuntary transfers

In certain circumstances a person may become ineligible to be in a particular scheme, for example:

- if the person ceases to be eligible to be a member of his or her employer's chosen KiwiSaver scheme (for example, if they ceased to be an employee of that employer and the scheme only applies to its employees);
- if the scheme they are in winds up;
- if the scheme is in contravention of certain provisions of securities law.

Under sections 57 to 59, the person must be allocated to another KiwiSaver scheme according to the process outlined above. In this case an employer choice of scheme will not apply. The person can choose their own KiwiSaver scheme, but if they do not choose they will be allocated to a default KiwiSaver scheme.

⁶ Member's accumulated funds is the net value of the total of:
 - the member's contributions;
 - any vested employer contributions in respect of the member;
 - any fee subsidies paid in respect of the member; and
 - the Crown contribution in respect of the member.

The Commissioner is required to take whatever steps the Commissioner thinks appropriate to ensure that, so far as practicable, the process for an involuntary transfer follows the process for a voluntary transfer. The provider of the old scheme will, however, have three months from when it received notice of the transfer (instead of 35 days) to meet the requirements outlined above.

The Commissioner must send the following information to people who are subject to an involuntary transfer:

- an information pack;
- advice on the effect of the transfer and the process of allocating the member to another KiwiSaver scheme.

If an employee ceases to be eligible to be a member of the employer's chosen KiwiSaver scheme, the employer must give the employee and the Commissioner notice of that fact.

Example one

Peter is a member of his employer's (FashionZ Ltd) KiwiSaver scheme. One of the conditions of being a member of that scheme is that the person remains an employee of FashionZ Ltd. Peter quits his job and therefore ceases to be eligible to be a member of that scheme. The Commissioner is required to provisionally allocate Peter to a default scheme. If Peter does not choose his own scheme within the required time period, Peter is treated as having become a member of the default scheme to which he was provisionally allocated.

Part 3 – KiwiSaver contributions

Subpart 1 – Deductions of contributions from salary or wages

Subpart 1 provides for automatic deductions of KiwiSaver contributions to be made from the salary or wages paid to employees.

Payments of salary or wages to which deduction rules apply

An employer is required to make deductions of KiwiSaver contributions from the salary or wages paid to employees when:

- an employee has started new employment and the automatic enrolment rules apply;
- an employee has opted in to KiwiSaver by giving their employer a notice requiring deductions of contributions; or
- the Commissioner has given the employer a notice requiring the deduction of contributions from the employee's salary or wages.

Section 60 requires deductions from:

- the first payment of salary or wages after an employee starts new employment; or

- the next payment of salary or wages calculated after the employer receives notice from the employee or the Commissioner requiring the deduction of contributions.

The Commissioner may give a notice to the employer under section 61 requiring the deduction of contributions to achieve the effect of the automatic enrolment rules or the rules regarding opt-in by employees.

An employer is not required to make deductions of contributions from a payment of salary or wages under section 62 if:

- the employee has opted out (either via the employer or via the Commissioner and the Commissioner has given notice to the employer);
- the employee has shown their employer a notice of a contributions holiday, or the Commissioner has notified the employer of a contributions holiday, for so long as the employer is satisfied that the employee is on that contributions holiday; or
- in accordance with the PAYE rules, no tax deduction is required to be made from the payment of the salary or wages at the time the payment is made.

Section 63 states that Part 3 also applies to PAYE intermediaries.⁷

Contribution rate

Section 64 sets out the contribution rate, which (in relation to an employee and to an employer and to each payment of salary or wages) is:

- 4% of the employee's gross salary or wages (the default rate if no contribution rate is provided); or
- 8% of the employee's gross salary or wages, if the employee gives his or her employer a notice requiring contributions to be deducted at that rate.

The employee can change their contribution rate (from 4% to 8% or from 8% to 4%) by giving notice to their employer of the new rate. Employees may not change their contribution rate at intervals of less than three months apart in relation to an employer, unless the employer agrees.

In accordance with section 65, the contribution rates may be altered and additional contribution rates may be provided for by the Governor-General by Order in Council.⁸ The Order in Council must specify:

- the date the new contribution rate(s) applies from – any change must apply from the first day in a tax year;
- how the contribution rates apply to employees who are already KiwiSaver members (for example, if

⁷ As defined in section OB 1 of the Income Tax Act, who are acting under subpart NBA of Part N of the Income Tax Act as if references to the employer were a reference to the PAYE intermediary and with other necessary modifications.

⁸ The Act gives an Order in Council the force of law as if it were enacted by the KiwiSaver Act itself.

the default contribution rate was reduced to 2%, the Order in Council would have to specify whether that rate then applied to employees who were on a contribution rate of 4%).

Such Orders in Council expire after 12 months unless the Order in Council is expressly validated and confirmed by an Act passed before the expiry date.

Obligation to make deductions

Under section 66 employers are required to make deductions from each payment of the employee's salary or wages of an amount equal to the contribution rate. Employees can choose if employer contributions count towards the contribution rate as long as those contributions vest immediately in the employee.

If employer contributions count towards the contribution rate, the employer must make deductions of contributions from each payment of the employee's salary or wages equal to the contribution rate minus the gross amount of the employer contribution.⁹

PAYE rules apply to deductions

Section 67 specifies that certain parts of the PAYE rules of the Income Tax Act apply to the deduction of KiwiSaver contributions. The effect is that:

- employers must deduct and record contributions at the same time and in the same way as they deduct and record PAYE; and
- employers must pay contributions deducted to the Commissioner at the same time as they on-pay PAYE deductions.

Example one

Jack is automatically enrolled in KiwiSaver and earns a salary of \$50,000, payable weekly. Jack does not give his employer notice requiring deductions at 8%. His employer is required to deduct contributions of \$38.46 per week (4% of his weekly salary of \$961.54). Jack opts out of KiwiSaver via his employer. His employer is no longer required to make deductions of KiwiSaver contributions and can refund contributions already deducted but not on-paid to Inland Revenue directly to Jack. If the employer does not refund the contributions, they must be on-paid to Inland Revenue at the time the next employer monthly schedule is required to be sent. If the contributions are on-paid to Inland Revenue, the employer monthly schedule must show those deductions of contributions from Jack's salary.

Money paid for things other than retirement benefits

The Act 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. In addition, there is no requirement on employers to make deductions from salary and wages for payment of other things.

Example two

Anna's KiwiSaver scheme offers a life insurance package. Her employer deducts 2% of her salary and on-pays it directly to the scheme so that Anna is entitled to the life insurance benefits. The 2% deduction does not count towards the minimum contribution rate. Anna has a further 4% deducted from her salary which is paid via Inland Revenue to her scheme.

Where deductions are made but not on-paid to the Commissioner

If the Commissioner is satisfied that a deduction has been made in a PAYE period by an employer and the amount of the deduction is not paid to the Commissioner by the date on which the deduction is required to be paid, the amount of the deduction is treated under section 69 as having been received on the 15th of the month in which the deduction is made.

The government will make good such amounts deducted and on-pay the contribution to the provider, and recover the non-payment from the employer.

Where deductions are received by the Commissioner but cannot be identified

Under section 70, if the Commissioner receives a deduction of KiwiSaver contributions from an employer who has failed to supply the particulars required in relation to the amounts deducted, and the Commissioner is unable to ascertain the particulars in sufficient time before the cut-off day for on-payments to the KiwiSaver providers, the Commissioner may hold the received amount until the amount attributable to each person from whom a deduction was made has been established.

Section 71 requires such an amount to be treated under the Act (except for the provisions regarding interest on contributions and home ownership withdrawal) as not having been received by the Commissioner until the day on which the amount attributable to each person has been established to the satisfaction of the Commissioner.

Subpart 2 – Miscellaneous provisions relating to contributions

Inland Revenue KiwiSaver holding account

Section 72 requires the Commissioner to establish a holding account for the purpose of recording the receipt, deduction, payment, and refund of KiwiSaver contributions and interest.

⁹ An employer contribution is a contribution made, during the same PAYE period as the payment of salary or wages to the employee, as a specified superannuation contribution within the meaning of section OB 1 of the Income Tax Act to the employee's KiwiSaver scheme on behalf of the employee.

The holding account is not a facility for the purpose of the Financial Transactions Reporting Act 1996, which means that the Commissioner is not required to verify the identity of contributions or report suspicious transactions.

Money entered and paid out of the holding account

As soon as practicable after the Commissioner receives an employer monthly schedule showing deductions of KiwiSaver contributions, under section 73 the Commissioner must enter the amount on the schedule in the holding account for the person from whose salary or wages the deduction was made.

Under section 74 the Commissioner must also enter any other contribution received (for example, if a person makes a voluntary contribution to their scheme via Inland Revenue) into the holding account as soon as practicable after receiving the contribution.

As soon as practicable after entering an amount in the holding account, the Commissioner must pay the amount to the provider of the relevant KiwiSaver scheme.

Money entered into the holding account that has been deducted from an employee's salary or wages is not trust money for the purposes of sections 66 to 68 of the Public Finance Act 1989. This is because the government will on-pay such deductions. Money entered other than contributions deducted from an employee's salary or wages, is trust money for the purposes of sections 66 to 68 of the Public Finance Act 1989.

Initial contributions stay in holding account for three months

When a person first becomes a KiwiSaver member, under section 75 the Commissioner must hold all contributions for that person in the holding account until three months after the first contribution was received. The Commissioner must pay those contributions to the provider of the person's KiwiSaver scheme as soon as practicable after expiry of the three-month period. In addition, the Commissioner must give notice to the person as soon as practicable after paying those contributions to the person's KiwiSaver scheme. The provider must also give notice to the person as soon as practicable after receiving those contributions.

The reason for the three-month holding period is to allow the person to seek financial assistance and to choose a KiwiSaver scheme if they wish.

Employer contributions may stay in holding account until deducted contributions paid

If the Commissioner receives a contribution from an employer for a person and that contribution has not been deducted from the person's salary or wages (that is, an employer contribution), under section 76 the Commissioner may:

- hold the contribution in the holding account; and
- pay it to the provider of the person's KiwiSaver scheme at the same time as contributions deducted from that person's salary or wages are paid to the provider.

Small amounts of contributions may be held until large enough to be on-paid

If the Commissioner and the KiwiSaver provider agree on a minimum threshold for the payment of contributions to the provider, under section 77 the Commissioner may keep any contribution that relates to a person in the holding account until the amount reaches the minimum threshold. Once the amount reaches the minimum threshold, the Commissioner must pay the amount to the provider of the person's KiwiSaver scheme.

Treatment of unremitted deductions in holding account

If a deduction is not paid to the Commissioner on or before the date on which the employer is required to pay it to the Commissioner, under section 78 the Commissioner must pay the amount out of a Crown bank account and the amount is treated as having been received by the Commissioner on the 15th of the month in which the deduction is made. This provision ensures that contributions deducted but not paid by the employer are made good. This means that the employee does not suffer a loss due to non-payment by the employer.

Information that the Commissioner must supply to providers when paying contributions

Under section 79 the Commissioner must supply to the provider any information, in any format, that the Commissioner determines to be relevant, after consultation with the provider.

Refund by Commissioner of amounts deducted in excess or if employee opts out

Under section 80 the Commissioner may refund any amount of contribution to the person from whose salary or wages the amount was deducted if:

- the person opts out and the contribution is in the possession of the Commissioner;
- the contribution is more than the amount that is required to be deducted and the contribution is in the possession of the Commissioner; or
- the person has opted out and the contribution was deducted from their salary or wages but was not refunded to the person or paid to the Commissioner. In this case the Commissioner will recover the unpaid contributions from the employer.

A person may request that the Commissioner transfer all or part of the refundable amount to another tax type.¹⁰

Example one

Shayne is a member of KiwiSaver. His employer accidentally deducted contributions of 8% of his wages when Shayne was on a contribution rate of 4%. \$200 has been deducted from his wages to date, which has not yet been on-paid to the KiwiSaver scheme provider. The Commissioner gives Shayne a refund of \$100.

¹⁰ In accordance with section 173L of the Tax Administration Act.

Example two

Ella is automatically enrolled in KiwiSaver but opts out seven weeks after she began her new job. Ella has had \$300 of KiwiSaver contributions deducted from her pay. Instead of getting a refund from the Commissioner, Ella requests that the \$300 be treated as a voluntary repayment towards her student loan.

Refund by provider of amounts paid in excess of required contribution

Any excess amount that is paid by the Commissioner to the provider must be refunded to the Commissioner under section 81. The Commissioner must refund or give credit for the amount refunded by the provider to the employee in the manner that the Commissioner sees fit. Again, a person may request that the Commissioner transfer all or part of the amount able to be refunded to another tax type.

Example one

Maria is a member of KiwiSaver and her employer accidentally deducted contributions of 10% of her wages when she was on a contribution rate of 8%. The Commissioner has passed \$1,000 of contributions to the provider. The provider is required to refund \$200 to the Commissioner. The Commissioner refunds or gives credit to Maria for the \$200 refunded.

Trustee investment rules do not apply to contributions in the holding account

Section 82 specifies that Part 2 of the Trustee Act 1956 (which relates to investment by trustees) does not apply to the Commissioner in relation to money in the holding account.

Unclaimed money held by the Commissioner

If money has been in the Commissioner's possession for at least six years and the Commissioner has insufficient information to process that money in accordance with the Act then section 83 provides that the Unclaimed Money Act 1971 applies to that money. No interest is payable on that money for the period the Unclaimed Money Act applies.

Interest on contributions

Interest on money in the holding account

Under sections 84 to 87 the Commissioner is liable to pay interest on any amount that is received, or treated as received as a contribution for a person.

The interest rate is:

Commissioner's paying rate¹¹ x (1 – lowest tax rate)¹²

¹¹ "Commissioner's paying rate" is the rate of interest established and notified as the Commissioner's paying rate by Order in Council made under section 120H of the Tax Administration Act as the Commissioner's paying rate applying on the day on which the contribution is received or treated as received.

¹² "Lowest tax rate" is the basic rate of tax stated in Part B of Schedule 1 of the Income Tax Act 2004 in respect of a taxable income that is not more than \$38,000 for a tax year (expressed as a decimal).

The amount of interest payable by the Commissioner on a contribution for a person is calculated using the following formula:

$$(\text{interest rate} \times \text{contribution})^{13} \times \frac{\text{interest period}^{14}}{365}$$

If the Commissioner's paying rate changes during an interest period, under section 90 the paying rate is taken to be the weighted average rate based on the number of days on which each rate applied during the period.

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.

Section 69 of the Public Finance Act 1989 (which relates to payment of interest on trust money) does not apply to the holding account.

The Income Tax Act 2004 was amended to treat the interest received as exempt income and exempt interest.

How and when interest is paid on on-payments

Under section 88, interest payable on a contribution that is on-paid to a provider must be paid to the provider of the person's KiwiSaver scheme at the same time the contribution is on-paid.

How and when interest is paid on refunds

If a contribution is refunded by the Commissioner, interest must be paid with the refund under section 89. However, no interest is payable if the interest on that refund is less than \$5. The \$5 threshold may be increased by the Governor-General by Order in Council.

Overpaid interest

Section 91 provides that interest overpaid by the Commissioner may be recovered in the same manner as income tax that is payable under the Income Tax Act (income tax that is payable can be recovered under the Tax Administration Act 1994).

Subpart 3 – Contributions other than deductions from salary or wages

This subpart allows contributions other than those that are deducted from an employee's salary or wages to be made.

Contributions may be paid via the Commissioner

Under section 93, an employer may make a contribution to an employee's KiwiSaver scheme by paying it to the Commissioner, provided that the contribution is a "specified superannuation contribution".¹⁵ The employer

¹³ "Contribution" is the amount of contribution in respect of the person to whom the interest is payable.

¹⁴ "Interest period" is the number of days in the period that begins on the day on which the Commissioner receives, or is treated as receiving, the amount of contribution and ends with the day on which the Commissioner on-pays the amount of contribution to the provider of the person's KiwiSaver scheme or refunds the amount.

¹⁵ As defined in section OB 1 of the Income Tax Act, "specified superannuation contribution" is a contribution that:

- is an employer's superannuation contribution; and
- is made in money; and
- is made to a superannuation fund (a superannuation scheme registered under the Superannuation Schemes Act 1989).

must give notice under section 94 that it intends to pay employer contributions to the Commissioner to be on-paid:

- to the provider of the KiwiSaver scheme, if the employer has a contractual obligation to the provider to pay those contributions; and
- to the employee, if the employer has a contractual obligation to pay those contributions.

The employer contribution must be accompanied by a remittance certificate and must be paid to the Commissioner within the time prescribed¹⁶ as if the contribution were a tax deduction. The payments must be made net of specified superannuation contribution withholding tax payable (if any).

The employer must include details of the contributions made for each employee on the employer monthly schedule that the employer is required to deliver to the Commissioner in relation to that month.

Under section 95 a person other than an employer (including a member of a KiwiSaver scheme) may make a contribution to a person's KiwiSaver scheme by paying it to the Commissioner, provided the contribution is accompanied by the person's:

- name and address;
- tax file number; and
- any other information that the Commissioner may require.

Under section 96 the Commissioner must pay the contribution into the holding account and then on-pay the contribution to the person's KiwiSaver scheme provider.

Example one

Under her employment contract, Chloe is entitled to an employer contribution to her KiwiSaver scheme for every dollar she contributes (subject to a cap). The employer decides that it would prefer to pay the employer contributions to Inland Revenue along with PAYE, student loan deductions and other tax obligations rather than paying them direct to the provider. The employer contribution must be net of any specified superannuation contribution withholding tax.

Example two

Julie wishes to make a one-off payment to her son Mark's KiwiSaver scheme. Julie can send her payment to the Commissioner provided it is accompanied by Mark's details.

Example three

Frank is self-employed. He wishes to make a contribution of \$500 to his KiwiSaver scheme and pays this to the Commissioner at the same time he makes provisional tax payments.

Contributions not remitted or short paid

If an employer shows a payment of an employer contribution on a remittance certificate or an employer monthly schedule and the payment is not received in full by the Commissioner by the time the Commissioner receives the remittance certificate or monthly schedule for that PAYE period, the Commissioner must give notice under section 97 to the employer that the payment has not been received.

If the total amount received by the Commissioner for deductions from all employees' salary and wages and employer contributions is less than that shown on the remittance certificate or employer monthly schedule, under section 98 the employer contribution treated as received will be equal to the amount actually received and after the following deductions have been made for:

- combined tax and earner premium payments;¹⁷
- child support;
- student loans; and
- KiwiSaver contributions.

Under section 99, the amount of the employer contribution (gross of any specified superannuation contribution withholding tax payable) that is treated as received by the Commissioner for any one employee must be calculated by the Commissioner as follows:

$$\frac{a \times b}{c}$$

where –

- a is the total employer contributions received by the Commissioner for all of the employer's employees for the month to which the employer monthly schedule relates.
- b is the employer contribution shown on the employer monthly schedule for the relevant employee for the month to which the employer monthly schedule relates.
- c is the total employer contribution shown on either or both of the remittance certificate or employer monthly schedule for all of the employer's employees for the month to which the employer monthly schedule relates.

This calculation does not prevent the provider of a KiwiSaver scheme from crediting amounts on the basis provided for in the trust deed or other document governing employer contributions.

Example one

ABC Ltd has 10 employees. The employer monthly schedule for June shows:

Total tax and earner premium deductions \$ 50,000

Example continued on next page

¹⁶ As per section NC 15 of the Income Tax Act.

¹⁷ Within the meaning of the Income Tax Act 2004.

| | |
|---------------------------------------|-----------|
| Total child support deductions | \$ 5,000 |
| Total student loan deductions | \$ 2,000 |
| Deductions of KiwiSaver contributions | \$ 2,000 |
| Employer contributions | \$ 2,000 |
| Total | \$ 61,000 |

The Commissioner only received \$60,000 from ABC Ltd. The employer contribution that is treated as received by the Commissioner is \$1,000.

The employer monthly schedule shows that \$400 of the \$2,000 employer contribution related to Mel. The amount of the employer contribution that is treated as received for Mel is equal to:

$$\begin{aligned} & \$1,000 \times \$400 \\ & \quad \quad \quad \$2,000 \end{aligned}$$

A \$200 employer contribution is treated as having been received for Mel.

Refunds of employer contributions if employee opts out

Under section 100 if an employee opts out after an employer contribution is paid to the Commissioner, the Commissioner may, if it is still in his or her possession, refund the employer contribution to the employer.

Refunds of employer contributions by provider

Under section 101 the provider of a KiwiSaver scheme may refund to the Commissioner any amount of employer contribution that was paid by the Commissioner in excess of the amount that the Commissioner was required to on-pay to the provider.

However, no refund will be made if the contribution paid in relation to a payment of salary or wages is less, after the refund is deducted, than what is required under the Act according to the employee’s contribution rate.

Subpart 4 – Contributions holidays

This subpart allows KiwiSaver members to receive a holiday from compulsory deductions of contributions from their salary or wages.

Applying for a contributions holiday

Under section 102 an individual can apply to the Commissioner for a contributions holiday any time after:

- the Commissioner receives the first contribution for the person if they are suffering or are likely to suffer financial hardship;
- 12 months have expired since the earlier of:
 - the date that the Commissioner received the first contribution for the person; or
 - the date that a provider received the first contribution for the person’s membership of a KiwiSaver scheme.

Under section 103 an application for a contributions holiday can be made by any means that the Commissioner accepts. The application must tell the Commissioner:

- the person’s name and address;
- the person’s tax file number;
- the name and address of each employer that the person intends the holiday to apply to;
- the period of time that the holiday is required;
- in the case of financial hardship, the details of that hardship (Inland Revenue will provide guidelines as to what constitutes “financial hardship”); and
- any other information that the Commissioner requires.

Grant of a contributions holiday

Under section 104 the Commissioner must accept an application for a contributions holiday if the Commissioner is satisfied that the person meets the requisite criteria and provides the required information.

A financial hardship contributions holiday will be granted for a period of three months, unless the Commissioner agrees to a longer period. Any other contributions holiday will be granted for a minimum period of three months and a maximum period of five years or the period specified in the application (whichever is the shorter).

As soon as practicable after granting a contributions holiday, the Commissioner must give notice under section 105:

- to the person who applied for the holiday, that the holiday has been granted and the date on which the holiday will end;
- to each relevant employer, that a contributions holiday has been granted and that the employer must stop making deductions of contribution from the salary or wages of that person;
- to the provider of the person’s KiwiSaver scheme, that a contributions holiday has been granted, the names of the relevant employers and that deductions of contributions may not be made from the salary or wages paid to the person by the relevant employers during the period of the holiday.

“Relevant employer” means each employer that the contributions holiday was intended to apply to, as stated in the person’s application to the Commissioner.

If an employer is notified by the Commissioner that it must stop making deductions of contributions for an employee, under section 106 deductions must cease from the next payment of salary or wages that the employer calculates after the date on which the notice is received.

Employers to whom contributions holiday applies

Section 107 specifies that a contributions holiday applies to each employer as stated in the person's application to the Commissioner. If the person chooses, it may also be used for any other employer.

End of contributions holiday

Sections 109 to 111 set out what happens at the end of a contributions holiday. The Commissioner must give notice to a KiwiSaver member who is taking a contributions holiday before the holiday ends. The Commissioner must also give notice to each affected employer known as soon as practicable after the end of a contributions holiday. The notice must specify the date on which the contributions holiday ends and the date on which the employer must start making deductions of contributions from the salary or wages of a person.

Section 112 allows a person to revoke his or her contributions holiday with an employer at any time by giving notice to the employer to make deductions of contributions from their salary or wages. To prevent employees requesting employers to stop and start deductions of contributions too often, section 108 specifies that a contributions holiday may not be used for less than three months, unless the employer agrees.

Deductions of contributions must begin from the next payment of salary or wages that is calculated after the date on which the employer receives the notice from the Commissioner or the KiwiSaver member.

Refunds

Section 113 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 (as outlined below).

The applications may be made by any means that the Commissioner accepts. The application must tell the Commissioner:

- the person's name and address;
- the person's tax file number;
- details of the significant financial hardship or serious illness; and
- any other information that the Commissioner requires.

The Commissioner must refund the contributions to which the application relates if the person and the application meet the requirements. However, no refund of any employer contributions will be made. The Commissioner must give notice of the refund to the provider of the relevant KiwiSaver scheme.

If an employee who is taking a contributions holiday starts new employment and cannot show his or her employer that they are taking a contributions holiday – for example, if they lose the notice from

the Commissioner granting the contributions holiday, the employer will be required to make deductions of contributions from their salary or wages. The employer may, however, refund to the employee any contributions deducted under section 114 if the employee can later show the employer that they are taking a contributions holiday – for example, if the employee got a replacement notice from the Commissioner. The Commissioner may also refund those contributions to the employee if they are held by the Commissioner.

Example one

Joyce has been a KiwiSaver member for two years. She applies to the Commissioner for a contributions holiday. In her application she states that she wants the holiday to apply to both of her employers and that she wants to take a contributions holiday for one year. The Commissioner accepts Joyce's application and gives notice to her employers to stop making deductions of contributions from her wages. Three months later, Joyce decides that she wants contributions to begin from the wages she receives from her main job. She gives notice to her employer requiring deductions of contributions from her wages. As required, her employer begins making deductions. Close to the expiry of her one-year contributions holiday, the Commissioner writes to Joyce stating that her contributions holiday is about to end. Joyce does not apply for another contributions holiday and the Commissioner writes to her employer stating that deductions of contributions must begin.

Example two

Tony has been contributing to KiwiSaver for five months. He is struggling to make ends meet and applies to the Commissioner for a contributions holiday. After receiving evidence of his financial situation, the Commissioner grants Tony a financial hardship contributions holiday for three months. Three months later, Tony is still struggling and is granted another contributions holiday.

Example three

Jin is taking a contributions holiday and starts new employment. He has lost his contributions holiday letter and so his employer must begin making deductions of contributions. He has had \$300 deducted from his salary before he finds the letter from Inland Revenue granting the holiday. Jin shows the employer his letter and deductions of contributions stop. Because his employer has already paid the contributions to Inland Revenue, the Commissioner refunds the \$300 to Jin.

Example four

Mohammad has been contributing to KiwiSaver for six years and wants to take a contributions holiday. His application for a three-year holiday is accepted. The Commissioner writes to Mohammad shortly before his contributions holiday expires. Mohammad applies for another three-year contributions holiday which is granted.

Part 4 – KiwiSaver schemes

Part 4 (sections 115 to 204) establishes the rules for KiwiSaver schemes and their registration. Among other things, KiwiSaver schemes must have a principal purpose of providing retirement benefits, be defined contribution schemes and have an independent trustee.

The Superannuation Schemes Act 1989 and the Securities Act 1978 apply in most instances to KiwiSaver schemes. The KiwiSaver scheme rules (Schedule 1 of the Act) will be implied into the trust deed of every KiwiSaver scheme.

The Financial Transactions Reporting Act requires superannuation scheme providers to verify the identity of new members. This will not be possible for default schemes that will be accepting those who are automatically enrolled as members. The Act therefore provides an exception from this requirement for default schemes, with an associated requirement that schemes take reasonable efforts to verify the member's identity when they become a member.

Registration of KiwiSaver schemes

The Government Actuary is required to register a scheme on the KiwiSaver schemes register if it meets the requirements of the Act. Existing registered superannuation schemes can fully convert to a KiwiSaver scheme and all members of that scheme will become members of the KiwiSaver scheme. For a scheme to fully convert, it must obtain the consent of all members and employer contributors to the scheme. A scheme can, however, fully convert without consent if the terms and conditions of the KiwiSaver scheme are no less favourable than the old scheme.

The Act also enables an existing registered superannuation scheme to establish a KiwiSaver section within that scheme. Members of the existing scheme can then elect to transfer all or part of their existing benefits to the KiwiSaver section.

The Government Actuary has powers to cancel the registration of a KiwiSaver scheme and order its wind-up if it is no longer eligible to be a KiwiSaver scheme, if the scheme has no members or if the Government Actuary considers the scheme is acting in contravention of the Act. The Government Actuary also has powers to direct a trustee to give information to scheme members or to operate the scheme in a specified manner if it believes the scheme is acting in contravention of the Act.

The Government Actuary is required to establish a register of KiwiSaver schemes. This will also show which schemes are default schemes and whether an employer is an exempt employer.

Reporting requirements

KiwiSaver schemes will be required to provide an annual report to the Government Actuary and must also provide a separate annual return to the Government Actuary on a common date, which will contain unaudited statistical information about the scheme.

Appointment of default providers

One or more KiwiSaver default providers can be appointed by the Minister. To be a default provider, a KiwiSaver scheme must have at least one trustee that is a trustee corporation. The criteria for the appointment are not contained in the Act but the Act provides the Crown with the ability to apply to the High Court to act in respect of the terms of appointment of default providers.

Members' interest in KiwiSaver is not assignable

The Act provides that the interest of a KiwiSaver scheme member cannot be used as security. This means that a member cannot borrow against the amount they have invested in a scheme.

Part 5 – General provisions

Clarification of Crown and employer liability

Section 205 ensures that there is no Crown guarantee of any KiwiSaver scheme or investment product relating to a KiwiSaver scheme.

Section 206 clarifies the liability of employers, the Crown and any other person in relation to information that they provide about KiwiSaver. If an employer or the Crown, for example, only supplies an information pack, gives a factual description of the features of a KiwiSaver scheme, provides KiwiSaver information in the course of promoting the benefits of retirement savings in general or otherwise performs a function, duty or power under the Act, they will not be liable for giving investment advice under the Investment Advisers (Disclosure) Act 1996.

Unique identifiers

Section 207 overrides Information Privacy Principle 12(2) and (4) of the Privacy Act 1993 (which relate to unique identifiers) to allow a provider of a KiwiSaver scheme to:

- require an individual to disclose any unique identifier that has been assigned to that person by the Commissioner for the purposes of carrying out specified functions, duties or powers; and
- assign to a proposed member, or member of the KiwiSaver scheme any unique identifier assigned to that person by the Commissioner.

This override of the Privacy Act does not authorise a provider to use a unique identifier assigned by the Commissioner, except for the purpose of carrying out specified KiwiSaver functions, duties or powers.

Example one

The Commissioner allocates a person to be a member of TT Ltd, a default KiwiSaver scheme. TT Ltd can use the person's tax file number (as provided by the Commissioner) as that person's unique identifier.

Information held by the Commissioner for someone who has opted out or who should not have been a KiwiSaver member

Under section 208 the Commissioner must not use personal information collected on certain people for purposes other than the administration of KiwiSaver if the personal information was provided as required by, and for the purposes of, the Act and has not been provided to the Commissioner for purposes related to any other Inland Revenue Act.

The Commissioner cannot use personal information relating to:

- an employee who has given an opt-out notice to the Commissioner or to an employer after:
 - the date the opt-out notice is accepted by the Commissioner if the opt-out notice is given to the Commissioner and does not result in a requirement for contributions that are in the possession of the Commissioner to be repaid;
 - the date that the Commissioner receives a copy of the notice from the employer if the opt-out notice is received by an employer and does not result in a requirement for contributions that are in the possession of the Commissioner to be repaid; or
 - the date of the final refund of those contributions if the opt-out notice results in a requirement for contributions that are in the possession of the Commissioner to be repaid; or
- a person who is allocated to a KiwiSaver scheme in circumstances in which the Act does not require the person to be allocated to a KiwiSaver scheme and the person does not opt into any KiwiSaver scheme or choose to remain in the KiwiSaver scheme to which they are allocated.

Interface with securities law

Where a member's security in a KiwiSaver scheme cannot be allotted (for example, if the scheme's prospectus is cancelled), the Act seeks to place the member back to their previous position as far as possible by transferring that member back to their previous KiwiSaver scheme, or if this is not possible, into a default KiwiSaver scheme.

The Act also clarifies that if a person is allocated to either a default scheme or an employer-chosen scheme, the member is considered to have received an investment statement. This is to ensure that a security may not be made voidable at a later date simply because the provider does not have proof that the member had in fact received the investment statement.

Disputes

If a matter under Parts 2 and 3 of the Act is left to the discretion, judgement, opinion, approval, consent or

determination of the Commissioner, under section 212 a person affected by the Commissioner's decision has 20 working days (from the date on which the notice of the decision was given to the person) to:

- request that the Commissioner reconsider the decision; and
- give the Commissioner any information in support of that request.

The Commissioner may require a person to make that request by notice. On receiving a request, the Commissioner may:

- accept the person's request;
- seek further information from the person;
- decline the person's request; or
- accept or decline the person's request in part and decline or accept the other part.

Section 213 provides that Part 8A of the Tax Administration Act 1994 applies to every notice of a disputable decision given by the Commissioner under the Act.

Penalties

Sections 214 to 216 set out penalties that are to apply for KiwiSaver purposes. If there is a failure to provide information or withhold contributions under Part 2 or 3 of the Act, specific KiwiSaver penalties will apply in addition to the provisions of the Tax Administration Act. However, if the specific KiwiSaver penalties outlined below 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).

Penalty for employers who fail to provide information

Employers who fail to give information required by Part 2 or 3 of the Act will be subject to the following penalty:

- nil, if the Commissioner has not given notice to the employer within the preceding 12 months that a penalty may be imposed; and
- in any other case:
 - \$50, if the employer is a small employer; and
 - \$250, if the employer is not a small employer.

A "small employer" is defined as:

- an employer whose gross tax deductions payable and specified superannuation contribution withholding tax payable in the preceding tax year were less than \$100,000 in total; or

- not being an employer in the preceding year, until gross tax deductions payable and specified superannuation contribution withholding tax payable in the current tax year exceed \$100,000 in total.

The penalty is due and payable on the day the next tax deduction required under the PAYE rules is due to be paid to the Commissioner after the end of the PAYE period in which the failure occurred.

Penalty for employers who fail to make a deduction or incorrectly make deductions

Every employer who fails to deduct a contribution from a payment of salary or wages as required by this Act or who deducts an incorrect amount under the Act is liable for the following penalties:

- nil, if the Commissioner has not given notice to the employer, within the preceding 12 months, that a penalty may be imposed; and
- in any other case:
 - \$50, if the employer is a small employer (as defined above); and
 - \$250, if the employer is not a small employer.

An employer is not liable, however, for more than one penalty per month to which any employer monthly schedule relates. The penalty is due and payable on the day the next tax deduction required under the PAYE rules is due to be paid to the Commissioner after the end of the PAYE period in which the failure or incorrect deduction occurred.

Giving of notices

Section 14 of the Tax Administration Act 1994 applies when the Act requires the Commissioner to give a notice to a person. Section 14B of the Tax Administration Act applies when the Act requires a person to give a notice to the Commissioner.

When the Act requires a person to give a notice to someone other than the Commissioner:

- the notice must be in writing;
- the notice may be given by:
 - personal delivery to an addressee who is not a corporate body;
 - personal delivery to an addressee that is a corporate body, if the personal delivery is made to the addressee's office during working hours;
 - an electronic means of communication to the addressee, if the person complies with the Electronic Transactions Act 2002; or
 - posting it to:
 - the street address of the addressee's usual or last known place of residence;

- the street address of any of the addressee's usual or last known place of business; or
- to any other address, if the addressee has notified the person that he or she accepts notices at the address.

A notice given by post is treated as having been given at the same time it would have been delivered in the ordinary course of postal delivery.

Miscellaneous provisions

Consent to electronic transactions

A person who gives his or her electronic address is treated under the Act as having consented to accept information in an electronic form. In the case of investment statements, however, a hard copy must be sent if the person has provided a street address or post office box number.

Refunds made by direct credit to a bank account

Section 221 specifies that refunds of KiwiSaver contributions must be made by direct credit to a bank account nominated by the person entitled to the refund. When a person claims a refund, the person must provide the Commissioner with the particulars of a bank account in New Zealand that the direct credit is to be made to. However, if the Commissioner is satisfied that payment by direct credit would result in undue hardship to a person or is not practicable, a refund may be made by other means acceptable to the Commissioner.

A "bank account" is defined as an account with a registered bank within the meaning of the Reserve Bank Act 1989, a private savings bank, a credit union, a building society or the PSIS Limited.

Role of the Commissioner

Section 222 gives the Commissioner the function of ensuring oversight of the provisions that are administered by Inland Revenue under section 224. Without limitation, this includes the functions and powers of:

- requiring persons affected by the Act to verify certain matters with the Commissioner as requested; and
- requiring persons to give notice to the Commissioner to ensure that the Act is complied with.

Use of information by the Commissioner obtained under the Act and other Inland Revenue Acts

Section 223 specifies that despite anything in any other Act, nothing prevents the Commissioner or any officer of Inland Revenue from:

- using information obtained under the Act for the purposes of carrying into effect any of the Inland Revenue Acts; or

- using information obtained under any of the Inland Revenue Acts for the purposes of carrying into effect the provisions of the Act.

Section 208 outlines certain limits to the application of section 223.

Administration of the Act

Section 224 specifies that Parts 1 to 3 and Schedule 3 of the Act are administered by Inland Revenue. Part 4 and Schedules 1 and 2 are administered in the particular department of State that has been delegated responsibility by the Prime Minister.¹⁸ Part 5 is administered in the department of State that has been delegated responsibility by the Prime Minister, and different departments may be authorised to administer different sections.¹⁹

Fee subsidy

Section 225 enables a fee subsidy to be paid to a member of a KiwiSaver scheme. The Act allows regulations to be made prescribing the amount of the fee subsidy and the manner in which it is paid. It is the government's intention that the fee subsidy be paid as a contribution to the member's account.

Crown contribution

Section 226 specifies that 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, in the case of a person that subpart 1 of Part 3 applies (to a person that is required to have deductions of contributions from salary or wages);
- as soon as practicable after three months after the Commissioner is given notice that the person is a member of the KiwiSaver scheme, for any other case.

The amount of the contribution will be \$1,000 or an amount prescribed by the Governor-General by Order in Council. The provider must credit this contribution on a pro rata basis across the investment products of the KiwiSaver scheme to which the person has subscribed or been allocated. Each member is only entitled to one such contribution. If a person ceases to be a member of a KiwiSaver scheme and subsequently becomes a member of another KiwiSaver scheme, they will not be entitled to another Crown contribution.

Status of fee subsidy and Crown contribution for tax purposes

Section 227 states that the Crown contribution and fee subsidy paid by the Crown are not income for the purposes of the Income Tax Act 2004 or a gift for the purposes of the Estate and Gift Duties Act 1968.

Regulations

Section 228 allows regulations to be made by the Governor-General by Order in Council for a number of purposes, including:

- prescribing forms and specified information or documents to be included or attached to forms;
- prescribing requirements for documents that are sent, given, or delivered and the information that must be included in a notice that is in addition to the information specified in the Act;
- prescribing fees payable to the Commissioner or Government Actuary or the manner in which the fees may be calculated;
- recognising specific foreign superannuation schemes or classes of schemes based in named countries as schemes to which funds can be transferred on permanent emigration;
- prescribing the circumstances for who can qualify for the first home ownership withdrawal provision;
- prescribing the maximum number of default providers that can be appointed;
- specifying what information or matters must be used in information packs;
- providing for operational matters and electronic compatibility between the Commissioner and providers, including requirements for providers to enter into a scheme provider agreement with Inland Revenue and the matters to be included in those agreements;
- providing for the payment of fee subsidies to members or classes of members of KiwiSaver schemes, and the setting of those fee subsidies or the manner by which they may be calculated;
- specifying when fee subsidies will be paid, the terms and conditions relating to payment, their application and how they may be enforced;
- prescribing matters that are relevant to determining whether a fee is unreasonable;
- prescribing matters which may be considered as significant financial hardship; and
- providing any other matters necessary for the Act's administration or for giving it full effect.

Regulations relating to mortgage diversion

Section 229 specifies that the Governor-General may, by Order in Council (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 payment of a mortgage.

The recommendation may be made if the Minister is satisfied that the mortgage diversion facility will be consistent with the following principles:

¹⁸ Ministry of Economic Development has been delegated responsibility for these provisions.

¹⁹ Inland Revenue has been delegated responsibility for sections 207, 208, 211 to 218, 221 to 224, 226, 227, 229, 231 and 232 and the Ministry of Economic Development has been delegated responsibility for sections 205, 206, 209, 210, 219, 220, 225, 228 and 230.

- there is no compulsion on KiwiSaver scheme providers to provide a mortgage diversion facility;
- there is no compulsion on mortgagees to allow amounts secured by mortgages to be paid via KiwiSaver contributions;
- the facility is available to be used by a member any time after 12 months have expired from the earlier of the date that the Commissioner received the first contribution for the member or the date that the provider received the member's first contribution;
- the facility is available only in relation to a mortgage over the member's principal residence (for example, the family home);
- the mortgage diversion may apply for the remainder of the terms of the mortgage after the diversion is made available;
- after the total amount secured by the mortgage is paid, ongoing contributions are retained automatically in the member's KiwiSaver account;
- if the member chooses to end the mortgage diversion facility before the mortgage is fully paid, the contributions are redirected towards retirement savings;
- the provider, and not the Commissioner, is responsible for paying the amount diverted under the mortgage diversion facility;
- the diverted amount is capped at no more than half of the member's contribution rate and is a fixed dollar amount;
- employer contributions may not be diverted; and
- the facility is available for new mortgages and existing mortgages.

The regulation may specify all or any of the terms and conditions that apply to the mortgage diversion facility, including:

- which types of mortgages qualify;
- what a scheme must do to participate;
- how the regulations affect the scheme's trust deed;
- what happens if the scheme decides to terminate participation;
- whether payment via the facility counts as payment by the mortgagor for the purpose of the terms of the mortgage; and
- any other matters.

If a provider chooses to participate in the mortgage diversion facility, any withdrawal made in accordance with those regulations will be treated as a withdrawal permitted under the KiwiSaver scheme rules.

Transitional measure

Section 232 specifies that as a transitional measure all contributions must be paid to the Commissioner for the first three months after the automatic enrolment rules have come into effect. No provider may accept contributions in the first three months.

Schedule 1 – KiwiSaver scheme rules

Schedule 1 sets out the KiwiSaver rules that are to be implied in the trust deed of a KiwiSaver scheme.

Fees must not be unreasonable

The trustees, administration manager, investment manager, promoter or any other person who may charge a fee for providing a KiwiSaver scheme must not charge a fee that is unreasonable. The Court has the power to order that unreasonable fees be annulled or reduced.

Zero balances

If the balance in all of a member's accounts falls to zero the provider may terminate the person's membership of their KiwiSaver scheme by giving them notice that membership has terminated.

Withdrawals

Lock-in until age of eligibility for New Zealand Superannuation or five years of membership

Subject to other permitted withdrawals, a KiwiSaver member's funds in the scheme are locked in until the later of the date on which the person reaches New Zealand superannuation qualification age (currently 65 years) or five years' membership in a KiwiSaver scheme. A member is entitled, but not required, to withdraw his or her funds at this date.

Purchase of a first home

The member's accumulated funds and any return on them (but not the Crown contribution) may be withdrawn from a KiwiSaver scheme for the purchase of a first home if the member has been a member of a KiwiSaver scheme for at least three years. The purchase must be for the member's principal place of residence.

Death

If a member dies, on application by the member's personal representative the trustees must pay the representative an amount equal to the funds in the member's KiwiSaver account (including the Crown contribution) on the date on which the application is accepted as part of the member's estate.

Significant financial hardship and serious illness

If the trustees are reasonably satisfied that a member is suffering or is likely to suffer significant financial hardship, the member may make a significant financial hardship withdrawal. The amount withdrawn must be equal to or less than the accumulated funds in the person's KiwiSaver account (excluding the Crown contribution). The trustees 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 trustees' opinion, is required to alleviate the particular hardship.

"Significant financial hardship" includes significant financial difficulties that arise because of:

- a member's inability to meet minimum living expenses;
- a member's inability to meet mortgage repayments on his or her principal family residence, resulting in the mortgagee seeking to enforce the mortgage on the residence;
- the cost of modifying a residence to meet special needs arising from the disability of a member or a member's dependant;
- the cost of medical treatment for an illness or injury of a member or a member's dependant;
- the cost of palliative care for a member or a member's dependant;
- the cost of a funeral for a member's dependant; or
- the member suffering a serious illness (as defined below).

If the trustees are satisfied that a member is suffering from serious illness, the member may make a serious illness withdrawal. The amount withdrawn must be equal to or less than the accumulated funds in the person's KiwiSaver account, excluding the Crown contribution.

"Serious illness" means an injury, illness or disability that:

- results in the member being unable to engage in work for which he or she is suited by reason of experience, education, or training (or any combination of them); or
- poses a serious and imminent risk of death.

A significant financial hardship or serious illness withdrawal must be in the form required by the trustees and must include a completed statutory declaration covering the member's assets and liabilities. The trustees may require that any medical matter asserted in support of the application for withdrawal is verified by medical evidence. The trustees may also require that any other documents, evidence or information produced in support of the application are verified by oath or statutory declaration.

Permanent emigration

One year or more after a member's permanent emigration from New Zealand a member may withdraw all of the funds in their KiwiSaver scheme (including the Crown contribution). In addition, a member may at any time after permanently emigrating transfer all of the funds in their KiwiSaver scheme to a foreign superannuation scheme authorised for that purpose by regulations.

A permanent emigration withdrawal application must be in the form required by trustees and must include:

- a statutory declaration completed by the member to the effect that they have permanently emigrated from New Zealand; and
- proof to the satisfaction of the trustees that:
 - the member has departed from New Zealand (for example, passport evidence)
 - the member has resided at an overseas address at some time during the year following the member's departure from New Zealand.

The trustees may require that any other documents, evidence or information produced in an application are verified by oath or statutory declaration.

Release of funds under other enactments

Trustees must comply with the provisions of any enactment or Court order under any enactment that requires them to release funds from the KiwiSaver scheme, including an order made under section 31 of the Property (Relationships) Act 1976.

Withdrawals may be paid as a lump sum

Upon the request of a member, the trustees must pay a permitted withdrawal as a lump sum. Nothing prevents a member from purchasing annuities or a pension from all or part of the funds withdrawn by the member.

Trustees may require evidence

A trustee may reasonably require evidence of the facts necessary to establish whether a member has a right to make a withdrawal.

Minimum contribution for members who are employees

For each pay period, a member who is an employee must contribute to the KiwiSaver scheme an amount at least equal to the minimum contribution rate, unless that person is taking a contributions holiday. If contributions are made for a purpose other than for the payment of future benefits to the member or to cover a scheme's fees, they do not count towards the contribution rate.

Contributions holiday

A member who is an employee has a right to take a contributions holiday at any time in accordance with subpart 4 of Part 3.

Transfer of members

A member can, at any time, transfer to another KiwiSaver scheme. On application by a member, trustees must transfer the funds in that person's KiwiSaver scheme to the person's new KiwiSaver scheme according to subpart 3 of Part 2. In addition, a member can be transferred to another KiwiSaver scheme in the circumstances provided for in the Act (for example, if they cease to be employed by their employer and only employees of that employer can be members of that scheme).

Schedule 2 – Matters to be specified in application for registration as a KiwiSaver scheme

Schedule 2 specifies the matters that are to be contained in any application for registration as a KiwiSaver scheme.

Schedule 3 – Amendments to other Acts

Schedule 3 makes amendments to other Acts. Some of the more significant amendments are:

- the Superannuation Schemes Act clarifies that a KiwiSaver scheme may be a member of a registered superannuation scheme for investment purposes;
- interest paid by Inland Revenue on KiwiSaver contributions held in the holding account will be exempt income for tax purposes;
- details of KiwiSaver contributions from employers that are paid via Inland Revenue must be shown on the employer monthly schedules, together with remittance certificates required under the PAYE rules;
- funds in a KiwiSaver scheme will not be taken into account in asset testing for the accommodation supplement, but funds already withdrawn from a KiwiSaver scheme will be;
- funds in a KiwiSaver scheme that are locked in will not be taken into account in asset testing for long-term residential care in hospitals or rest homes;
- after approval from the Government Actuary, transfers between schemes can be made without the need for member consent provided that the terms and conditions of membership of the new scheme are no less favourable than those in the old scheme.

Exemption from SSCWT

Amendments to section NE of the Income Tax Act exempt specified superannuation contributions (employer contributions) from specified superannuation contribution withholding tax (SSCWT), if the contribution is paid to an employee's KiwiSaver scheme and it does not exceed the cap provided. The cap is the lesser of the employee's contribution or 4 percent of the employee's gross salary or wages. The cap is adjusted according to previously exempted amounts and how long the employer has been deducting KiwiSaver contributions from the employee's salary or wages.

The exemption applies to employer contributions that are made on a pay-by-pay basis as well as to lump sum payments to a member's KiwiSaver scheme. To calculate whether an employer contribution is eligible for the exemption, employee contributions from the previous 12 months are taken into account. The cap applies on a rolling basis and is not tied to a particular year.

The Taxation (Savings Investment and Miscellaneous Provisions) Act 2006 extended the SSCWT exemption so that it also applies to employer contributions to complying superannuation funds. A complying superannuation fund is a registered superannuation scheme that has incorporated certain KiwiSaver rules – in particular, lock-in and portability. Approval from the Government Actuary that the requisite criteria have been met is a condition of the exemption.

Exemption for employer contributions to a KiwiSaver scheme

SSCWT does not apply if a specified superannuation contribution is for an employee's KiwiSaver scheme and is up to the lesser of:

- an amount equal to 0.04 x total salary or wages – previous exempt contributions;
- an amount equal to total KiwiSaver contributions – previous exempt KiwiSaver contributions;

where –

“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 (the contributions deducted under Part 3, subpart 1 of the Act).

“previous exempt contributions”

means the total specified superannuation contributions for the employee, to the extent that:

- the contributions are made in the KiwiSaver calculation period, but excluding the current specified superannuation contribution; and
- either the KiwiSaver SSCWT exemption or the complying superannuation fund SSCWT exemption applied to those contributions (excluding the current one).

“total KiwiSaver contributions”

means the total KiwiSaver contributions deducted from the salary or wages paid to the employee in the KiwiSaver calculation period.

“KiwiSaver calculation period”

means, for the current specified superannuation contribution, a period:

- beginning with the later of:
 - one year before when the employer makes the current specified superannuation contributions;
 - when the employer is first required to deduct KiwiSaver contributions from the employee's salary or wages; and

- ending when the employer makes the current specified superannuation contribution.

“previous exempt KiwiSaver contributions” means the total specified superannuation contributions for the employee’s KiwiSaver scheme, to the extent that:

- those contributions are made in the KiwiSaver calculation period, but excluding the current specified superannuation contribution; and
- the KiwiSaver SSCWT exemption applied to those contributions (excluding the current one).

Exemption for employer contributions to a complying superannuation fund

The Superannuation Schemes Act 1989 was amended to allow the Government Actuary to approve a registered superannuation scheme as a complying superannuation fund for the purposes of the Income Tax Act 2004. The \$1,000 Crown contribution and the fee subsidy will not be paid to members of a complying superannuation fund.

An application for approval of a scheme must be accompanied by all information relevant to the Government Actuary dealing with the application. The Government Actuary must complete consideration of whether or not the scheme is approved as a complying superannuation fund within 28 days after receiving an application. The Government Actuary must approve a scheme if:

- the scheme and any relevant participation agreement have rules that subject the relevant contributions to complying fund rules;
- the scheme is a defined contribution scheme (a scheme in which contributions are allocated to members on an individual basis);
- the scheme has at least 20 members (associated persons are treated as being one person);²⁰
- the scheme is registered on or before 1 July 2007; and
- any relevant participation agreement is entered into on or before 1 July 2007.

The Government Actuary must notify the applicant whether or not the registered scheme is approved as a complying superannuation fund as soon as practicable after completing consideration. If the relevant scheme is approved, the Government Actuary must notify the Commissioner at the same time as notice is given to the applicant of that approval. Approval is effective on and after the date the Government Actuary must complete consideration, or earlier if consideration is completed earlier. The notices must give the date on which approval is effective.

²⁰ All interests in a registered scheme or account held by persons associated under section OD 8(3) of the Income Tax Act 2004 are treated as being held by one person.

If the Government Actuary has reasonable cause to believe that a registered scheme no longer meets the requirement, or has failed to specify certain information in an annual report, the Government Actuary may revoke approval immediately. As soon as practicable after revoking approval, the Government Actuary must notify:

- the registered scheme;
- the person who originally applied for the approval; and
- the Commissioner.

The information required in the annual report must include:

- the market value of assets subject to complying fund rules;
- the number of members to which the assets relate; and
- the value of withdrawals subject to complying fund rules.

Revocation is effective from the date the Government Actuary revokes approval. The notices must contain the revocation date. A scheme that is notified that approval has been revoked must immediately notify each member affected and their employers. At the same time, the registered scheme must notify the Commissioner of each member affected, and their employers.

Complying fund rules

Section OB 1 of the Income Tax Act 2004 sets out the rules that must apply to the relevant contributions for the Government Actuary to approve a scheme as a complying superannuation fund (the complying fund rules).

The complying fund rules must be the same as for KiwiSaver schemes in respect of:

- lock-in until the age of eligibility for New Zealand superannuation or five years of membership is reached;
- complying with the provisions of any enactment that requires a trustee to release funds from the scheme in accordance with that enactment; and
- withdrawal upon death.

The complying fund rules can (but are not required to) allow for the following KiwiSaver withdrawals:

- first home ownership;
- significant financial hardship;
- serious illness; and
- permanent emigration.

The complying fund rules:

- cannot allow for withdrawals under any other circumstances;

- must require a transfer of all or part of an employee's superannuation accumulation to another complying superannuation fund or to a KiwiSaver scheme (provided the requirements of the KiwiSaver Act are met) if the employee requests a transfer;
- must require that an employee's superannuation accumulation is subject to complying fund rules if it is transferred to another complying superannuation fund;
- must require a transfer of an employee's superannuation accumulation to a KiwiSaver scheme, if the employee does not request a transfer and the employee:
 - ceases to be a member of their complying superannuation fund;
 - cannot remain a member for any other reason (other than described above or revocation of a fund as a complying superannuation fund) or a withdrawal of all or part of an employee's superannuation accumulation in accordance with complying fund rules;
- must require transfer of an employee's superannuation accumulation to a KiwiSaver scheme, if the Government Actuary revokes approval of the superannuation fund and the accumulation is not transferred to another complying superannuation fund and is not subject to complying fund rules;
- must require total minimum superannuation contributions to be deducted in relation to an employee of at least the amount required to be contributed to a superannuation scheme for an employer to be approved as an exempt employer (4% of the annual gross base salary or wages):
 - as with contributions to a KiwiSaver scheme, employee and employer contributions can count towards this amount;
 - if employer contributions count, they must vest immediately and completely in the employee;
 - do not count a superannuation contribution unless the contribution is for the payment of future benefits to the employee, or for fees under the superannuation fund (for example, contributions to pay for life insurance do not count);
- must not allow the member's interest in the complying superannuation fund to be assigned or charged or passed to any other person;
- must commit an employee to continue to be a member unless otherwise provided by the rules above; and
- must not derogate from the rules above.

If a transfer is required, but is not requested by the employee, the Commissioner must be notified that the employee's superannuation accumulation must be transferred, including in that notice the name, address and tax file number of the employee, the name and address of their employer, and the name and tax file number of the employee's complying superannuation fund.

An employee's superannuation accumulation means the total superannuation contributions, together with any return on them, that are subject to complying fund rules and are:

- specified superannuation contributions (employer contributions) vested completely in an employee; and
- deducted from the employee's salary or wages.

The transfer provisions in the KiwiSaver Act have been amended to accommodate transfers from a complying superannuation fund to a KiwiSaver scheme.

SSCWT does not apply to the extent that a specified superannuation contribution is for an employee's complying superannuation fund and is up to the lesser of:

- an amount equal to 0.04 x total salary or wages – previous exempt contributions;
- an amount equal to total complying fund contributions – previous exempt complying fund contributions;

where –

“total salary or wages”

means the total salary or wages paid to the employee in the complying fund calculation period, but excludes salary or wages for which there are no superannuation contributions for the employee's complying superannuation fund that are subject to complying fund rules.

“previous exempt contributions”

means the total specified superannuation contributions for the employee, to the extent that:

- those contributions are made in the complying fund calculation period, but exclude the current specified superannuation contribution; and
- either the KiwiSaver SSCWT exemption or the complying superannuation fund SSCWT exemption applied to those contributions (excluding the current one).

“total complying fund contributions”

means the total superannuation contributions that are:

- deducted from the employee's salary or wages in the complying fund calculation period; and

- subject to complying fund rules.

“complying fund calculation period”

means, for the current specified superannuation contribution, a period:

- beginning with the later of:
 - one year before the employer makes the current specified superannuation contributions;
 - when the employer is first required to deduct superannuation contributions that are subject to complying fund rules from the employee’s salary or wages; and
- ending when the employer makes the current specified superannuation contribution.

“previous exempt complying fund contributions”

means the total specified superannuation contributions for the employee’s complying superannuation fund, to the extent that:

- those contributions are made in the complying fund calculation period, but exclude the current specified superannuation contribution; and
- the complying superannuation fund SSCWT exemption applied to those contributions (excluding the current one).

Example one

Margot earns \$1,000 a week. She contributes 4% to her KiwiSaver scheme which is matched by a 4% employer contribution. She has been contributing to KiwiSaver for 20 weeks (\$800 in contributions) and all of her previous employer contributions (\$800) were exempt from SSCWT. Margot is not a member of a complying superannuation fund.

To calculate whether (or to what extent) the employer contribution of \$40 in week 21 is exempt from SSCWT, the formula on page 31 is used:

Week 21

| | | |
|---|---|------------------------|
| Total salary or wages | = | \$21,000.00 |
| Previous exempt contributions | = | \$800.00 |
| Total KiwiSaver contributions | = | \$840.00 ²¹ |
| Previous exempt KiwiSaver contributions | = | \$800.00 |

The amount exempted is up to the lesser of:

| | | | |
|-----|--------------------------------|---|---------|
| i. | $0.04 \times \$21,000 - \800 | = | \$40.00 |
| ii. | $\$840 - \800 | = | \$40.00 |

The entire \$40 employer contribution is exempt from SSCWT.

Example two

James earns \$25,000 a year and contributes 1% of his income to a complying superannuation fund. His employer contributes 3% of his income. James is not a member of a KiwiSaver scheme.

To calculate whether (or to what extent) the weekly employer contribution of \$14.42 is exempt from SSCWT, the formula on page 33 is used:

Week 1

| | | |
|--|---|----------|
| Total salary or wages | = | \$480.77 |
| Previous exempt contributions | = | \$0.00 |
| Total complying fund contributions | = | \$4.81 |
| Previous exempt complying fund contributions | = | \$0.00 |

The amount exempted is up to the lesser of:

| | | | |
|-----|------------------------------|---|---------|
| i. | $0.04 \times \$480.77 - \0 | = | \$19.23 |
| ii. | $\$4.81 - \0 | = | \$4.81 |

\$4.81 of the employer contribution is exempt from SSCWT. SSCWT is payable on the remaining \$9.61.

Week 2

| | | |
|--|---|----------|
| Total salary or wages | = | \$961.54 |
| Previous exempt contributions | = | \$4.81 |
| Total complying fund contributions | = | \$9.62 |
| Previous exempt complying fund contributions | = | \$4.81 |

The amount exempted is up to the lesser of:

| | | | |
|-----|---------------------------------|---|---------|
| i. | $0.04 \times \$961.54 - \4.81 | = | \$33.65 |
| ii. | $\$9.62 - \4.81 | = | \$4.81 |

\$4.81 of the employer contribution is exempt from SSCWT. SSCWT is payable on the remaining \$9.61.

²¹ Includes week 21 employee contribution.

Example three

William earns \$100,000 a year and is paid monthly. He has just started to contribute 4% of his income to KiwiSaver and receives a 6% employer contribution. He is not a member of a complying superannuation fund.

To calculate whether (or to what extent) the monthly \$500 employer contribution is exempt from SSCWT, the formula on page 31 is used:

Month one

| | | |
|---|---|------------|
| Total salary or wages | = | \$8,333.33 |
| Previous exempt contributions | = | \$0.00 |
| Total KiwiSaver contributions | = | \$333.33 |
| Previous exempt KiwiSaver contributions | = | \$0.00 |

The amount exempted is up to the lesser of:

| | | | |
|-----|--------------------------------|---|----------|
| i. | $0.04 \times \$8,333.33 - \0 | = | \$333.33 |
| ii. | $\$333.33 - \0 | = | \$333.33 |

\$333.33 of the \$500 employer contribution is exempt from SSCWT. SSCWT is payable on the remaining \$166.67 employer contribution.

Month two

| | | |
|---|---|-------------|
| Total salary or wages | = | \$16,666.67 |
| Previous exempt contributions | = | \$333.33 |
| Total KiwiSaver contributions | = | \$666.67 |
| Previous exempt KiwiSaver contributions | = | \$333.33 |

The amount exempted is up to the lesser of:

| | | | |
|-----|--------------------------------------|---|----------|
| i. | $0.04 \times \$16,666.67 - \333.33 | = | \$333.33 |
| ii. | $\$666.67 - \333.33 | = | \$333.33 |

\$333.33 of the \$500 employer contribution is exempt from SSCWT. SSCWT is payable on the remaining \$166.67 employer contribution.

Example four

Josh earns \$50,000 a year and contributes 4% of his income throughout the year to his KiwiSaver scheme. His employer does not contribute to his scheme. At the end of the year the employer pays a bonus of \$2,000. Josh's employment contract states that bonuses may be paid as cash or as an employer contribution to a superannuation scheme. Josh asks that the bonus be paid as an employer contribution towards his KiwiSaver scheme. Josh is not a member of a complying superannuation fund.

To calculate whether (or to what extent) the employer contribution is exempt from SSCWT, the formula on page 31 is used:

Week 52

| | | |
|-------------------------------|---|-------------|
| Total salary or wages | = | \$50,000.00 |
| Previous exempt contributions | = | \$0.00 |
| Total KiwiSaver contributions | = | \$2,000.00 |
| Previous exempt contributions | = | \$0.00 |

The amount exempted is up to the lesser of:

| | | | |
|-----|------------------------------|---|------------|
| i. | $0.04 \times \$50,000 - \0 | = | \$2,000.00 |
| ii. | $\$2,000 - \0 | = | \$2,000.00 |

The entire lump sum employer contribution is exempt from SSCWT.

Example five

Jeremy earns \$70,000 a year and contributes 8% to his complying superannuation fund throughout the year. His employer contributes 2% throughout the year. At the end of the year the employer tells Jeremy that he is going to receive a bonus of \$2,000 to be paid in week 52. Jeremy's employment contract provides that bonuses may be paid as cash or as an employer contribution to a superannuation scheme. Jeremy asks that it be paid as an employer contribution towards his complying superannuation fund.

To calculate whether (or to what extent) the employer contribution is exempt from SSCWT, the formula on page 33 is used:

Week 52

| | | |
|--|---|-------------|
| Total salary or wages | = | \$70,000.00 |
| Previous exempt contributions | = | \$1,373.08 |
| Total complying fund contributions | = | \$5,600.00 |
| Previous exempt complying fund contributions | = | \$1,373.08 |

The amount exempted is up to the lesser of:

| | | | |
|-----|-------------------------------------|---|------------|
| i. | $0.04 \times \$70,000 - \$1,373.08$ | = | \$1,426.92 |
| ii. | $\$5,600 - \$1,373.08$ | = | \$4,226.92 |

\$1,426.92 of the employer contribution is exempt from SSCWT. SSCWT is payable on the remainder of the employer contribution (\$573.08).

Example six

Shayne is a member of a KiwiSaver scheme and a complying superannuation fund. He contributes 2% to both and his employer also contributes 2% to both. He earns \$80,000 a year.

To calculate whether (or to what extent) the weekly employer contribution of \$30.77 is exempt from SSCWT, the formulas on pages 31 and 33 are used:

Week one

Employer contribution to KiwiSaver scheme:

| | | |
|---|---|------------|
| Total salary or wages | = | \$1,538.46 |
| Previous exempt contributions | = | \$0.00 |
| Total KiwiSaver contributions | = | \$30.77 |
| Previous exempt KiwiSaver contributions | = | \$0.00 |

The amount exempted is up to the lesser of:

| | | | |
|-----|--------------------------------|---|---------|
| i. | $0.04 \times \$1,538.46 - \0 | = | \$61.54 |
| ii. | $\$30.77 - \0 | = | \$30.77 |

The entire \$30.77 employer contribution to Shayne's KiwiSaver scheme is exempt from SSCWT.

Employer contribution to complying superannuation fund:

| | | |
|--|---|------------|
| Total salary or wages | = | \$1,538.46 |
| Previous exempt contributions | = | \$30.77 |
| Total complying fund contributions | = | \$30.77 |
| Previous exempt complying fund contributions | = | \$0.00 |

The amount exempted is up to the lesser of:

| | | | |
|-----|------------------------------------|---|---------|
| i. | $0.04 \times \$1,538.46 - \30.77 | = | \$30.77 |
| ii. | $\$30.77 - \0 | = | \$30.77 |

The entire \$30.77 employer contribution to Shayne's complying superannuation fund is exempt from SSCWT.

Example seven

Frances is a member of a KiwiSaver scheme and a complying superannuation fund. She contributes 4% to both and her employer also contributes 4% to both. She earns \$50,000 a year.

To calculate whether (or to what extent) the weekly employer contribution of \$38.46 is exempt from SSCWT, the formulas on pages 31 and 33 are used:

Week one

Employer contribution to KiwiSaver scheme:

| | | |
|---|---|----------|
| Total salary or wages | = | \$961.54 |
| Previous exempt contributions | = | \$0.00 |
| Total KiwiSaver contributions | = | \$38.46 |
| Previous exempt KiwiSaver contributions | = | \$0.00 |

The amount exempted is up to the lesser of:

| | | | |
|-----|------------------------------|---|---------|
| i. | $0.04 \times \$961.54 - \0 | = | \$38.46 |
| ii. | $\$38.46 - \0 | = | \$38.46 |

The entire \$38.46 employer contribution to Frances's KiwiSaver is exempt from SSCWT.

Employer contribution to complying superannuation fund:

| | | |
|--|---|----------|
| Total salary or wages | = | \$961.54 |
| Previous exempt contributions | = | \$38.46 |
| Total complying fund contributions | = | \$38.46 |
| Previous exempt complying fund contributions | = | \$0.00 |

The amount exempted is up to the lesser of:

| | | | |
|-----|----------------------------------|---|---------|
| i. | $0.04 \times \$961.54 - \38.46 | = | \$0.00 |
| ii. | $\$38.46 - \0 | = | \$38.46 |

None of the \$38.46 employer contribution to Frances's complying superannuation fund is exempt from SSCWT.

KiwiSaver Act an Inland Revenue Act

An amendment to the Schedule of the Tax Administration Act 1994 has been made to include the KiwiSaver Act as an Inland Revenue Act.

Application date

The Act comes into force on the date appointed by the Governor-General by Order in Council. The Order in Council specifies that the automatic enrolment rules, the provisions relating to opt-in and the SSCWT exemption applies from 1 July 2007 and everything else in the Act applies from 1 December 2006. Further details of the Order in Council are outlined later in this publication.

CHILD SUPPORT AMENDMENT ACT 2006

Changes in child support legislation have resulted from the enactment of the Child Support Amendment Bill (No.4), introduced on 5 August 2005. The main changes are a partial write-off of late payment penalties – to encourage lapsed payers of child support to begin making regular payments again – and strengthened Inland Revenue powers to investigate liable parents' financial affairs.

The bill received its first reading on 24 November 2005, its second reading on 15 June 2006 and was assented to on 25 September 2006.

All references to “the Act” are to the Child Support Act 1991.

WRITE-OFF OF PENALTY DEBT

Sections 135 to 135O of the Child Support Act 1991

Liable persons who reach an agreement with Inland Revenue to begin making regular payments again, which will include paying something towards the arrears that they owe, will be able to have some of the late payment penalties that they owe written off if they keep to the agreement for 26 weeks.

Background

This major change is a response to the escalation of penalties owed by liable parents. It is intended to serve as an incentive for those who have stopped paying to begin making their payments again.

As at June 30 2006, liable parent debt was \$1,073 million. Of this, core debt was \$433.4 million, with unpaid penalties amounting to another \$640 million. Penalties compound and grow very quickly, so much of the increase in child support debt over recent years is the result of unpaid penalties rather than a dramatic increase in the numbers of parents not paying.

Key features

The previous provisions in the Act relating to penalties have been rewritten to provide a consistent form for the granting of relief from them, distinguishing between those provisions under which relief is discretionary and those under which relief is mandatory.

Sections 135B to 135F describe the discretionary power available to Inland Revenue to grant relief from penalties that already existed, while the new provisions for relief from penalties are contained in sections 135G, 135J, 135K and 135L.

When a liable person has no current or future liability for financial support, all initial 10% penalties have been paid, and all that remain are incremental penalties, section 135G gives the Commissioner of Inland Revenue the discretion to consider writing off those incremental penalties. Inland Revenue must have regard to whether recovery is an inefficient use of resources or whether it would place the liable person in serious hardship as defined in the section.

The provisions for mandatory relief in respect of the initial late payment penalty that were in section 135A are located in new sections 135H and 135I.

When there is continuing liability, or arrears still to pay, the write-off of accrued incremental penalties is mandatory if the terms of a new payment agreement have been complied with. Section 135J provides a formula for the calculation of the amount that is to be written off at 26-weekly review points for new agreements.

The formula is modified in section 135K in respect of arrangements that are already in place, while section 135L gives Inland Revenue the discretion to disregard failures to make a payment under an agreement in specified circumstances.

The mandatory relief from continuing incremental penalties previously in subsection 135(3) is in new sections 135M and 135N.

New section 135O provides for refunds to be made out of a Crown Bank Account and for the new provisions to apply to penalties that are imposed before or after the new legislation comes into force.

Application date

The amendments apply from 26 September 2006.

DETERMINATIONS INITIATED BY INLAND REVENUE

Sections 96Q to 96ZG of the Child Support Act 1991

A further set of amendments allows Inland Revenue to initiate the administrative review process if it considers that the amount of child support payable by a liable parent does not accurately reflect that parent's ability to provide financial assistance for his or her child(ren).

Background

The child support formula is based on taxable income, which can provide an incentive for liable parents who wish to minimise their child support liability to reduce their taxable income. Most liable parents receive a salary, wages or a benefit and thus have limited opportunity

to manipulate their income in order to minimise their child support liability. However, the way in which other liable parents, such as business people and those with investment income, can structure their financial affairs means that the amount of child support they pay may not reflect their capacity to pay. The structures they use may be legal for income tax purposes and may have been adopted for legitimate reasons, such as separating business and private assets. Equally, they may have been adopted to minimise child support liabilities. Whatever the reason for the way in which liable parents structure their financial affairs, if they have the effect of reducing their taxable income, and thus their child support liability, the intent of the Child Support Act, that parents contribute to their children's support according to their capacity to pay, is defeated.

Custodians can already deal with this problem by seeking a departure from an assessment if they consider that special circumstances exist that make the amount payable by the liable parent unfair. The administrative review process is a low-cost, informal process which is carried out by independent people, experienced in law and contracted to Inland Revenue, who follow precedents set by past court cases. However, for a variety of reasons, including a lack of knowledge of the liable parent's current financial position, custodians may fail to seek a departure.

Key features

The intention behind Part 6B is to allow Inland Revenue to identify cases where it considers that liable parents have a greater capacity to contribute to their children's financial support than that arising from basing their liability on their taxable income. Inland Revenue will thus be considering just one of the 10 grounds on which a departure may be granted. However, both the liable parent and the custodian may make an application under the existing provisions in Part 6A on any of the other grounds, and the liable parent may also raise the financial position of the other parent and/or child.

Case selection will occur by applying set criteria (which will not be made publicly available) against information held by Inland Revenue. No distinction in case selection will be made on the basis that the custodian is, or is not, a beneficiary. While information from custodians will be accepted, and fed into the case selection process, it will not be the single determinant of whether a liable parent is selected for review. Likewise, information referred by staff or Review Officers will also feed into the selection process. It is expected that self-employed liable parents will form the bulk of those investigated. However, liable parents who earn salaries or wages will also be included if any evidence is received that their capacity to pay child support is not reflected by their taxable income.

Inland Revenue will use its powers under the Tax Administration Act 1994 to establish what it considers to be a liable parent's full financial position. These powers include:

- requiring liable parents to provide any information that Inland Revenue requires, such as details of any financial interest in any entity which is not reflected in their income tax returns, recent dispositions of assets, and the like;
- if there are doubts about the veracity of the information supplied, requiring the liable parent to make a statutory declaration; and
- if the information is not supplied, seeking a court order to require the liable parent to supply the information.

From the information gathered in this way, plus any other information to which Inland Revenue has access, a summary of the liable parent's income, assets, liabilities, any indirect interests in other tax entities and any other relevant information (such as whether a new partner is financially independent of the liable parent) will be prepared. This summary will be supplied to the liable parent, and a period will be allowed for the liable parent to raise any concerns he or she has with Inland Revenue. An amended summary will be issued if Inland Revenue agrees with the liable parent. Should liable parents not accept that the summary truly represents their financial position, their reasons for holding that view may be set out in writing and this will be attached to the summary.

Once the information is agreed (or a statement of disagreement is received from the liable parent), a notice will be sent to both the custodian and the liable parent advising that Inland Revenue intends to initiate the review process. The liable parent (but not the custodian) will also receive a summary of the information on which Inland Revenue has based its decision. At this stage, the custodian will have three choices: to ask Inland Revenue not to proceed (non-beneficiary custodians only); to become a party to the proceedings; or to accept the outcome of the review without becoming a party to the proceedings.

The usual review process will then follow. Review Officers will consider the summary provided by Inland Revenue, together with any submissions made by the liable parent and/or the custodian, and reach a conclusion based on existing case law as to whether the child support assessment ought to be amended. As with any administrative review, the liable parent and the custodian will each have the opportunity to appear before the Review Officer in person (or by telephone if this is more convenient). The liable parent will still have the choice of not participating but, should this happen, the Review Officer will be able to recommend a departure on the basis of the information contained in the summary. Inland Revenue will not make any further representations to the Review Officer, although Review Officers will be able to seek clarification of any item included in the summary and/or further information from Inland Revenue.

As with any other administrative review, the first step will be to establish that "special circumstances" exist. Once

that test has been met, any adjustment to the child support liability will still need to be “just and equitable” and “otherwise proper”.

As with the existing review process, if it is relevant to the decision, information (other than that relating to a third party, such as the income of the liable parent’s new partner) on which the decision is based may be included in the information supplied to both the liable parent and the custodian.

As departures from the formula assessment are not limited to just the current year, it is envisaged that any departure made under Part 6B will usually be made for a number of years. That is to prevent Inland Revenue having to review the same cases year after year until child support ceases to be payable for the child(ren).

If a liable parent or custodian is unhappy with the outcome of the review, he or she will be able to lodge an appeal in the Family Court against the decision (with the usual appeal rights to a higher court). However, Inland Revenue will not be able to lodge an appeal but will automatically be a party to the proceedings.

Application date

The amendments apply from 26 September 2006.

EXEMPTIONS FROM LIABILITY

Sections 28, 38, 41, 43, 87, Part 5A, sections 90, 108, 109, 112, 115, 119, 152A, 207, 208, 240 of the Child Support Act 1991

Sections 85K and 85L of the Tax Administration Act 1994

Two new exemptions from liability for child support – a permanent exemption for victims of sex offences, and a temporary exemption for liable parents under the age of 16 years – have been incorporated into a new Part 5A. The new Part also restructures the previous provisions relating to exemptions, makes some remedial changes to them and includes new provisions for determinations that exemptions be set aside on application from the payee.

Background

Recent changes to provisions relating to sexual crimes in the Crimes Act 1961 highlighted the potential for victims of sexual crimes to become liable for child support when a child is born as a result.

The two most likely scenarios are:

- A male, who is the victim of abuse by an older female, fathers a child as a result of the sexual act.
- A female victim of abuse gives birth to a child as a result of the sexual act. She later has the child placed in foster care and becomes a liable parent in relation to the child.

In both cases an obligation to pay child support would be likely to add to the trauma already experienced by the victim.

Consideration of that specific issue was a catalyst for reconsidering the consequences for young people in general who become liable for child support at a time when their earning ability is limited through compulsory requirements for attendance at school. The reality is that if their parents do not help them to meet their obligations, they are likely to accumulate a debt that could ultimately act as a barrier to their successful transition into the workforce.

Allowing an exemption for young people does create some conflict with the rights of their children to receive financial support, particularly if the custodian is also under the age of 16 and consequently not eligible for income assistance. However, the exemption is only for a limited period and is considered to be in the long-term interests of both young parents and their children.

Key features

Victims of sex offences

Subpart 4 of new Part 5A provides for exemption of the victim from liability for child support for a child born as a result of an offence under the relevant sections of the Crimes Act 1961. New section 89Z requires Inland Revenue to grant a permanent exemption when satisfied that the requirements for the exemption have been met.

Section 89ZA provides for the exemption to be withdrawn if a conviction is overturned on appeal, but allows a new application for exemption in the event of a new conviction at re-trial.

New sections 85K and 85L have been inserted into the Tax Administration Act 1994 relating to information to be provided by the New Zealand Police and the Ministry of Justice for the purposes of this new exemption.

Liable parents under age 16

Young people are exempt from child support liability until they reach the age 16 years, in accordance with new section 89E, subject to the same income criteria that apply to hospital patients and prisoners. That means they cannot have earned income, although they can receive investment income, such as interest on a bank account, up to the level of the current minimum amount of child support. They can apply for an exemption up until three months after they reach age 16 years.

The new exemptions will not preclude voluntary payments, nor will it be compulsory to apply for them.

Remedial changes

Hospital patients can now apply for an exemption at any time up until three months after discharge.

When an exemption has retrospective effect Inland Revenue will not refund any payments made by the liable person. Such payments will be applied to past or future liability.

Because there are differences in the qualifying criteria, the new Part 5A provides separately for each category of exemption.

There are also a number of amendments to include new references as a consequence of the new Part 5A and related provisions.

Transitional provisions

Sections 46 and 47 of the Amendment Act are transitional provisions relating to exemptions that had been applied for or were in place before its enactment.

Application date

The amendments apply from 26 September 2006.

APPEAL RIGHTS FOLLOWING AN ADMINISTRATIVE DETERMINATION

New sections 103A to 103E of the Child Support Act 1991

Three new appeal rights have been introduced. Two are as a direct consequence of the new provisions for determinations in subpart 3 of Part 5A and in new Part 6B.

The other new appeal right provides greater fairness between applicants and respondents following an administrative review. Previously, unsuccessful applicants could have their case reconsidered by the Family Court, but dissatisfied respondents following a successful administrative review had recourse only through judicial review in the High Court. The new appeal right allows respondents also to have their case reconsidered in the Family Court.

Background

The administrative review process that was introduced into the child support scheme in 1994 was intended to give the Commissioner of Inland Revenue the power to make determinations on the same basis as the Family Court. It was also intended that either party to a review, if unhappy with the outcome of an administrative review hearing, would have the right to apply to the Family Court for a departure order.

Despite that intention, a respondent to a successful application for an administrative determination has been unable to take an application to the Family Court for a departure order without proving his or her own "special circumstances". The fact of the administrative determination itself was not considered by the Court to be a special circumstance. The respondent, therefore, was at a greater disadvantage before the Court than an unsuccessful applicant for a determination, who could apply for a departure order and rely on the same grounds that were rejected by the Commissioner.

Key features

The provisions in section 103B are intended to produce outcomes for respondents similar to those that are possible for applicants for administrative reviews, who can subsequently pursue an application for a departure order in the Family Court.

The new rights of appeal under sections 103A and 103C will be available to both applicants and respondents.

There is a two-month time limit on appeals under these new provisions, although the Family Court may allow an extension of time.

Section 49 of the Amendment Act is a transitional provision relating to certain applications to the Family Court made before 26 September 2006.

Application date

The amendments apply from 26 September 2006.

ACCEPTANCE OF OVERSEAS BIRTH DOCUMENTS

Sections 2, 7, 7A & 235 of the Child Support Act 1991

The amendments allow all countries outside New Zealand to be recognised for the purpose of accepting proof of parentage documents (such as birth certificates) to establish child support liability.

However, Inland Revenue has the discretion to decline to accept overseas documentation on a case-by-case basis when its authenticity is in doubt.

Administrative guidelines will assist delegated staff to determine when documentation is not authentic.

Key features

A definition "overseas jurisdiction" has been inserted into subsection 2(1) of the Act to mean a country, state, territory, province or other part of a country outside New Zealand, and includes the Cook Islands, Niue and Tokelau.

Section 7 defines "parent" for the purposes of the Act. The omission of the word "specified" wherever it occurred, together with the repeal of subsection (5) and subsections 1(a), 1(b) and (2) of section 235, has the effect of removing the requirement to obtain an Order in Council to recognise each individual country from which documentation is to be accepted.

New section 7A allows the Commissioner the discretion to decline to accept documentation on a case-by-case basis when its authenticity is in doubt.

Application date

The amendments apply from 26 September 2006.

OFFSETTING RULES

Sections 34 & 35 of the Child Support Act 1991

The amendments extend the automatic offsetting of liabilities (when two parents are liable to pay child support to each other) to cases where one of the parties goes on to a social security benefit.

Background

The Act provides that when care of a child or children is split or shared between two liable parents, the annual rate of child support payable by one parent may be reduced (offset) by the amount which would be payable by the other parent. Since 1994, offsetting has been available when one parent is a beneficiary, although the non-beneficiary parent had to apply for it in writing.

When offsetting was in place and one parent went on a benefit, the automatic offsetting ceased but the non-beneficiary parent was not made aware of this fact until he or she received a statement showing a higher amount to pay. About a third of non-beneficiary parents did not notice the increase on the statement; they paid their usual amount and incurred a debt and associated penalty.

Key features

A new section 34 has been substituted in the Act to make it clear when offsetting applies in cases of split custody.

Section 35 has been amended by substituting a new subsection (1) to make it clear when offsetting applies in cases of shared custody.

Application date

The amendments apply from 1 November 2006.

ORDER OF PAYMENT APPLICATION

Sections 142 & 143 of the Child Support Act 1991

The amendments give priority to payments of child support owed to custodians for periods when they were not in receipt of a benefit over payments owed to the Crown. This reduces the time that such custodians have to wait before they receive their payments.

Background

The Act sets out the rules for how payments are to be allocated to the amounts due from a liable person. The priority order is based on both the type of financial support due and the period the amount relates to.

The rules are beneficial to liable parents because they reduce the rate at which penalties accrue on outstanding amounts. However, they have also meant that custodians sometimes had to wait for payments they were entitled to receive until after payments due to the Crown had been made.

Key features

The amendments to section 142 of the Act ensure that payments of formula assessment child support owed to a custodian for periods when the custodian was not receiving a social security benefit are given priority over payments that are owed to the Crown.

The amendments to section 143 of the Act ensure that payments of child support in accordance with a voluntary agreement that are owed to a custodian for periods when the custodian was not receiving a social security benefit are given priority over payments that are owed to the Crown.

There is no change to how payments are allocated in the liable parent's account because to do so would carry a risk that the liable parent would be confused by statement changes or deduce the beneficiary status of the custodian.

Application date

The amendments apply from 1 December 2006.

OTHER AMENDMENTS TO THE CHILD SUPPORT ACT 1991 THAT APPLY FROM 26 SEPTEMBER 2006

Section 30 has been amended to correct a mismatch between the date that amendments made to the Child Support Act 1991 and the Social Security Act 1964 in the Taxation (Working for Families Act) 2004 come into effect, and to correct a minor drafting error relating to the indexation of a liable parent's living allowance.

Section 96D(1) has been amended to extend to the Commissioner the powers relating to cessation of orders that have been available only to the Court. It allows administrative determinations to continue in force after a temporary break in liability, when the circumstances that gave rise to the original administrative determination are unchanged and the term of the determination has not expired.

Section 156 has been amended to correct a drafting inconsistency that affects the relationship between the requirements in the Child Support Act for giving copies of deduction notices to liable persons and the provisions in the Tax Administration Act 1994 relating to deemed receipt of notices.

As previously drafted, the law required copies of deduction notices to be issued to payers of child support but not to payers of spousal maintenance. The change of wording from "liable parent" to "liable person" reflects the administrative practice of issuing copies of deduction notices to all liable persons.

Section 215 has been amended so that it authorises regulations to override only the Child Support Act, rather than all primary legislation as previously.

Section 216A has been amended and new sections 216B to 216D inserted so that it is again possible for liable persons to transfer credits to meet their own tax liability. They will also have the added flexibility of being able to request that an available credit be transferred to meet another person's tax or financial support liability.

It is possible to transfer the full amount of a credit when a liable person does not have a liability to make further payments of financial support, or, if there is a future liability, the transfer is limited to the amount that has not been paid to the payee. Once transferred, the amount will be treated as a payment into the account to which it has been credited, and a refund to the person who authorised the transfer.

ORDERS IN COUNCIL

KIWISAVER ACT COMMENCEMENT ORDER

Section 2 of the KiwiSaver Act 2006 enables a number of Orders in Council to be made, bringing different provisions of the Act into force on different dates.

The following sections of the KiwiSaver Act come into force on 1 July 2007:

- sections 10 to 21, relating to the automatic enrolment rules;
- sections 22 and 23, which cover notice requirements for people who start new employment;
- sections 33 to 39, which relate to opting in provisions;
- sections 40 to 43, which require information about the overall KiwiSaver scheme to be provided;
- section 45, which relates to people choosing their own KiwiSaver scheme;
- section 66, which is the obligation to make deductions; and
- those parts of Schedule 3 that relate to section NE 3(2) to (6) of the Income Tax Act 2004, covering the capped exemption from specified superannuation withholding tax for employer contributions to KiwiSaver schemes.

The rest of the Act came into force on 1 December 2006.

The regulations came into force on 1 December 2006.

KiwiSaver Act Commencement Order 2006 (2006/357)

KIWISAVER REGULATIONS

Section 228 of the KiwiSaver Act 2006 allows the Governor-General, by Order in Council, to make regulations for certain purposes. The regulations cover a number of operational matters between the Commissioner of Inland Revenue and KiwiSaver scheme providers by way of scheme provider agreements. Schedule 2 of the Act (which deals with matters to be specified in an application for registration or proposed registration as a KiwiSaver scheme) requires a certificate to be signed by the Commissioner that the provider has entered into a scheme provider agreement.

Before it can register as a KiwiSaver scheme, a provider must enter into a scheme provider agreement with the Commissioner that covers the following matters to the Commissioner's satisfaction:

- the electronic exchange of information and contributions between the Commissioner and the provider, including technical interface requirements;
- the refund of contribution overpayments;
- the use and promotion of the KiwiSaver brand and KiwiSaver trademarks; and
- the use of information that is received by the provider from the Commissioner (for example, tax file numbers) in administering the scheme.

The scheme provider agreement may also cover other matters in addition to those on this list.

The scheme provider agreement may be reviewed every seven years. At least six months before a review date, the Commissioner must give notice to a provider of an impending review. If the Commissioner does not give notice, no review is required. If the Commissioner does give notice that a review is intended, the Commissioner must complete the review and give notice to the provider of his or her decisions on or before the end of the seven-year period. The date by which the review must be completed may be extended if the Commissioner gives at least one month's notice to the provider of the later review date. The seven-year review period may also be made earlier or later by agreement between the Commissioner and the provider.

The regulations also specify:

- the steps that scheme providers must take to verify the identity of a member of a scheme for the purposes of the Financial Transactions Reporting Act 1996;
- the fees payable to the Government Actuary to process applications for exemptions, conversions, registrations, transfers and other regulatory functions under the KiwiSaver Act;
- the process for the Government Actuary to determine whether fees charged by KiwiSaver scheme providers are unreasonable and the matters that the Government Actuary and a Court may have regard to in making such an assessment;
- fees KiwiSaver scheme providers may charge customers; and
- the statistical annual return scheme providers must submit to the Government Actuary.

The regulations came into force on 1 December 2006.

KiwiSaver Regulations 2006 (2006/358)

FEES PAYABLE TO THE GOVERNMENT ACTUARY

Section 30 of the Superannuation Schemes Act 1989 allows the Governor-General, by Order in Council, to make regulations specifying the fees payable to the Government Actuary for the exercise of his or her functions under the KiwiSaver Act.

The fee payable to the Government Actuary for applications to approve transfers under section 9BAA of the Superannuation Schemes Act 1989 (which is a new procedure inserted by the KiwiSaver Act 2006) is set at \$100 for each half-hour spent by the Government Actuary considering the application.

The regulations came into force on 1 December 2006.

Superannuation Schemes (Fees) Amendment Regulations 2006 (2006/359)

STUDENT LOAN SCHEME – REPAYMENT THRESHOLD FOR THE 2007–08 TAX YEAR

The student loan scheme repayment threshold, which sets the income level at which compulsory repayments begin for New Zealand-based borrowers, will increase from its current level of \$17,160 to \$17,784 for the 2007–08 tax year.

The threshold is reviewed annually in December. It has been inflation-adjusted by the annual movement in the September 2006 CPI and rounded up so that it is divisible into whole dollars on a weekly basis.

Student Loan Scheme (Repayment Threshold) Regulations 2006

QUESTIONS WE'VE BEEN ASKED

This section of the *TIB* sets out answers to some enquiries we've received. We publish these as they may be of general interest to readers. A general similarity to items published here will not necessarily lead to the same tax result. Each case should be considered on its own facts.

TAX TREATMENT OF WOODEN SCAFFOLDING PLANKS

Section DA 1(1)(b) of the Income Tax Act 2004

Question

We have recently been asked to clarify the income tax treatment of wooden planks used in scaffolding, ie, planks used as working platforms on metal-framed scaffolding.

Answer

The Commissioner considers that the wooden planks are part of the asset class "scaffolding" and, therefore, the planks must initially be depreciated at the same rate as the scaffolding framework which they are used with. However, as "scaffolding", as described in DEP 1 (Tax Depreciation Rate General Determination Number 1) is the depreciable property, any plank that is replaced because it is no longer useful in deriving assessable income, can be treated as a repair or maintenance (replacement) for income tax purposes. The cost of any replacement wooden planks used in conjunction with scaffolding can be claimed as a deduction in the year of purchase.

Analysis

Tax Depreciation Determination DEP1 under the "Contractors, Builders and Quarrying" industry class sets estimated useful lives, diminishing value and straight-line depreciation rates for scaffolding as follows:

| | Estimated useful life | DV dep'n rate (%) | SL dep'n rate (%) |
|------------------------------------|-----------------------|-------------------|-------------------|
| Scaffolding (aluminium) | 8 | 22 | 15.5 |
| Scaffolding (other than aluminium) | 15.5 | 12 | 8 |

For the income years corresponding to the 2005-06 and subsequent tax years, in respect of scaffolding acquired on or after 1 April 2005, Tax Depreciation Determination DEP54 sets the rates for the above assets as follows:

| | DV dep'n rate (%) | SL dep'n rate (%) |
|------------------------------------|-------------------|-------------------|
| Scaffolding (aluminium) | 25 | 17.5 |
| Scaffolding (other than aluminium) | 13 | 8.5 |

The Commissioner considers wooden planks, used with scaffolding framework, form an essential and integral part of the scaffolding.

There are a number of factors to take into account when considering whether or not an asset is a separate part of a complete asset. These factors consider physical separation, functional separation, completeness and the degree of permanence of the asset under consideration. These factors were considered in respect to "scaffolding", and it was concluded that scaffolding could not function without the planks.

On balance, the degree of physical separation, affixation, and the fact that the planks are readily relocatable tends to suggest that the planks could be separate items of depreciable property. However, the functionality and completeness of scaffolding combined with the degree of permanence leads to the conclusion that scaffolding includes both the framework and the planks. Accordingly, wooden planks used in this manner are not sufficient to be categorised functionally as a separate depreciable item.

It is expected that wooden scaffolding planks will have a shorter estimated useful life than the scaffolding framework. This may be due to a variety of factors, including regular replacement to meet health and safety requirements. As the wooden planks form part of the asset class "scaffolding", they must be depreciated at the rate for the scaffolding they are used in conjunction with. However, where the wooden planks are replaced the cost of replacement can be claimed as a deduction in the year of purchase.

Other types of planks

The Commissioner recognises that wooden planks are used in the construction industry and in other industries for purposes other than as scaffolding and has issued a separate depreciation determination to reflect this: see DEP60 on page 5. In this determination the planks are described as "Builders' planks (wooden)" to distinguish

them from planks used in conjunction with scaffolding. The new depreciation rate will only be applicable where the taxpayer does not choose to claim a current year deduction for the purchases under the “low value asset” provisions of section EE 31 of the Income Tax Act 2004 and the requirements of that section have been met.

GST TREATMENT OF SERVICES PROVIDED IN MAKING VIDEOS AND FILMS IN NEW ZEALAND UNDER CONTRACTS WITH NON-RESIDENTS

We have been asked what is the correct GST treatment of services provided in making videos and films in New Zealand under contracts with non-residents who are not in New Zealand. Would the GST treatment be different if a representative of the film buyer physically collects the completed film in New Zealand?

Background

A number of short films (which could include advertisements, documentaries, and background footage) are shot in New Zealand every year by filmmakers contracted directly by the overseas purchasers, who own the rights to the film, and who pay the filmmakers from overseas. The raw footage is then edited by a director and exported, usually in the form of a video cassette. The cassette is usually exported in a courier pack which has the appropriate postal customs declaration attached. Sometimes, for reasons of valuation or security, a representative of the non-resident purchaser will collect the cassette in New Zealand and take it out of the country as accompanying baggage.

Inland Revenue view

Though the terms of contracts vary, in this scenario the fees paid to the New Zealand filmmakers are zero-rated under section 11A(1)(k) of the Goods and Services Tax Act 1985. The services are supplied to non-residents who are not in New Zealand at the time the services are performed. There is judicial support for this approach in Case T 54 (1998) 18 NZTC 8,410. Although the legislation has since been changed by the enactment of section 11A (2) this will not affect the ability of the contractors to zero-rate their supplies.

We have considered whether the zero-rating is lost if a representative of the purchaser physically collects the cassette in New Zealand. Although the final product is reduced to the medium of a video cassette, which would generally be regarded as “goods” – and goods that are supplied to a non-resident who is in New Zealand usually cannot be zero-rated – it is Inland Revenue’s view that the payment for this supply can still be zero-rated under section 11A(1)(k).

This is because Inland Revenue considers that the essential nature of the supply (again this would depend on the terms of the contract to produce the film to some extent) relates to the filming and editing services that had been performed before the buyer (or representative) arrived in New Zealand. Provided the representative does nothing materially more than take delivery of the completed work, their presence in New Zealand would be considered a “minor presence” and under section 11A(3) such a minor presence does not prevent zero-rating of services provided to non-residents. The same principle will apply to any exported screen production service provided to non-residents. Where non-resident representatives are present in New Zealand at the time of film production, the issue of whether their presence is more than a “minor presence” is a question of fact and degree of the particular circumstances of each situation.

The GST treatment of video and film services provided under contract to non residents for consumption outside of New Zealand is different in nature to contracts with non residents to provide services for consumption in New Zealand by a third party. Accordingly, the GST consequences will depend on the nature of the supply provided, including the terms of the contract, and whether consumption occurs in New Zealand.

REGULAR FEATURES

DUE DATES REMINDER

February 2007

7 End-of-year income tax

- **7 April 2005**

2004 end-of-year income tax due for clients of agents with a March balance date

20 Employer deductions

Small employers (less than \$100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*
- *Employer monthly schedule (IR 348) due*

28 GST return and payment due

March 2007

7 Provisional tax instalments due for people and organisations with a March balance date

20 Employer deductions

Small employers (less than \$100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*
- *Employer monthly schedule (IR 348) due*

30 GST return and payment due

These dates are taken from Inland Revenue's *Smart business tax due date calendar 2006–2007*. This calendar reflects the due dates for small employers only—less than \$100,000 PAYE and SSCWT deductions per annum.

YOUR CHANCE TO COMMENT ON DRAFT TAXATION ITEMS BEFORE THEY ARE FINALISED

This page shows the draft binding rulings, interpretation statements, standard practice statements and other items that we now have available for your review. You can get a copy and give us your comments in these ways.

By internet: Visit www.ird.govt.nz

On the homepage, click on “Public consultation” in the right-hand navigation bar. Here you will find links to drafts presently available for comment. You can send in your comments by the internet.

By post: Tick the drafts you want below, fill in your name and address, and return this page to the address below. We’ll send you the drafts by return post. Please send any comments in writing, to the address below. We don’t have facilities to deal with your comments by phone or at our other offices.

Name _____

Address _____

Draft standard practice statement

ED 0093: Notification of a pending audit or investigation

Comment deadline

28 February 2007

Draft question we’ve been asked

QB0057: Aircraft overhaul reserves— deductibility

Comment deadline

31 March 2007

Draft interpretation statement

IS0064: Residential rental properties—depreciation of items of depreciable property

Comment deadline

31 March 2007

No envelope needed—simply fold, tape shut, stamp and post.

Put
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here

Public Consultation
National Office
Inland Revenue Department
PO Box 2198
Wellington

