

**Submission on the Taxation (FBT, SSCWT and
Remedial Matters) Bill**

The Association of Superannuation Funds of New Zealand Inc.

31 May 2000

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The Association of Superannuation Funds of New Zealand Inc.

This submission is made by The Association of Superannuation Funds of New Zealand Inc. (“ASFONZ”) on behalf of employer sponsored superannuation schemes. ASFONZ is a national non profit organisation whose membership of approximately 200 comprises the major employer/employee superannuation schemes as well as representatives of the superannuation schemes’ actuarial, legal, insurance, investment and administration in New Zealand.

ASFONZ’s mission is to promote employment-related superannuation in New Zealand. It will achieve that mission by:

- Being the recognised voice;
- Representing the interests of trustees and employer/employee groups in areas such as economic, political and public education; and
- Supporting members through education and information on industry matters.

ASFONZ was established in 1969 at a time of considerable change. Although a variety of superannuation and pension schemes had been established many years before this they operated in isolation. The schemes, as such, had no real voice. The creation of the association provided an important vehicle for increasing understanding among sponsors and managers of schemes of the issues that they were facing. It enabled schemes to stand together with a representative voice to safeguard the interest of all concerned – members, beneficiaries, trustees and employers.

The latest statistics available published in the Government Actuary’s Report for the year ended 30 June 1999 show that there are 952 registered employer schemes with total assets of \$10.4 billion and 279,800 members. These figures include the National Provident Fund but exclude the Government Superannuation Fund.

There are also 22 master schemes with assets of \$7.4 billion and 17,300 members. A number of these master trust schemes include employment sponsored arrangements.

Executive Summary of Submissions

1. Fundamental Premise of the Withdrawal Tax

Issue: Policy Process

Submission 1

That Clause 6 (Containing sub-part CL) and clause 9 (containing section NE 2AA) be struck out of the Bill on its report back by the Select Committee.

Submission 2

That any proposed amendments to the SSCWT regime as it applies to employer superannuation contributions be undertaken through the generic tax policy process.

Submission 3

That the proposal to introduce a withdrawal tax be abandoned in favour of consideration of a taxing regime which removes the inequities and disincentives faced by taxpayers on a marginal rate of 19.5% by taxing contributions at the appropriate tax rate.

2. Policy and Legislative Design

Issue: Application of the 5% Withdrawal tax

Submission 1

That the 5% withdrawal tax should only apply to taxpayers deriving gross income over \$60,000 per annum at the time at which the employer contribution is made.

Submission 2

That the 5% withdrawal tax only apply to increases in contributions from 1 April 2000 levels.

3. Application Date

Issue: Legislation is retrospective in effect

Submission

That the withdrawal tax be introduced to tax increases in employer superannuation contributions from 1 April 2001.

Issue: Timing issue regarding prospectuses and investment statements

Submission

That a transitional period to 31 December 2000 be included in the bill to allow schemes to update prospectuses and investment statements and exempt the withdrawal tax from applying to members who leave schemes between 1 April 2000 and enactment of the legislation.

4. Compliance Burden

Issue: Increase in Compliance Costs and Lack of Simplification

Submission

That the withdrawal tax concept introduces an unnecessary compliance burden on trustees.

5. Superannuation Funds -- Application

Issue: The extent of relevant contributions

Submission

That section CL 3(1)(a) be re-worded to provide that the withdrawal tax applies to superannuation funds where the relevant contributions are those an employer of the member has made to a superannuation fund in respect of the relevant member.

Issue: The application of section CL 5

Submission

That section CL 3(1)(b) be re-worded to read

“one that has received a transfer from another superannuation fund in respect of the member withdrawing, *not* being a transfer to which section CL 5 applies”.

6. Times of Withdrawal – Measurement

Issue: Amount withdrawn

Submission

That section CL 3(2) be reworded to provide that

“an amount withdrawn means money withdrawn, or, if money is not withdrawn, the market value of the withdrawal *at the time of the withdrawal.*”⁷

7. Measurement of Pre 1 April Amounts

Issue: Pre 1 April 2000 Amounts

Submission 1

That there be clarification of how the amount that existed in a superannuation fund prior to 1 April 2000 is to be calculated.

Submission 2

That market values are used to determine the amount that existed in a superannuation fund before 1 April 2000.

Submission 3

That consideration be given to allowing different measurement dates to take into account non standard balance dates of superannuation funds.

8. Determination of Employer Contributions to Superannuation Savings

Issue: Ability of Trustees to Establish

Submission 1

That the Tax Administration Act 1994 be amended to provide that trustees be able to request information from employers for the purposes of their section CL 3 obligations and that employers be required to provide such information.

Submission 2

That trustees be entitled to rely on the information provided by employers pursuant to the abovementioned change.

Issue: No Part of Amount is Employer Contributions

Submission

That section CL 3(1) should not apply if the trustee can establish that no part of the amount is employer contributions to superannuation savings.

9. Meaning of Withdrawal

Issue: Monies Borrowed from Superannuation Fund

Submission 1

That the deemed withdrawal in circumstances of money borrowed from a superannuation fund is limited to taxpayers on a top marginal tax rate of 39%.

Submission 2

That the amount of the withdrawal be the differential interest rate (being the prescribed rate for FBT less the rate being charged, if positive) applied to the amount of employer contribution to superannuation savings as defined.

Submission 3

That section 165AA of the Tax Administration Act 1994 be strengthened to ensure that trustees are able to collect tax from members in circumstances of withdrawals arising from money borrowed.

10. Cessation of Employment Exclusions

Issue: Leaving Employment

Submission

That it be made clear that the date an employee ceases employment is the date the employee ceases employment with the relevant employer.

Issue: Contribution Increases

Submission

That the test for employer superannuation contributions made in the final two years of employment be 150% rather than 50% of the previous year's superannuation contributions.

Issue: Two Year Lock In

Submission

That the rule exempting employees who have been employed for less than 2 years from the non-application of section CL 3 be removed.

11. Significant Hardship

Issue: Definition of “Hardships”

Submission 1

That the definition of “hardship” be reworded and that the reference to “significant” be dropped.

Submission 2

That the trustee is the person responsible for determining whether a person is suffering from “hardship”.

12. Fund to Fund Transfers

Issue: Test of Withdrawal

Submission 1

That section CL 5(1) should state that section CL 3 does not apply to an “amount” that is transferred rather than to a “withdrawal” that is transferred.

Submission 2

That section CL 5(4) should refer to the trustee of the transferring superannuation fund establishing the amount of employer contributions to superannuation savings, and if not, should refer to the employer establishing the amount of employer contributions to superannuation savings.

Issue: Transfers to other funds

Submission

That the term “transfer to another superannuation fund” be clarified to include circumstances where amounts are physically paid to members but are immediately invested by that person as a contribution to another superannuation fund.

13. Application of CL 6

Issue: Grand-parenting post 1 April 2000 contributions

Submission

That section CL 6 be entirely redrafted.

14. Election to Pay Higher Rates of SSCWT

Issue: Determination of Withdrawal Composition

Submission 1

That the person determining the composition of withdrawals be the trustee with information provided to them by employers.

Submission 2

That the return on contributions which have been subject to SSCWT at the rate of 39% be excluded from the operation of section CL 3.

Submission 3

That if a trustee (with information provided by the employer) cannot establish the extent of employer contributions, section CL 3 should apply to the “withdrawal”, not to the “entire amount of the withdrawal”.

15. Defined Benefit Funds

Issue: Exemption for defined benefit funds

Submission 1

That the term “defined benefit fund” be redefined as outlined below.

Submission 2

That section CL 8(2)(a) be amended so that the employer has temporarily ceased to make contributions during a “contribution holiday” will not affect the status of the fund.

Submission 3

That section CL 8(2)(b)(i) refer to the length of a member's *membership of the scheme*, not to the length of the member's employment.

Submission 4

That in section CL 8(2)(b), "return" be replaced by "benefit".

Submission 5

That paragraph (c) of section CL 8(2) be removed.

Alternatively, that it be amended so that defined benefit pension funds be included even if some benefits are payable as lump sums.

16. Winding Up a Superannuation Fund

Issue: Structure of section CL 9

Submission 1

That section CL 9 be incorporated into section CL 3.

Submission 2

That section CL 9 apply only when a superannuation fund is wound up other than by reason of an employer being placed in liquidation or receivership or otherwise ceasing to operate.

17. Election to Pay 39% SSCWT

Issue: Person making the election to pay 39c tax

Submission 1

That the 39% rate of SSCWT be applicable to employer contributions made by the employer on behalf of particular members rather than all such contributions.

Submission 2

That the election to pay SSCWT at 39% should be by agreement between the employer and employee rather than as a unilateral decision of the employer.

18. Definitions

Issue: Employer Contributions to Superannuation Savings

Submission 1

That paragraph (b) of the definition of “employer contributions to superannuation savings” be removed. Alternatively, that the term “return” be defined to include only amounts of gross income derived from the investment of certain employer contributions.

Submission 2

That paragraph (c) of the definition of “employer contributions to superannuation savings” be removed. Alternatively, that the term “return” as used in the definition of “reserves” be defined to include only amounts of gross income derived from the investment of those reserves.

1. Fundamental Premise of the Withdrawal Tax

Issue: Policy Process

Submission 1

That clause 6 (containing Part CL) and clause 9 (containing section NE 2AA) be struck out of the Bill on its report back by the Select Committee.

Submission 2

That any proposed amendments to the SSCWT regime as it applies to employer superannuation contributions be undertaken through the generic tax policy process.

Submission 3

That the proposal to introduce a withdrawal tax be abandoned in favour of consideration of a taxing regime which removes the inequities and disincentives faced by taxpayers on a marginal tax rate of 19.5% by taxing contributions at the appropriate tax rate.

Comments

The draft legislation contained in the Bill is extremely wide in application and poses a considerable threat to the future of employer sponsored superannuation funds. There are a number of discrepancies between the Bill and the Government's stated policy. We appreciate the problems inherent in trying to finalise the legislation as soon as possible (given that it will apply retrospectively), but we have had to make assumptions in relation to numerous provisions as to whether it is the policy or the intended wording of the legislation that is incorrect. Had the generic tax policy process been followed, the differences between the apparent policy and the legislation introduced into Parliament would have been minimal at worst.

The Bill's commentary suggests that the legislation is targeted at a very small sector of superannuation scheme members. However, its potential application affects all employer sponsored scheme members.

Any legislative changes affecting the SSCWT regime should take into account the problem identified during the TOLIS review in 1998. The differences in tax rates of superannuation scheme members (i.e., from 19.5% to 39%) means that even a flat rate of 33% of SSCWT and a trustee rate of 33% represents a disincentive to save through superannuation for those with incomes of \$38,000 or less.

2. Policy and Legislative Design

Issue: Application of the 5% Withdrawal tax

Submission 1

That the 5% withdrawal tax should only apply to taxpayers deriving gross income over \$60,000 per annum at the time at which the employer contribution is made.

Comment

The stated policy behind the Bill is to prevent tax avoidance by members of superannuation funds deriving gross income over \$60,000 per annum by having their income contributed by employers into superannuation funds.

As outlined above, the Bill will apply to all taxpayers regardless of their income level except if the various exclusions apply. In our view, the legislative mechanism is ill conceived since it applies at the time of withdrawal from a scheme rather than at the times of employer contribution – the times at which the so call tax avoidance mechanism is operable for those earning over \$60,000. It is difficult to envisage how a withdrawal tax could operate to only tax those with incomes above \$60,000 without introducing further requirements as to income measurement of the member with the associated compliance and administrative burden. As submitted above, the whole area of employer contributions and their taxation should be reviewed rather than a piecemeal attack on 39% taxpayers with a scatter gun result.

Submission 2

That the 5% withdrawal tax only apply to increases in contributions from 1 April 2000 levels.

Comment

As the Bill currently stands, all post 1 April 2000 employer contributions will be subject to withdrawal tax if they are withdrawn before the cessation of employment (except in the limited circumstances listed in the Bill). This is contrary to the stated policy behind the Bill which is aimed at preventing abuses by members who channel increased employer contributions into the superannuation fund to avoid the 39c tax rate with the intention of then withdrawing those contributions. The Bill should be amended so that the withdrawal tax does not apply to employer contributions which remain at their pre-April 2000 levels as specified in the plan's trust deed or the employee's employment contract.

3. Application Date

Issue: Legislation is retrospective in effect

Submission 1

That the withdrawal tax be introduced increases in employer superannuation contributions from 1 April 2001.

Comment

As currently drafted, the withdrawal tax will apply to all withdrawals from 1 April 2000. Accordingly, trustees are currently required to determine:

- whether the fund is a defined benefit scheme;
- the level of employer contributions to superannuation savings;
- the reasons for the withdrawal;
- whether hardship is being alleviated;
- whether a transfer to another fund is taking place; and
- whether an amount borrowed is a withdrawal or not.

All of these matters must be determined with reference to unenacted law which is inconsistent with the stated Government policy and at best uncertain in its application.

If the trustee determines that a withdrawal has occurred, the trustee is unable to currently recover the tax from the member since section 165 AA is not law and trust deeds may not permit deductions for taxes in the absence of overriding legislation. In the absence of other funding sources trustees will be in no position to pay the tax by way of provisional tax instalments.

The retrospective effect of the withdrawal tax also exposes trustees to late payment penalties for provisional tax, tax shortfall penalties, other civil penalties and use of money interest albeit in the context of inadequately drafted, unenacted legislation with retrospective effect.

Issue: Timing issue regarding prospectuses and investment statements

Submission

That a transitional period to 31 December 2000 be included in the bill to allow schemes to update prospectuses and investment statements and exempt the withdrawal tax from applying to members who leave schemes between 1 April 2000 and enactment of the legislation.

Comment

Due to the introduction of the new withdrawal tax, the prospectuses and investment statements of schemes will need to be updated to inform members that withdrawals before retirement and borrowing from schemes may in certain circumstances be subject to a withdrawal tax.

Further, members may have left schemes in the period between 1 April 2000 and the enactment of the legislation. As stated above trustees have no present entitlement to withhold any payment from the benefit paid and it would be inequitable to remaining members to now make the trustees pay the tax from remaining assets in the scheme. Withdrawals from 1 April 2000 to the date of the enactment of the legislation should be exempt from the withdrawal tax.

Trustees and promoters cannot amend their current prospectuses and investment statements which will not have referred to the withdrawal tax and as a result will probably be in breach of the disclosure requirements under the Securities Act 1978 and the Securities Regulations 1983. Accordingly, they should not be required to update their prospectus or investment statement until 31 December 2000 or when a new prospectus is required to be registered, whichever is the earlier.

4. Compliance Burden

Issue: Increase in compliance costs and lack of simplification

Submission

That the withdrawal tax concept introduces an unnecessary compliance burden on trustees.

Comment

We disagree with the statements in the Minister’s commentary on the Bill concerning minimal compliance requirements. Quite simply, the current drafting of the Bill places a considerable compliance burden on all employer sponsored superannuation scheme trustees. It is not relevant that the withdrawal tax is (allegedly) only to apply to a small number of members, its design means that trustees must at least for each withdrawal determine –

- whether the scheme is a “defined benefit fund”;
- the amounts in the scheme at 31 March 2000;
- the amount of employer contributions to superannuation savings, if any;
- the reasons for the withdrawal (if during employment);
- whether contributions have increased in the last 2 years of employment;
- how long the person has been employed;
- whether significant hardship needs to be alleviated (if during employment);
- whether a transfer to another fund is occurring; and
- Record-keeping necessary for tax payments.

Since trustees are dealing with a tax, the tax shortfall, other civil and criminal penalties regimes have potential application. It is not enough for trustees to adopt the approach that “the tax isn’t supposed to apply to us”. At least all trustees must take an acceptable interpretation or reasonable care when filing the relevant tax returns and making (or not making) tax payments.

5. Superannuation Funds - Application

Issue: The extent of relevant contributions

Clause	Part	Section	Page
6	CL	CL 3(1)(a)	3

Submission

That section CL 3(1)(a) be re-worded to provide that the withdrawal tax applies to superannuation funds where the relevant contributions are those an employer of the member has made to a superannuation fund in respect of the relevant member.

Comment

As it is currently worded, section CL 3 (1)(a) is confusing. Section CL 3 should only apply to superannuation funds to which an employer of the member has made contributions *in respect of the member withdrawing*. If the current wording was to remain, all members of employer sponsored superannuation schemes would potentially be subject to the regime notwithstanding that no employer contributions were made in respect of them. Employees may be entitled to become members of schemes but may not be “receiving” employer contributions due to their contractual circumstances.

Clarifying the members to whom the tax may apply will aid in the simplification of the operation of the tax.

Issue: The application of Section CL 5

Clause	Part	Section	Page
6	CL	CL 3(1)(b)	3

Submission

That section CL 3(1)(b) be re-worded to read:

“one that has received a transfer from another superannuation fund in respect of the member withdrawing, *not* being a transfer to which section CL 5 applies”.

Comment

Section CL 3(1)(b) provides that a qualifying withdrawal is gross income if section CL 5 applies. Section CL 5 lists the circumstances in which section CL 3 does *not* apply. The result of this is that no amounts will ever fall under section CL 3(1)(b), making that paragraph redundant. Thus, it is submitted that that section be removed, or re-worded to give effect to the policy behind the section.

6. Times of Withdrawal - Measurement

Issue: Amount withdrawn

Clause	Part	Section	Page
6	CL	CL 3(2)	3

Submission

That section CL 3(2) be reworded to provide that:

“an amount withdrawn means money withdrawn or, if money is not withdrawn, the market value of the withdrawal *at the time of the withdrawal.*”

Comment

It should be made clear that the market value is determined at the time of withdrawal.

7. Measurement of Pre 1 April 2000 Amounts

Issue: Pre 1 April 2000 amounts

Clause	Part	Section	Page
6	CL	CL 3(3)	3

Submission 1

That there be clarification of how the amount that existed in a superannuation fund prior to 1 April 2000 is to be calculated.

Submission 2

That market values are used to determine the amount that existed in a superannuation fund before 1 April 2000.

Submission 3

That consideration be given to allowing different measurement dates to take into account non standard balance dates of superannuation funds.

Comment

Without significant clarification, this rule will be unworkable. It is the policy intention that pre 1 April 2000 “amounts” not be included in the withdrawal tax calculation. Accordingly, in respect of every member of an employer sponsored superannuation scheme, the “amount” as at 1 April 2000 needs to be determined and maintained for the period of that person’s membership of the scheme. Notwithstanding the unwanted administration and compliance burden and associated costs, it is critical that the determination of the amount be simple and clear. The determination of a member’s interest in a superannuation fund needs to be based on the market value of that interest at the relevant date. Precedent for such an approach was established with the removal of superannuation funds from the definition of “designated sources” in the context of group investment funds from 1 April 1999. In addition, pursuant to FRS 32 superannuation funds are required to recognise their financial assets at market value. Accordingly, a calculation of a member’s interest in the fund at 1 April 2000 at market value will be facilitated by the fund’s financial statements.

Whilst we appreciate that any “grand-parenting” provisions need by necessity to operate from a particular date, we note the considerable burden placed on those superannuation funds that do not have a 31 March balance date in complying with these provisions. In effect, all employer sponsored funds will need to prepare a set of financial statements as at 31 March 2000 to facilitate the calculation of the pre 1 April 2000 excluded amounts.

8. Determination of Employer Contributions to Superannuation Savings

Issue: Ability of trustees to establish

Clause	Part	Section	Page
6	CL	CL 3(4)	3

Submission 1

That the Tax Administration Act 1994 be amended to provide that trustees be able to request information from employers for the purposes of their section CL 3 obligations and that employers be required to provide such information.

Submission 2

That trustees be entitled to rely on the information provided by employers pursuant to the abovementioned change.

Comment

In determining “employer contributions to superannuation savings”, trustees will need information from employers. In order to facilitate that information being made readily available, employers need to be statutorily compelled to provide the information as requested. In addition, trustees need to be able to place reliance on the quality of that information particularly in the context of taxation where use of money interest, late payment and tax shortfall penalties arise where tax obligations are not accurately met.

A section with similar wording to section 40A of the National Provident Fund Restructuring Act 1990 would be appropriate to oblige the employer to furnish the trustee with sufficient information to enable a determination of the nature and extent of employer contributions. Liability for mis-information should be with the employer.

Issue: No part of amount is employer contributions

No reference

Submission

That section CL 3(1) should not apply if the trustee can establish that no part of the amount is employer contributions to superannuation savings.

Comment

As it is currently drafted, the effect of section CL 3(4) is that if no part of an amount is employer contributions, section CL 3(1) will apply to the whole post 1 April 2000 “amount”. This is clearly not what was intended, and therefore it is submitted that a subsection(s) be inserted providing that section CL 3(1) should not apply to an amount withdrawn if the trustee can establish that no part of the amount is employer contributions.

Suggested wording would be:

“(5) if the trustee can establish that no part of an amount withdrawn is employer contributions to superannuation savings, subsection (1) shall not apply.”

9. Meaning of Withdrawal

Issue: Monies borrowed from superannuation fund

Clause	Part	Section	Page
6	CL	CL 4(1)	4
19	-	165 AA	16

Submission 1

That the deemed withdrawal in circumstances of money borrowed from a superannuation fund is limited to taxpayers on a top marginal tax rate of 39%.

Submission 2

That the amount of the withdrawal be the differential interest rate (being the prescribed rate for FBT less the rate being charged, if positive) applied to the amount of employer contribution to superannuation savings as defined.

Submission 3

That section 165AA of the Tax Administration Act 1994 be strengthened to ensure that trustees are able to collect tax from members in circumstances of withdrawals arising from money borrowed.

Comment

It is inequitable that an amount borrowed from a superannuation fund should be treated as a “withdrawal” when by its very nature a loan will be repaid. The only “withdrawal” as such is the difference between the FBT rate of interest and the interest paid, if the interest paid is lower than the FBT rate. If the amount borrowed is not repaid but is forgiven by the trustees, the amount forgiven would become a “withdrawal” and subject to the provisions at the date of forgiveness.

The difference in interest rates should only be applied to the amount of employer contributions to superannuation savings (as defined), since it is the policy intent that only these amounts be subject to the withdrawal tax. Applying the differential interest rate to pre 1 April 2000 or private contributions (and associated reserves) results in further taxation of amounts already taxed correctly.

Section 165AA of the Tax Administration Act 1994 needs to be clear that tax is able to be recovered from members in circumstances of withdrawals arising from money being borrowed at “low” interest rates.

10. Cessation of Employment Exclusions

Issue: Leaving employment

Clause	Part	Section	Page
6	CL	CL 4(3)	4

Submission

That it be made clear that the date an employee ceases employment is the date the employee ceases employment with the employer.

Comment

Primarily, the exclusion could be interpreted as only applying on the cessation from all employment rather than the relevant employer which sponsors the member's scheme. The policy intent is therefore not met.

Issue: Contribution increases

Clause	Part	Section	Page
6	CL	CL 4(3)(a)	4

Submission

That the test for employer superannuation contributions made in the final two years of employment be 150% rather than 50% of the previous year's superannuation contributions.

Comment

The policy intent is that the exclusions will not apply where prior year's employer contributions are increased by 50%. To do so, the prior contributions must be multiplied by 150% not 50%.

Issue: Two year lock in

Clause	Part	Section	Page
6	CL	CL 4(3)(b)	4

Submission

That the rule exempting employees who have been employed for less than 2 years from the non-application of section CL 3 be removed.

Comment

This rule is absolutely arbitrary, without focus on any particular mischief. It fails to take into account the transient nature of the modern workforce and is inequitable. If such a rule is to remain, it must provide exclusions for redundancy, takeovers, mergers and other business reorganisations i.e., only apply to voluntary cessation of employment. It must also, for obvious policy reasons, exclude cessation of employment by reason of death or physical or mental incapacity.

11. Significant Hardship

Issue: Definition of “hardship”

Clause	Part	Section	Page
6	CL	CL 4(4)	4
6	CL	CL 4(5)	4

Submission 1

That the definition of “hardship” be reworded and that the reference to “significant” be dropped.

Submission 2

That the trustee is the person responsible for determining whether a person is suffering from “hardship”.

Comment

Section CL 4(4) refers to “significant hardship” as the test for non-application of section CL 3. Whereas section CL 4(5) simply defines “hardship”. It is unclear what the term “significant” adds to the definition of hardship, and accordingly it is submitted that that term is removed.

Furthermore, “hardship” is a highly subjective term to which only an inclusive definition is offered. Therefore, it is also submitted that further clarification of “hardship” is included. In particular, it should be made clear whether hardship owing to matrimonial and de facto separations, hardship owing to redundancy and hardship owing to death would be included. Further, total and permanent disability is an extremely stringent test which would not catch situations of cessation of employment by reason of mere ill health or where a person had been completely incapacitated for a period of years, but is eventually rehabilitated and able to work again. Such a person would, in ordinary terms, be understood to be suffering from “hardship”.

The trustee is in the best position to determine whether a member is suffering from hardship, therefore such determination should be at his discretion, but should be subject to challenge by the Commissioner.

12. Fund to Fund Transfers

Issue: Test of withdrawal

Clause	Part	Section	Page
6	CL	CL5	4&5

Submission 1

That section CL 5(1) should state that section CL 3 does not apply to an “amount” that is transferred rather than to a “withdrawal” that is transferred.

Submission 2

That section CL 5(4) should refer to the trustee of the transferring superannuation fund establishing the amount of employer contributions to superannuation savings, and if not, should refer to the employer establishing the amount of employer contributions to superannuation savings.

Comment

Section CL 5(1) is nonsensical in its current form. The word “withdrawal” needs to be replaced by “amount”.

The test of withdrawal in section CL 5(4) refers to the superannuation fund transferring the amount. The superfund is a legal fiction and responsibility for tracking employer contributions must fall on a natural person. Therefore, if the liability is to lie with the transferring superannuation fund, it must do so with the trustee, or an employee of the trustee.

Issue: Transfers to other funds

Clause	Part	Section	Page
6	CL	CL 5	4

Submission

That the term “transfer to another superannuation fund” be clarified to include circumstances where amounts are physically paid to members but are immediately invested by that person as a contribution to another superannuation fund.

Comment

Physically paying funds to members is common practice particularly for example when superannuation funds are wound up. This situation needs to be addressed otherwise people intending to save for the long term will be penalised by the 5% withdrawal tax through no fault of their own, simply because of the method by which amounts from an employer sponsored superannuation fund are distributed on wind up.

13. Application of CL 6

Issue: Grand-parenting post 1 April 2000 contributions

Clause	Part	Section	Page
6	CL	CL 6	5

Submission

That section CL 6 be entirely redrafted.

Comment

The policy intent is that post 1 April 2000 contributions by employers will not be within the regime so long as those amounts are not increased. Certain increases are permitted, namely if required by a contract or deed that existed before 1 April 2000. Section CL 6 does not achieve this objective, and therefore needs to be redrafted.

14. Election to Pay Higher Rates of SSCWT

Issue: Determination of withdrawal composition

Clause	Part	Section	Page
6	CL	CL 7	6

Submission 1

That the person determining the composition of withdrawals be the trustee with information provided to them by employers.

Submission 2

That the return on contributions which have been subject to SSCWT at the rate of 39% be excluded from the operation of section CL 3.

Submission 3

That if a trustee (with information provided by the employer) cannot establish the extent of employer contributions, section CL 3 should apply to the “withdrawal”, not to the “entire amount of the withdrawal”.

Comments

The person who is required to determine the composition of a withdrawal established in section CL 7(1) is inconsistent with the test (employer contributions to a superannuation fund) set out in section CL 3. In all cases, the person determining the composition of a withdrawal needs to be the trustee, since it is the trustee that has the tax obligations arising from the gross income inclusion of section CL 3. As commented above, trustees should be able to require information from employers and be able to rely on that information in taking their tax position.

It is not clear from section CL 7(2) whether the amounts exempt from the withdrawal tax include the returns on the 39% SSCWT contributions. Therefore, it is submitted that section CL 7(2) needs to be amended to clarify this point.

It is illogical for section CL 7(2) to state that if the level of 39% SSCWT employer contributions cannot be established, section CL 3 is to apply to the “entire amount of the withdrawal” because section CL 3 itself contains exemptions to its application.

15. Defined Benefit Funds

Issue: Exemption for defined benefit funds

Clause	Part	Section	Page
6	CL	CL 8	6

Submission 1

That the term “defined benefit fund” be redefined as outlined below.

Submission 2

That section CL 8(2)(a) be amended so that the employer has temporarily ceased to make contributions during a “contribution holiday” will not affect the status of the fund.

Submission 3

That section CL 8(2)(b)(i) refer to the length of a member’s *membership of the scheme*, not to the length of the member’s employment.

Submission 4

That in section CL 8(2)(b), “return” be replaced by “benefit”.

Submission 5

That subsection (c) of section CL 8(2) be removed.

Alternatively, that it be amended so that defined benefit pension funds be included even if some benefits are payable as lump sums.

Comment

The stated policy objective is to exclude “defined benefit funds” from the operation of the new tax. However, very few defined benefit schemes only pay *members* benefits as pensions.

Some schemes which are still genuine defined benefit funds provide for the payment of the resulting benefit as a lump sum.

Even those schemes which are essentially defined benefit pension funds typically:

- Allow members, on retirement, to “commute” some or all of their pension for a lump sum, calculated as a fixed or floating multiple of the amount of pension foregone. Such a lump sum is payable as a function of the pension which is foregone, rather than as a lump sum in its own right; and
- Provide for the repayment of contributions as a lump sum on withdrawal – the very process on which the tax will be imposed.

Some schemes which are essentially defined benefit pension funds provide a lump sum death benefit (often insured, but still a component of the member’s “benefit” or “return”).

Accordingly, the definition is too narrow to include most defined benefit schemes and needs to be redrafted to meet the policy objective of excluding genuine defined benefit schemes from the operation of the regime.

16. Winding Up a Superannuation Fund

Issue: Structure of section CL 9

Clause	Part	Section	Page
6	CL	CL 9	7

Submission 1

That section CL 9 be incorporated into section CL 3.

Submission 2

That section CL 9 apply only when a superannuation fund is wound up other than by reason of an employer being placed in liquidation or receivership or otherwise ceasing to operate.

Comment

It would be logical for section CL 3 to contain the provision currently found in that section CL 9. This would also simplify the structure of the Bill.

Just as section CL 3 should apply only on voluntary cessation of employment, section CL 9 should not apply to involuntary scheme wind-ups.

17. Election to Pay 39% SSCWT

Issue: Person making the election to pay 39c tax

Clause	Part	Section	Page
11	NE	NE 2AA	13

Submission 1

That the 39% rate of SSCWT be applicable to employer contributions made by the employer on behalf of particular members rather than all such contributions.

Submission 2

That the election to pay SSCWT at 39% should be by agreement between the employer and employee rather than as a unilateral decision of the employer.

Comment

It is unclear from the wording of section NE 2AA(1) to which contributions the rate of SSCWT may apply. Any suggestion that the rate should only be applicable to all contributions made by an employer is nonsensical.

It is submitted that it should be stated explicitly that the 39% SSCWT should apply only to contributions by the employer in respect of the chosen member, rather than in respect of all contributions made by the employer.

Further, it is inequitable that an employer can unilaterally decide to pay the 39c withholding tax in circumstances where an employee intends to leave the funds in the superannuation fund for the long-term. There would be particularly unfair consequences for 19.5% and 33% taxpayers, and as such, the 39% SSCWT would prove a strong disincentive to retirement saving.

Furthermore, unilateral election is contrary to existing sections in subpart NE of the Income Tax Act 1994 which envisage elections only where there is consensus between employer and employee.

18. Definitions

Issue: Employer contributions to superannuation savings

Clause	Part	Section	Page
13	OB	OB 1	14

Submission 1

That paragraph (b) of the definition of “employer contributions to superannuation savings” be removed. Alternatively, that the term “return” be defined to include only amounts of gross income derived from the investment of certain employer contributions.

Submission 2

That paragraph (c) of the definition of “employer contributions to superannuation savings” be removed. Alternatively, that the term “return” as used in the definition of “reserves” be defined to include only amounts of gross income derived from the investment of those reserves.

Comment

The term “return” is easily understood by economists, but it has no precise legal meaning. It is desirable that the only terms included in the Bill are those which are capable of definition by a Court.

The term “return” in ordinary usage includes all economic returns. It does not distinguish between gross income and capital gains as is necessary for tax purposes. The use of the term has potential to tax capital gains on certain withdrawals from superannuation funds. For example, a superannuation fund may derive capital gains from the disposal of share or property investments. Whilst the superannuation fund has made a return on the capital invested, that return is not gross income and not subject to tax in the hands of the trustee.

The bill contains no criteria for measurement of the “return” on the relevant contributions. Is this to be determined actuarially or by some other means? In the absence of a capital gains tax, the measurement of return must necessarily be linked to taxable income of the trustee.

The problem is compounded for those employer sponsored superannuation funds that invest wholly or partly in an underlying fund. Amounts withdrawn from that underlying fund are exempt from tax. The taxable income, if any, derived from the contributions invested is derived at the underlying fund level. The withdrawal tax will require a look through/tracing of contributions and the income ultimately earned on those funds (with the associated compliance costs).