

6 May 2010

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

To the Chair of the Select Committee,

## **WORKPLACE SAVINGS NZ Submission on the Securities Trustees and Statutory Supervisors Bill 2010**

We wish to submit the attached in response to the Securities Trustees and Statutory Supervisors Bill 2010.

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

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

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

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

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

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I would be pleased to discuss our comments or answer any queries in relation to the submission.

Thank you for the opportunity to make this submission.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Bruce Kerr', with a large loop at the start and a long horizontal stroke.

Bruce Kerr  
**Executive Director**

**Workplace Savings NZ**

**Submission to the**

**Commerce Select Committee**

**on the**

**Securities Trustees and Statutory**

**Supervisors Bill (“the Bill”)**

**May 2010**

# The Workplace Savings NZ Submission

## Summary

The Bill as drafted impacts on:

- Trustees of debt securities,
- Statutory supervisors of participatory securities, and
- Unit trustees of unit trusts.

The membership of Workplace Savings NZ comprises workplace superannuation and KiwiSaver schemes, and organisations and individuals representing the various product and service providers for workplace savings arrangements. The Bill as drafted does not, therefore, apply directly to the membership of Workplace Savings NZ as the trustees of superannuation and KiwiSaver schemes are not covered.

However, recent comments have suggested that the Government will, or should, consider extending the scope of the Bill, most particularly in respect of KiwiSaver schemes. Similarly, the MED expressed a view during the Review of Financial Product Providers in 2006/7 that consideration be given to introducing a common governance regime with superannuation schemes covered in the same way as, for example, unit trusts.

In the circumstances, Workplace Savings NZ wishes to make a general submission to the Committee. We think that it is important for the particular circumstances that apply to superannuation and KiwiSaver schemes to be included in any debate relating to the governance regime that will lead to the most effective regime from an investor's perspective to be put in place.

We would be pleased to work with officials in formulating appropriate wording where this might prove helpful.

## The Submission

### 1. **Governance regime for Superannuation Schemes (excluding KiwiSaver Schemes)**

- 1.1. Governance of a superannuation scheme is, under current legislation, entirely the responsibility of the scheme trustee. While the trustee may, and invariably will, delegate activity and functions to one or more managers and/or investment managers, responsibility and accountability for the actions of the managers remain with the trustee.
- 1.2. This differs from other similar managed fund type investment arrangements (e.g. unit trusts) where the responsibilities of the trustee and those of the managers are formally separated.
- 1.3. It has been suggested that the split responsibilities model (as applicable for unit trusts) is a preferable model as it provides for the trustee to act in a supervisory capacity over the manager.
- 1.4. Superannuation Schemes are subject to oversight from the Government Actuary's office. The Government Actuary has provided the regulatory supervisor function that is now proposed, in conceptual terms, to apply to other investment securities.
- 1.5. There are likely to be advantages in having a single governance regime applied to all similar security types.

- 1.5.1. We are not, however, aware of any compelling evidence suggesting that the split responsibilities model would provide any greater protection to investors in registered superannuation schemes than the regime currently in place;
- 1.5.2. Superannuation scheme legislation and case law builds around the concept of the trustee having full responsibility. Scheme trust deeds have been drafted accordingly;
- 1.5.3. Schemes, and therefore scheme members, would face significant costs and upheaval if the governance regime is to be changed;
- 1.5.4. It would be essential to allow sufficient time for trust deeds and associated disclosure documentation to be replaced if the current regime is replaced. This would be a huge task and needs to recognise the limited resources that are available in NZ to complete this work – in addition to other extensive changes that providers are faced with.
- 1.5.5. In our view, given the existing protections under trust law and the effective supervision by the Government Actuary, there is no evidence to support the significant cost of changing the governance model for superannuation schemes will be outweighed by any benefit at the present time.

## **2. Improving the regime**

- 2.1. The Explanatory Note to the Bill highlights the main issues with the current regime (as applying to the split responsibilities model). Some of these issues could apply to some superannuation schemes:
  - 2.1.1. a lack of capability or capacity; and
  - 2.1.2. weak trust deeds, with insufficient minimum protections for investors.
- 2.2. On the other hand, some of the issues listed are not likely to apply, in particular there should be no lack of role clarity;
- 2.3. However, the existing disciplines under trust law, and the close supervision by the Government Actuary, have been effective to date.
- 2.4. As observed above, the Explanatory Note to the Bill highlights the main issues with the current regime:
- 2.5. One of these issues is a lack of role clarity that applies under the split responsibilities model;
- 2.6. We do not, however, note anything in the Bill that will assist in providing any clarity of roles other than in relation to reporting requirements;
- 2.7. A fundamental requirement for any security that operates under a trust structure is that trustees and any managers have a fiduciary duty of care towards all investors on both an individual and collective basis although there are, on occasions, conflicts between the interests of an individual investor versus those of investors collectively;
- 2.8. We believe that it would be helpful for the respective roles of the trustee and the managers to be defined in general terms as a guide to determining how these duties are expected to be equitably discharged.

## **3. Licensing by the Securities Commission.**

- 3.1. The granting of a licence would be based on an assessment related to a number of characteristics, including:
  - 3.1.1. must be of good character;
  - 3.1.2. experience, skills and qualifications;

- 3.1.3. various others.
- 3.2. As noted in the previous sections, Workplace Savings NZ does not see a need for a separate supervisory model to be extended to the existing single responsible entity model that applies to superannuation, which we believe is working effectively. However if a requirement for licensing were to be extended to superannuation scheme trustees, we would like the following points taken into account:-
- 3.2.1. We note that the Bill currently requires that applicants would need to be bodies corporate - that this is already the requirement in respect of unit trusts. This is not the case for trustees of superannuation schemes. Although many schemes will use a corporate trustee there is no legislative requirement to do so.
- 3.2.2. Scheme trust deeds will include requirements for trustees. It would not be uncommon for individuals to be appointed to be trustees of workplace superannuation schemes. Similarly, it is not uncommon for 'stand alone' workplace superannuation schemes (those established for the employees of a single employer or group of associated employers) to include a requirement for a trustee (or trustees) to be elected by members;
- 3.2.3. This is often seen as an advantage for a workplace savings scheme as it enables members to feel that they have a role to play in the governance of the scheme. The Superannuation Schemes Act 1989 entrenches existing rights of participation by members in scheme governance;
- 3.2.4. We believe that any change to the governance regime for workplace superannuation schemes should continue to recognise the value of individuals being appointed or elected to be trustees;
- 3.2.5. We suggest that, in considering the licensing of trustees of workplace superannuation schemes (if it is proposed to extend the scope of the trustee licensing regime) where the trustees include individuals, the trustees should be assessed as a group. I.e. the applicant trustee should be an unincorporated body called "the XYZ superannuation scheme trustee" with the individuals considered in the same way as directors of a corporate body would be. Critically, any trustee licensing regulation must allow for the continuing appointment of lay trustees by scheme members or member representative bodies.

#### **4. KiwiSaver Schemes**

- 4.1. Workplace Savings NZ recognises that there are important differences between KiwiSaver schemes and other 'traditional' workplace superannuation schemes,
- 4.2. The reality for most KiwiSaver schemes is that they operate, from a governance perspective, in much the same way as is implied by the split responsibilities model used for unit trusts.
- 4.3. We understand the rationale behind the recent government proposals to change the "Issuer" of KiwiSaver schemes to be the manager and not the trustee, with the trustee moving into a statutory supervisor role. Given this proposed change we accept the logic of the move to extend this change to "retail" KiwiSaver schemes.
- 4.4. However, we endorse the Minister of Commerce's comments that this change should not apply to "non-retail" KiwiSaver schemes which should continue to operate under the same governance structure as other registered superannuation schemes.
- 4.5. We believe that any change to the legislation needs to be carefully considered, and Workplace Savings NZ would be happy to work with officials in this area.

## **5. Period of Appointment**

- 5.1. We note that the Bill as drafted provides that a license can be granted for a maximum of 5 years. While we can appreciate that it may be desirable for the Securities Commission to be able to issue a license for a restricted period in certain circumstances, it is difficult to see the value of such a restriction built in to the legislation. This observation applies equally to trustees of securities currently contemplated by the Bill and to trustees of superannuation schemes.
- 5.2. It is submitted that, in general, licenses should be granted on an open ended basis. Regular reporting requirements to the Securities Commission (or other suitable regulator, such as the Financial Markets Authority) should be designed such that the regulator is able to determine whether or not a license should be revoked – with adequate warning and the ability to remedy perceived deficiencies. The circumstances that the regulator should consider would usefully be included in regulations so that trustees have visibility of requirements.
- 5.3. Replacing a trustee, or trustees, is often a time consuming and costly process, with costs ultimately falling on the investors. Where a trustee, or trustees, are to be replaced it is important that any consequences for members are properly considered, in particular with suitable relief from any need to update disclosure documents.

**Ends.**