

**SUBMISSION TO THE FINANCE AND EXPENDITURE SELECT
COMMITTEE ON THE TAXATION (INTERNATIONAL TAXATION, LIFE
INSURANCE, AND REMEDIAL MATTERS) BILL**

Note: This submission relates to the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008. It is addressed to the Finance and Expenditure Select Committee on the basis that it is primarily concerned with KiwiSaver, and therefore falls within the ambit of that Committee to consider

Who is making this submission?

- 1 This submission is made by the Association of Superannuation Funds of New Zealand Incorporated (ASFONZ).
- 2 ASFONZ can be contacted at the following address:

Bruce Kerr
Executive Director
ASFONZ
PO Box 19194
Wellington.

- 3 ASFONZ is an independent national, non-profit organisation founded in 1969. Its current membership comprises workplace superannuation schemes, employers involved in workplace savings, and various product and service providers for employment-related savings arrangements. The main objective of ASFONZ is to promote workplace savings in New Zealand.

Summary of submission

- 4 The changes brought about by sections 5, 7, 8 and 10 of the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008 extended the grounds for personal grievance claims. These changes have impacted employers in ways which go beyond the Government's stated objectives.
- 5 The unintended effects are perverse for employers who contribute to employer superannuation schemes outside the KiwiSaver regime. If left unaddressed, the changes introduced may result in a number of employers ceasing to make subsidised superannuation arrangements available through the workplace. This in turn would result in a reduction in the overall level of retirement savings made through the workplace.

Preferred solution

- 6 The amending legislation should be repealed and the KiwiSaver Act revised to prohibit salary or wages being reduced by compulsory employer contributions to a KiwiSaver scheme or a complying superannuation fund. In other words, there will be no breach as long as an employee's employment agreement – entered into on or after a specified date - results in compulsory employer contributions being made over and above salary or wages. The solution would simply be to require section 101B(1) to be observed under all agreements entered into after a specified date, and remove the express provisions from the ambit of the Employment Relations Act altogether.

Alternative solution

- 7 If ASFONZ's preferred solution is not accepted, specific amendments should be made to make plain that employers can lawfully:

7.1 offset other superannuation contributions against any employer contributions payable to a KiwiSaver scheme or a complying superannuation fund. On the assumption that Government remains committed to prohibiting 'total remuneration' arrangements, ASFONZ proposes that this offset only be allowed where the employer's other superannuation contributions are made over and above salary or wages; and

7.2 agree to any form of sacrifice arrangement that does not involve an employee trading off salary or wages against compulsory employer contributions.

- 8 Also, the extended grounds for a personal grievance claim under the new Employment Relations Act provisions should only apply (in the case of a complying superannuation fund) in respect of compulsory employer contributions that are made to that fund.

- 9 Clarification is also required around what is intended to be caught within the concept of variations of employment agreements to ensure that mere increases in salary or wages, or other variations unrelated to compulsory employer contributions, are not caught.

- 10 We **attach** suggested drafting – addressing firstly the preferred, then the alternative, solution - to address the issues raised in this submission.

Objectives of sections 5, 7, 8 and 10 Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008

- 11 The personal grievance provisions in the Employment Relations Act 2000 were recently extended and consequential amendments were made to the KiwiSaver Act 2006. The stated objectives of these changes were to ensure that:

11.1 employers do not reduce one employee's pay (relative to another) by reason of the employee joining KiwiSaver or a complying superannuation fund (and qualifying for compulsory employer contributions); and

11.2 employers cannot "pocket" employer tax credits while at the same time reducing an employee's pay by the amount required to meet compulsory employer contributions to KiwiSaver or a complying superannuation fund.

How were those objectives sought to be achieved?

12 The list of grounds for a personal grievance has been extended. A personal grievance claim can now be brought where an employee's employment is adversely affected because of membership of a KiwiSaver scheme or complying superannuation fund (new section 103(1)(h), Employment Relations Act).

13 An "adverse affect" on an employee's employment can arise where:

13.1 the employee is a member of a KiwiSaver scheme or a complying superannuation fund;

13.2 the employer of the employee refuses to offer or afford the same terms of employment, conditions of work or fringe benefits as are made available to other employees of the same or substantially similar qualifications, experience or skills; and

13.3 the reason (in whole or in part) for the different treatment is that the employee is a member of a KiwiSaver scheme or complying superannuation fund.

(See section 110A(1), Employment Relations Act).

14 In particular:

14.1 if salary or wages of one employee are less than salary or wages of a comparable employee; and

14.2 the reason (in whole or in part) is that the employer has reduced the first employee's salary or wages to take into account compulsory employer contributions to KiwiSaver or a complying superannuation fund;

then this will be grounds for a personal grievance. (See section 110A(2), Employment Relations Act).

What are the problems created by these law changes?

- 15 The key issue is that the law changes leave uncertain whether an employer can offset the other superannuation scheme contributions it makes against compulsory employer contributions to a KiwiSaver scheme or complying superannuation fund. The issue is – does the law change render such an offset grounds for a personal grievance?
- 16 A further uncertainty is whether an employer can agree with an employee to sacrifice salary or other superannuation scheme contributions in favour of employer contributions to KiwiSaver which are over and above the compulsory level.
- 17 Many employers have set up, and wish to continue, a facility for an employee to choose whether he or she:
- 17.1 joins and has employer contributions made solely to the employer's superannuation scheme; or
- 17.2 joins and has employer contributions made to both that scheme and KiwiSaver.
- 18 Other employers allow salary to be sacrificed in exchange for additional contributions to be made to KiwiSaver (over and above compulsory employer contributions).
- 19 We set out below examples of the choices that employers typically offer. Importantly, in each example compulsory employer contributions are provided over and above salary or wages. That amount must be contributed to KiwiSaver or a complying superannuation fund. It cannot be taken as cash.

Example 1 – Employer's contribution to employer's superannuation scheme offset by 4% employer contributions to KiwiSaver

An employer has been offering a superannuation scheme for many years. The employer pays all the employees salary or wages of \$100. If the employee joins the employer's superannuation scheme, the employer will contribute an amount equal to 10% of the employee's salary to that scheme. This is on top of the salary of \$100. If the employee also joins KiwiSaver, the employer's contribution to the employer's superannuation scheme will reduce from 10% to 6%, but the remaining 4% will be paid by the employer to KiwiSaver (with the 4% including compulsory as well as 'voluntary' employer contributions to KiwiSaver).

The comparison between employees who join KiwiSaver and those who don't can be summarised as follows:

	Employee who joins KiwiSaver	Employee who does not join KiwiSaver
Salary	100	100
Employer contribution to employer's superannuation scheme	6	10
Employer contribution to KiwiSaver	3	-
Compulsory employer contribution to KiwiSaver	1	
Total	110	110

For ease of illustration, in this and other Examples we ignore the possibility of bonuses, overtime and other additional payments to the employee.

Does the employee who joins KiwiSaver have the same terms of employment and conditions of work as the employee who does not join KiwiSaver? There is now an issue as to whether the employee who joins the employer's superannuation scheme and KiwiSaver should get the full 10% contribution to the employer's scheme *as well as* the contribution of 4% to KiwiSaver (i.e. total 14%). Clearly, that would increase the employer's costs. We do not think that this result was the objective of the legislation. However, the wording of the legislation (in particular section 110A(1)(b)) leaves the issue in doubt.

Example 2 – Employer's contribution to employer's superannuation scheme offset by amount of compulsory employer contribution to KiwiSaver

This variation of Example 1 is possibly the most common type of example. The employer pays all the employees salary or wages of \$100. If the employee joins the employer's superannuation scheme, the employer will contribute (on top of salary or wages) an amount equal to 10% of the employee's salary or wages to that scheme. However, the employer will reduce that contribution by the amount of any compulsory employer contribution payable to KiwiSaver if the employee also joins a KiwiSaver scheme.

The comparison between employees who join KiwiSaver and those who don't can be summarised as follows:

	Employee who joins KiwiSaver	Employee who does not join KiwiSaver
Salary	100	100
Employer contribution to employer's superannuation scheme*	9	10
Compulsory employer contribution to KiwiSaver*	1	-
Total	110	110

**Note that under current KiwiSaver rules, the compulsory employer contribution rate will increase over time to 4% (i.e. in this example, from \$1 to \$4), with a corresponding reduction in the employer contribution to the employer's superannuation scheme. Under this example the compulsory employer contribution to KiwiSaver plus the employer contribution to the employer's superannuation scheme will always add up to \$10 (i.e. where the compulsory employer contribution rate is \$4, the employer's contribution to the employer's superannuation scheme is \$6).*

As with Example 1, there is now an issue as to whether the employee who joins the employer's superannuation scheme and KiwiSaver should get the full 10% contribution *as well as* a contribution to KiwiSaver at the compulsory employer contribution rate (currently 1%, but increasing over time to 4%).

Example 3 – Salary sacrifice in exchange for employer's non-compulsory contribution to KiwiSaver. Compulsory contribution still paid on top of original salary or wages level

An employer pays all the employees salary or wages of \$100. An employee joins KiwiSaver and is offered employer contributions of \$4. The employee elects to sacrifice salary in exchange for the employer making "non-compulsory" contributions to KiwiSaver (\$3). Compulsory contributions to KiwiSaver are (currently) made at the rate of \$1.

The comparison between this employee who joins KiwiSaver and the employees who don't join KiwiSaver is as follows:

	Employee who joins KiwiSaver	Employee who does not join KiwiSaver
Salary	97	100
Employer's contribution to KiwiSaver (but not including compulsory contributions)*	3	-
Compulsory employer contribution to KiwiSaver*	1	-
Total	101	100

**Note that under current KiwiSaver rules, the KiwiSaver compulsory employer contribution rate will increase over time to 4%. Under this example the employer's KiwiSaver "non-compulsory" contribution will correspondingly decrease over time from \$3 to \$0. As the employer's "non-compulsory" KiwiSaver contribution decreases, the salary will increase. Salary plus employer's "non-compulsory" KiwiSaver contributions will always equal 100. The compulsory employer contribution (\$1 now and increasing to \$4 over time) will be paid on top of the salary package of \$100.*

There is an issue whether the salary sacrifice arrangement breaches section 110A on the basis that the salary of the KiwiSaver joiner is less than for the employee who does not join KiwiSaver, even though the KiwiSaver has voluntarily agreed to sacrifice salary in favour of employer contributions to KiwiSaver.

20 Importantly, in each of these examples:

- 20.1 employees are given a choice of a scheme or schemes to which employer contributions are to be made;
- 20.2 compulsory employer contributions are made over and above salary or wages; and
- 20.3 the contributions must be made to a superannuation scheme (i.e. KiwiSaver and/or other superannuation schemes) – they can't be taken as a cash amount.

How should the problems be resolved?

Preferred solution

- 21 The amending legislation should be repealed, and the KiwiSaver Act revised simply to prohibit salary or wages being reduced by compulsory employer contributions to KiwiSaver or a complying superannuation fund. In other words, there will be no breach as long as an employee's employment agreement – entered into on or after a specified date - results in compulsory employer contributions being made over and above salary or wages.
- 22 Our preferred solution would result in the express statutory provisions addressing compulsory employer KiwiSaver contributions being limited to the KiwiSaver Act. Any right of an employee to bring a personal grievance claim as a result of any failure by an employer to make compulsory contributions in addition to salary or wages would then be left to general rights under the Employment Relations Act without any express provision to that effect. In our view this is a far more appropriate legislative response to the issue. Suggested wording is **attached**.

Alternative solution

- 23 If ASFONZ's preferred solution is not accepted, ASFONZ strongly supports specific amendments being made to the recent amending legislation which would put beyond doubt that all of the examples outlined above are lawful.
- 24 In relation to Examples 1 and 2, where:
- 24.1 employees have a choice of schemes (KiwiSaver and/or otherwise) to which employer contributions can be made;
- 24.2 the employer contributions are made over and above salary or wages; and
- 24.3 the employer contributions cannot be taken by the employee as a cash amount,

ASFONZ does not believe that there should be any impediment to an employer offsetting the other superannuation contributions the employer is making against employer contributions to KiwiSaver (or a complying superannuation fund).

- 25 If this is not accepted in principle, the consequence will be either:
- 25.1 employers will be forced to pay employer contributions for employees who join KiwiSaver *as well as* the full employer contributions to the other scheme(s) that the employers offer. Remembering that as all these contributions are on top of "salary or wages", this additional cost would clearly be untenable for many employers; or

- 25.2 employers will close existing superannuation schemes. This would be a perverse outcome in an environment where the Government has sought to promote retirement savings. This is particularly the case where many of the employer superannuation schemes offer far more generous employer contributions than KiwiSaver.
- 26 In relation to Example 3, ASFONZ strongly supports any form of salary sacrifice that does not involve an employee trading off salary or wages against compulsory employer contributions. The key point is that as long as the compulsory employer contributions themselves are not tradable for salary or wages, contributions in excess of the compulsory level should be able to be made by virtue of salary sacrifice arrangements.
- 27 We **attach** a suggested amendment to section 110A to remove the uncertainty about the legality of the offsetting and salary sacrifice illustrated by the examples above (see our proposed section 110A(4), Employment Relations Act).

Variations of employment agreements

- 28 Section 5 of the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008 states that the extended grounds for personal grievance apply to variations of employment agreements entered into before 2 September 2008, if the variations were made on or after 2 September 2008.
- 29 We strongly submit that it should be made plain (to avoid any doubt) that the “variations” contemplated here are limited to variations which directly relate to membership of, or compulsory employer contributions to, KiwiSaver or a complying superannuation fund. Variations that are unrelated to these matters (for example, the inclusion of a carpark; a mere salary increase) should not trigger the employment agreement becoming subject to the extended personal grievance provisions.
- 30 Suggested wording to amend section 5 is included at the end of this submission.

Complying superannuation funds

- 31 Section 110A of the Employment Relations Act provides that an “adverse effect” on an employee’s employment can arise where an employer makes a different offer by reason of the employee being a member of a KiwiSaver scheme or a *complying superannuation fund*.
- 32 A *complying superannuation fund* is a superannuation fund that is approved as a complying superannuation fund by the Government Actuary under section 35 of the Superannuation Schemes Act 1989. The fund must contain provisions that comply with the complying fund rules set out in Schedule 28 of the Income Tax Act 2007.

- 33 Two things need to be addressed:
- 33.1 almost all complying superannuation funds have a “locked-in” and a “non locked-in” part of the scheme. Section 110A should not capture membership of the part of a complying superannuation fund that is not subject to KiwiSaver-style lock-in rules; and
 - 33.2 nor should section 110A apply to employer contributions to a complying superannuation fund that are *not* compulsory employer contributions because of the section 101D(5) of the KiwiSaver Act provisions. This is the case even where there may be a subsequent variation to the employment agreement.
- 34 The objective of the recent changes was to address offsetting of employees’ salary or wages against compulsory employer contributions.
- 35 If the law does apply to contributions to a complying superannuation fund that are not compulsory employer contributions, the consequences are:
- 35.1 a personal grievance may be taken on the grounds set out in section 110A(1) by an employee who is a member of a part of a scheme which has nothing to do with KiwiSaver or KiwiSaver-style benefits;
 - 35.2 a pre-1 April 2008 joiner of a complying superannuation fund who has elected a “lock-in” may also bring a grievance on the grounds set out in section 110A(1) despite their employer having no obligation to make compulsory employer contributions in respect of that member.
- 36 ASFONZ does not consider that either was an intended result.
- 37 Simple changes to address these points, should the recent amendments be retained, are **attached** to this submission (see our proposed clarifications to section 110A(1), Employment Relations Act).

PREFERRED SOLUTION – SUGGESTED AMENDMENTS

Repeal sections 5, 7, 8 and 10 of the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008. Then make the following amendments to section 101B of the KiwiSaver Act 2006.

SUGGESTED AMENDMENTS TO SECTION 101B, KIWISAVER ACT

101B. Compulsory contributions must be paid on top of gross salary or wages except to extent that parties otherwise agree after 13 December 2007

- (1) The purpose of this section is to ensure that, for contractual arrangements of parties to an employment relationship (as defined in section 4(2) of the Employment Relations Act 2000), compulsory contributions are paid in addition to an employee's gross salary or wages described in section 101D(3).
- (2) The contractual arrangements of parties to an employment relationship must not have the effect of defeating the purpose of this section described in subsection (1).
- (3) A contractual term or condition has no effect to the extent to which it is contrary to the purpose of this section described in subsection (1).
- (4) However, for the period on and after 13 December 2007 to the date after the date on which the [insert name of Amendment Act making this change] receives the Royal assent,—
 - (a) parties to an employment relationship are free to agree contractual terms and conditions that ignore the purpose of this section described in subsection (1); and
 - (b) to the extent of such agreement described in subparagraph (a), subsections (1) to (3) do not apply.
- (5) For the avoidance of doubt, the duty of good faith described in section 4 of the Employment Relations Act 2000 always applies when parties to an employment relationship bargain for terms and conditions relating to compulsory contributions and associated matters.
- (6) In this section, **compulsory contributions** means an amount of employer contributions equal to the amount of compulsory employer contributions that would be required by this subpart in the absence of section 101D(5)(a).

ALTERNATIVE SOLUTION – SUGGESTED AMENDMENTS

SUGGESTED AMENDMENTS TO SECTION 110A, EMPLOYMENT RELATIONS ACT 2000

110A Membership of KiwiSaver scheme or complying superannuation fund

- (1) For the purposes of section 103(1)(h), an employee's employment is adversely affected if—
- (a) the employee is a member of a KiwiSaver scheme within the meaning of section 4 of the KiwiSaver Act 2006 or a complying superannuation fund within the meaning of section YA 1 of the Income Tax Act 2007; and
 - (aa) the employer is required to make compulsory contributions (within the meaning of section 101B(6) of the KiwiSaver Act 2006) to that scheme or fund in relation to the employee; and
 - (b) the employee's employer refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills (**comparable employees**) employed in the same or substantially similar circumstances; and
 - (c) the reason (wholly or in part) for the employer doing any of those things is that the employee is a member of a KiwiSaver scheme or a complying superannuation fund (or the part of it) to which compulsory contributions described in section 110A(1)(aa) are payable.
- (2) Without limiting subsection (1), an employee's employment is adversely affected if—
- (a) the employee's salary or wages are less than the salary or wages of other comparable employees employed by the employee's employer; and
 - (b) the reason (wholly or in part) for the situation described in paragraph (a) is that the employer has taken into account the compulsory contributions (within the meaning of section 101B(6) of the KiwiSaver Act 2006) the employer is required to make in relation to the employee.
- (3) To avoid doubt, for the purposes of subsection 2(a), an employee's salary or wages—
- (a) do not include any amount that recognises (wholly or in part) compulsory contributions (within the meaning of section 101B(6) of the KiwiSaver Act 2006) made by the employer in relation to the employee; but

- (b) do include deductions made by an employer on behalf of the employee, being the employee's contributions to a KiwiSaver scheme or a complying superannuation fund.

(4) For the purposes of section 110A(1)(b), **terms of employment** and **conditions of work** do not include:

(a) membership entitlements under a registered superannuation scheme to which employer's superannuation contributions (within the meaning of section 4(1) of the KiwiSaver Act 2006) are made or credited which:

(i) are not compulsory contributions within the meaning of section 101B(6) of the KiwiSaver Act 2006; and

(ii) are paid in addition to the employee's gross salary or wages described in section 101D(3) of the KiwiSaver Act 2006; or

(b) a reduction in salary or wages at the employee's request in exchange for employer's superannuation contributions (within the meaning of section 4(1) of the KiwiSaver Act 2006) made or credited to a registered superannuation scheme or KiwiSaver scheme, to the extent those employer's superannuation contributions are not compulsory contributions within the meaning of section 101B(6) of the KiwiSaver Act 2006.

**SUGGESTED AMENDMENTS TO SECTION 5, EMPLOYMENT
RELATIONS (BREAKS, INFANT FEEDING, AND OTHER MATTERS)
AMENDMENT ACT 2008**

5 Application

- (1) The amendments made by sections 7 and 8, to the extent that they relate to terms and conditions in employment agreements, -
 - (a) apply to employment agreements entered into on or after 2 September 2008; and
 - (b) do not apply to employment agreements entered into before 2 September 2008; and
 - (c) apply to variations of employment agreements entered into before 2 September 2008, if the variations were made on or after 2 September 2008.

- (2) The amendments made by sections 7 and 8, to the extent that they relate to other matters, apply –
- (a) only to matters occurring on or after 2 September 2008; and
 - (b) whether or not an employee's employment agreement was entered into before 2 September 2008.
- (3) For the purposes of section 5(1)(c), **variations of employment agreements** means variations of employment agreements that relate directly to membership of, or the making of compulsory contributions (within the meaning of section 101B(6) of the KiwiSaver Act 2006) to, KiwiSaver schemes or complying superannuation funds.