

New Zealand Superannuation and Retirement Income Amendment Bill

Government Bill

As reported from the Finance and
Expenditure Committee

Commentary

Recommendation

The Finance and Expenditure Committee has examined the New Zealand Superannuation and Retirement Income Amendment Bill, and recommends that it be passed with the amendments shown.

Introduction

The bill seeks to amend Part 2 of the New Zealand Superannuation and Retirement Income Act 2001 to facilitate the efficient and effective investment of the New Zealand Superannuation Fund by the Guardians of New Zealand Superannuation, and to help protect the Guardians from liability.

The principal change would be to allow the Guardians to control Fund investment vehicles (FIVs). At present, section 59 of the Act prevents the Guardians from controlling any other entity. This restriction is considered inconsistent with the Guardians' obligation under the Act to invest the Fund in a way consistent with best-prac-

tice portfolio management, and to maximise returns without undue risk to the Fund as a whole. Allowing the use of FIVs is expected to enable the Guardians to structure Fund investments more efficiently, resulting in cost savings, and to manage risk more effectively.

Other amendments proposed in the bill would make the following relatively minor changes:

- protecting the Guardians from the potential challenge that their investment decisions lack statutory authority in relation to the Crown Entities Act 2004 or the New Zealand Superannuation and Retirement Income Act 2001
- allowing the board of the Guardians to delegate the operational functions of appointing external fund managers and custodians, and granting powers of attorney
- making it explicit that the Fund is not an entity separate from the Crown; the current wording of the Act leaves some uncertainty about the sovereign nature of the Fund.

The bill would also make consequential amendments to the Income Tax Act 2007 relating to the use of FIVs. All income generated by the Fund would, however, continue to be captured within the New Zealand tax base.

Validation provision

Clause 5 of the bill would amend section 49 with the aim of strengthening confidence in commercial transactions entered into by the Guardians, preventing them from being challenged on the basis that they conflicted with the Crown Entities Act 2004 or the New Zealand Superannuation and Retirement Income Act 2001. After considering points raised by the Legislation Advisory Committee, we recommend replacing clause 5 in the bill as introduced with a different formulation, which we believe would achieve the intended purpose in a more straightforward way.

Fund investment vehicles

Clauses 6 and 7 of the bill would amend section 59 and insert new section 59A to permit the Guardians to use FIVs for the purpose of investing the Fund. We note that at present the Fund uses collective investment vehicles, for example to target certain geographic regions

or industry sectors. A Fund investment vehicle would allow it to select more specifically the products it wished to invest in, without the costs it currently incurs in adapting a collective investment vehicle to its preferences.

No controlling interests

We note that allowing the Guardians to control a Fund investment vehicle would be an exception to the general rule in section 59 of the Act that prohibits the Guardians from controlling any other entity.

It should be noted that the prohibition on control does not preclude the Fund from 100 percent ownership of assets. For example, its present investments include purchases of land, livestock, trees, and infrastructure, including farming and forestry machinery. While the Fund effectively “controls” these assets, such investments do not entail control of the business entity—the farm or forestry operation.

We are aware that the Guardians are working to increase the proportion of the Fund invested in New Zealand assets, and that the limited size of the New Zealand market means it must purchase real assets as well as shares if it is to do so while maintaining a diversified portfolio with a prudent level of risk. We consider that its approach to date strikes an appropriate balance within the requirement of section 59.

We gave thought to whether the use of FIVs and continuing growth in the size of the Fund could affect this balance, if for example the ownership of various assets through investment vehicles effectively gave the Fund the ability to control an operating entity. We consider it desirable to reinforce the intention that FIVs be passive holding entities, but we also accept that considerations of diversification and risk management might make some classes of asset a desirable investment for the Fund, so the question of effective control of an operating entity might arise. We see it as desirable that the Act provide a mechanism for scrutiny and control of the governance arrangements in such a situation.

To these ends, we recommend amending clause 7 by inserting new sections 59A(1A) and 59A(1B). Subsection (1A) would reinforce the expectation that investments through FIVs would be passive, by requiring the approval of the Minister of Finance for any instance in which this would not be the case. Subsection (1B) would allow the

Minister of Finance to specify the class of investment or entity for which an FIV could be used, and to stipulate governance arrangements for the entity with the aim of ensuring that the Guardians were not involved in controlling the entity's business operations.

We consider that these amendments would provide a suitable balance between allowing the Guardians access to new vehicles to invest the Fund efficiently and effectively as it grows, and complying with the Act's intention that the Guardians not be involved in the business operations of the entities in which the Fund is invested.

Application of the Official Information and Ombudsmen Acts

We recognise the importance of Fund investment vehicles being transparent and accountable, with information about their use available to the public. We therefore considered whether the Official Information Act 1982 should apply explicitly to FIVs. There is a risk, however, that this might reduce the effectiveness of FIVs by discouraging the participation of private investors. We note that the Guardians themselves are subject to the OIA (with the usual scope for withholding commercially-sensitive information), and that the discharge of their obligations would require them to ensure that they obtained information about the use and operation of Fund investment vehicles. We consider that these reporting and accountability requirements would ensure appropriate disclosure about the use and operation of FIVs, without the need to make FIVs directly subject to the Official Information Act. For similar reasons, we consider it sufficient that the Ombudsmen Act 1975 applies to the Guardians, without also making FIVs subject to it.

We recommend inserting subsection 59A(3A) in clause 7, to make it clear that these two Acts do not apply to a Fund investment vehicle directly, but that they apply to the Guardians in respect of information held by the Guardians about a Fund investment vehicle.

Appendix

Committee process

The New Zealand Superannuation and Retirement Income Amendment Bill was referred to the committee on 19 March 2014. The closing date for submissions was 5 May 2014. We received and considered three submissions from interested groups and individuals, and heard oral evidence from one submitter. We received advice from the Treasury.

Committee membership

Paul Goldsmith (Chairperson)

David Bennett

Dr David Clark

John Hayes

Dr Russel Norman

Simon O'Connor

Hon David Parker

Rt Hon Winston Peters

Grant Robertson

Jami-Lee Ross

Hon Kate Wilkinson

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Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

text deleted unanimously

Hon Bill English

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The Parliament of New Zealand enacts as follows:

1 Title
This Act is the New Zealand Superannuation and Retirement Income Amendment Act **2013**.

2 Commencement 5
This Act comes into force on the day after the date on which it receives the Royal assent.

Part 1
Amendments to principal Act

3 Principal Act 10
This Part amends the New Zealand Superannuation and Retirement Income Act 2001 (the **principal Act**).

4 Section 38 amended (Property of Fund)
In section 38, insert as subsections (2) and (3):
“(2) The Fund is not an entity separate from the Crown. 15
“(3) However, **subsection (2)** does not limit section 66(2) or 67(1).”

5 Section 49 amended (Body corporate status and powers)
In section 49, insert as subsections (1) and (2):
“(1) Section 19(1)(a) of the Crown Entities Act 2004 does not apply 20
to any act of the Guardians.
“(2) A person who has entered into a contract or an arrangement with the Guardians, or any entity formed or controlled by the Guardians, may not avoid or cancel the contract or arrange-

ment by reason of section 19 of the Crown Entities Act 2004 or any rule of law to similar effect.”

5 New section 49A inserted (Saving of certain transactions)

After section 49, insert:

“49A Saving of certain transactions

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“(1) A failure by the Guardians to comply with any provision of this Act or the Crown Entities Act 2004 does not affect the validity or enforceability of any deed, agreement, right, or obligation that is entered into, obtained, or incurred by—

“(a) the Guardians; or

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“(b) a Fund investment vehicle referred to in **section 59A**;

or

“(c) a Crown entity subsidiary of the Guardians.

“(2) This section applies only to the extent that the deed, agreement, right, or obligation is entered into, obtained, or incurred for the purpose of performing the functions of the Guardians.

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“(3) This section applies despite anything to the contrary in this Act or the Crown Entities Act 2004 or any other enactment or rule of law.

“Compare: 1986 No 124 s 21”

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6 Section 59 amended (No controlling interests)

After section 59(4), insert:

“(5) This section—

“(a) does not apply to a Fund investment vehicle referred to in **section 59A**; but

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“(b) does apply to an entity in which a Fund investment vehicle has an interest, as if the investments of the Fund that are held, facilitated, or managed by the Fund investment vehicle were held directly by the Guardians as manager and administrator of the Fund.”

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7 New section 59A inserted (Fund investment vehicles)

After section 59, insert:

“59A Fund investment vehicles

“(1) All or any of the investments of the Fund may be held in an entity that is formed or controlled by the Guardians for the

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- purpose of holding, facilitating, or managing the investments of the Fund (a **Fund investment vehicle**).
- “(1A) The Guardians may exercise the power in **subsection (1)** in respect of—
- “(a) passive holding entities (being entities that only hold financial products within the meaning of the Financial Markets Conduct Act 2013); or
- “(b) any other entities only with the approval of the Minister of Finance.
- “(1B) The Minister’s approval under **subsection (1A)(b)**—
- “(a) may be given for any class or classes of investments or entities; and
- “(b) may set conditions as to the governance framework for the implementation and operation of the entities and as to the application of this Act to the entities.
- “(2) A Fund investment vehicle is not a Crown entity subsidiary for the purposes of section 8 7(1)(c) of the Crown Entities Act 2004.
- “(3) Interests in Fund investment vehicles are Fund investments and part of the Fund.
- “(3A) To avoid doubt, the Official Information Act 1982 and the Ombudsmen Act 1975 do not apply to Fund investment vehicles, but the Official Information Act 1982 applies to the Guardians in respect of information held by the Guardians about Fund investment vehicles.
- “(4) **Subsection (1)** applies despite anything to the contrary in the Crown Entities Act 2004, this Act, or any other enactment.”
- 8 Section 61 amended (Contents of statements of investment policies, standards, and procedures)**
- After section 61(f), insert:
- “(fa) the governance framework for the implementation and operation of Fund investment vehicles referred to in **section 59A**; and”.
- 9 Schedule 3 amended**
- (1) In Schedule 3, after clause 39(b), insert:

- “(c) a Fund investment vehicle that is formed or controlled under **section 59A**.”
- (2) In Schedule 3, repeal clause 40.

Part 2

Amendments to Income Tax Act 2007 5

- 10 Income Tax Act 2007 amended**
This Part amends the Income Tax Act 2007.
- 11 Section CW 38 amended (Public authorities)**
After section CW 38(5)(c), insert:
- “(d) a Fund investment vehicle as referred to in **section 59A** of the New Zealand Superannuation and Retirement Income Act 2001: 10
- “(e) a company that is treated as being wholly owned by the Crown under **section HR 4B** (Activities relating to New Zealand Superannuation Fund).” 15
- 12 Section CX 55 amended (Proceeds from disposal of investment shares)**
Replace section CX 55(1)(b) with:
- “(b) the Crown as owner of the New Zealand Superannuation Fund: 20
- “(bb) a Fund investment vehicle, as referred to in **section 59A** of the New Zealand Superannuation and Retirement Income Act 2001, that is treated as being wholly owned by the Crown under **section HR 4B** (Activities relating to New Zealand Superannuation Fund): 25
- “(bc) a company that is treated as being wholly owned by the Crown under **section HR 4B**:”.
- 13 Section HR 4B replaced (Crown activities through New Zealand Superannuation Fund)**
Replace section HR 4B with: 30

“HR 4B Activities relating to New Zealand Superannuation Fund*“When this section applies*

- “(1) This section applies to determine for this Act the rules that determine the amounts of income derived and expenditure incurred by the Crown as owner of the New Zealand Superannuation Fund (the **Fund**). 5

“Activities of the Crown relating to Fund

- “(2) Amounts of income derived and expenditure incurred by the Crown in activities relating to the Fund are determined as if the amounts were being derived or incurred by a company (the **Fund company**), other than a public authority, that was a special corporate entity wholly owned by the Minister of the Crown who was for the time being responsible for the administration of the New Zealand Superannuation and Retirement Income Act 2001, Parts 2 and 3. 10 15

“Fund investment vehicles

- “(3) The consolidation rules, continuity provisions, and other rules relating to groups of companies apply to the Crown as owner of the Fund, to a Fund investment vehicle as referred to in **section 59A** of the New Zealand Superannuation and Retirement Income Act 2001, and to a company in which the Guardians of New Zealand Superannuation (the **Guardians**) hold interests for the Crown, as if— 20
- “(a) the Crown were the Fund company; and 25
- “(b) interests in the Fund investment vehicle or company held by the Guardians were owned by the Crown as the Fund company.

“Defined in this Act: amount, company, consolidation rules, continuity provisions, group of companies, income, public authority, special corporate entity”. 30

14 Schedule 29 amended (Portfolio investment entities: listed investors)

In Schedule 29, part A, replace item 4 with:

- “4 The Crown as owner of the New Zealand Superannuation Fund. 35
- “4B A Fund investment vehicle, as referred to in **section 59A** of the New Zealand Superannuation and Retirement Income

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Act 2001, that is treated as being wholly owned by the Crown
under **section HR 4B**.

“4C A company that is treated as being wholly owned by the Crown
under **section HR 4B**.”

Legislative history

5 November 2013
19 March 2014

Introduction (Bill 166–1)
First reading and referral to Finance and
Expenditure Committee
