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Background Paper

Changing your Superannuation Provider and Making
“Consent Free” Transfers Work for You



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Introduction

- In addition to the overheads from today's presentation, more general information on the key features of the "Consent Free" Transfer provisions and the appropriate legislative extracts are outlined in this paper.

Background shift from "Voluntary Transfer" to "Consent Free" Transfer

- Prior to the introduction of the KiwiSaver Act 2006 and its subsequent amendments to the Superannuation Schemes Act 1989 (**SSA**) written consent was required before a scheme member could be transferred from one superannuation scheme to another superannuation scheme (section 9B of the SSA).
- The KiwiSaver Act 2006 introduced an exception to the requirement for the written consent of a member in the form of an additional section to the SSA, section 9BAA. This prescribed the ability to transfer scheme members without their written consent.
- The relevant extracts from the legislation are set out below:

"[9B Implied provision as to transfer of members, etc.

(1) There shall be implied in every trust deed of a registered superannuation scheme a provision that no member or beneficiary of the superannuation scheme will be transferred to another superannuation scheme without the written consent of the member or beneficiary concerned.

[(1A) This section is subject to section 9BAA.]..."

"[9BAA When Government Actuary may approve transfers without consent of members and beneficiaries

(1) The requirement in section 9B to obtain the written consent of [all or any of the members] and beneficiaries of a scheme does not apply if the Government Actuary approves the transfer under this section.

[(1B) This section applies despite anything to the contrary in a scheme's trust deed.]

(2) The Government Actuary may approve the transfer if, and only if, the Government Actuary is satisfied that—

- (a) the terms and conditions of the scheme to which the members or beneficiaries are to be transferred (**new scheme**) are no less favourable to members or beneficiaries than the terms and conditions of the scheme from which they are being transferred (**old scheme**); and
- (b) the transfer is otherwise reasonable in all the circumstances (including having regard to the value of the assets transferred from the old scheme to the new scheme); and
- (c) the procedure in section 9BAB has been followed.

(3) The Government Actuary may decline to approve a transfer if the Government Actuary considers that the transfer would adversely affect the interests of all or any of the members and beneficiaries of the old scheme in any material way.

(4) In determining whether subsection (2) or (3) applies, the Government Actuary may—

- (a) have regard to the likely effect of the new scheme on benefits to members and beneficiaries as a whole; and
- (b) have regard to any other matter that the Government Actuary considers relevant.

[(4B) For a transfer that the Government Actuary has approved,—

- (a) each relevant member of the old scheme is treated as offering to be a member of the new scheme on the terms and conditions for that new scheme; and
- (b) the trustee of the new scheme is treated as accepting the member's offer.]

(5) The Government Actuary may publish, in any form that the Government Actuary considers fit, guidance as to matters that the Government Actuary considers relevant under this section (including principles that the Government Actuary may use to decide whether to approve the transfer)."

Protection for Members and Beneficiaries-Government Actuary Considerations

- The principal rationale behind the legislation was to facilitate transfers between schemes where transfer was unlikely to impact on interests. This is evidenced in the following extract from the Select Committee Report on the KiwiSaver Bill:

" Transfer to preferred scheme

We recommend an amendment to section 9(b) of the Superannuation Schemes Act 1989 to allow an employer who selects a preferred scheme to shift all employees to another preferred scheme without obtaining their consent, if the scheme will provide at least equal benefits. This will apply equally to an employer wishing to shift members from one registered superannuation scheme to another. This amendment will allow existing schemes to be consolidated as a result of the introduction of KiwiSaver, avoiding the need to wind them up.

We considered whether employees should be informed or transferred automatically if an employer changes the preferred provider. We understand that existing employees would not be affected by a change in preferred provider, which would affect only automatic enrolment of new employees. However the amendment to section 9(b) will have an impact on existing members, and we recommend that any person applying for members of a scheme to be transferred under the proposed amendment notify all members of the scheme of the proposed transfer."

- The legislation introduced a number of Considerations for the Government Actuary to take in to account before allowing a "consent free" transfer as outlined in section 9BAA above and in the procedural requirements outlined in section 9BAB below.

Procedural Requirements

- Section 9BAB of the SSA provides for the procedural requirements for "consent free" transfers. The section is as follows:

"[9BAB How approval under section 9BAA may be granted

(1) The Government Actuary may accept an application for approval under section 9BAA that is made by all or any of the trustees of the old scheme, the trustees of the new scheme, or a relevant employer, provided that the Government Actuary is satisfied that—

- (a) it is reasonable in all of the circumstances of the case that the person have standing to make the application; and
- (b) the person falls within a class specified in any guidelines published by the Government Actuary (if any) for the purposes of this subsection.

(2) The Government Actuary may require the applicant to give the Government Actuary, with the application or at any later time,—

- (a) a certificate, signed by a person of any class specified by the Government Actuary, that the transfer meets the requirements of section 9BAA; and
- (b) any other information about the new scheme, the old scheme, or the transfer.

(3) The applicant must give notice to every member and beneficiary to whom the transfer will relate—

- (a) that the applicant has applied for approval to transfer the members and beneficiaries without their written consent; and
- (b) that the member or beneficiary may make submissions to the Government Actuary about the transfer.

(4) The Government Actuary must have regard to any submission before deciding whether or not to give approval.

(5) The Government Actuary may give approval subject to any terms and conditions that the Government Actuary may specify in the notice of approval, and the approval is effective only if the transfer is carried out in accordance with those terms and conditions.

(6) To avoid doubt, any approval given under this section is subject to section 23."

