

## KiwiSaver Legislation

*Some remaining "grey areas"*

*"Life isn't black and white. It's a million grey areas, don't you find?"*

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# Outline

- “Total remuneration” option
- Membership contracts – mistake etc.
- Complying superannuation funds
- Consent-free transfers
- Double-dipping protections
- Mortgage diversion
- Fee increases
- Payments on death
- Employer obligations
- Disclosure obligations

# “Total remuneration” option

- Currently permissible – post 13 December 2007
- Proposed ERA amendments – “*lesser terms and conditions*” based on KiwiSaver membership to be outlawed
- Prospective only
- Raises fairness and cost issues
- Impact on take-up

# “Total remuneration” option cont’d

- Issues – grandfathering/“other contributions” offsets
- Treatment of employer tax credits
- Law of unintended consequences!

# Membership contracts – mistake etc.

- Significant uncertainty
- KiwiSaver Act – initial and confirmed back-dated validation
- Relationship with other contract legislation
  - CRA/FTA/CGA
  - “savings” provisions
  - KiwiSaver Act’s strict prescription

# Membership contracts – continued

- Inland Revenue view
- cf. Illegal Contracts (e.g. fraud/no guardianship/no agency authority)
- Clarification highly desirable!

# Double-dipping protections

## 1) Successors in business

- No protection currently
- Pending amendment

## 2) Base vs. gross salary

- “Wash up” requirement currently
- Pending amendment – rate for rate comparison

# Double-dipping protections (cont'd)

## 3) 5-year vesting requirement

- Employer contributions:

*"contributions vest completely in the employee in a period starting on or after the employee first becomes a member of the contributions scheme and ending no more than 5 years later."*

- Differing interpretations
- Inland Revenue intention
- Our view
- Forfeiture on dismissal

## 4) Hybrid/defined benefit schemes

# Complying superannuation funds

- Compulsory lock-in for new joiners:
  - compulsory employer contributions directed to fund
  - employment agreements
- Contribution holidays
- “Grandfathering” restrictions:
  - *relevant* participation agreements only

# Complying superannuation funds (cont'd)

- Application of reasonable fees constraints
- Lesser compliance/reporting *but* still (e.g.) care with annual reporting/notifying fee increases

# Consent-free transfers

- “Successor schemes” legislation now workable after false start:
  - trust deed
  - offer documents
  - deemed offer and acceptance
- Compliance requirements
- Emerging practice
  - document suite
  - “ancillary” elections – e.g. PIR

# Consent-free transfers (cont'd)

- Legislation removes *only* consent requirement – investment statement
- Consent-free transfer gives ongoing double-dipping protection

# Mortgage diversion

- Application deferred
- “Fixed \$ amount” requirement
- “All obligations” mortgages
- Amendments awaited
- Some retrospection but still a timing problem

# Fee increases

- Notice "*as soon as reasonably practicable*"
- Certification in annual report – grace period for complying fund
- Scope of provisions:
  - trustees
  - admin manager

# Fee increases (cont'd)

- investment manager
- promoter
- services providers e.g. lawyers (always reasonable), auditors etc.
- Clarificatory amendments desirable

# Payments on death

- Payments must be made to "*personal representative*"
- Meaning
- Small balances – Administration Act facility (amendments required)
- Directions/nominations facility undesirable

# Employer obligations

- Promoter? – section 209
- Advisor? – section 206
- Each a *test of fact*:
  - “promoter” definition
  - avoiding “investment advice”
- Change of provider
- Care with conduct
- Some other issues:
  - application of auto-enrolment rules (e.g. “temporary” employment/business sales)

# Disclosure obligations

## 1) Definition of "security"

- KiwiSaver schemes – are ongoing contributions subscriptions for "*new securities*"?
- Better view is no but this (critically important) point should be clarified
- Always an issue but now much more important (KiwiSaver is fee sensitive, involves regular contributions and large member numbers)

# Disclosure obligations (cont'd)

- Unit trust vs. unitised KiwiSaver scheme

## 2) KiwiSaver a “moving feast” – protections for providers

- Locked-in context
- Numerous recent amendments/policy changes (and more pending), e.g.:
  - menu of incentives
  - tax (e.g. PIE)
  - MTCs – creditable membership

# Disclosure obligations (cont'd)

- Trans-Tasman portability
- housing deposit subsidy
- Legislative attempts at protection for non-compliance flawed
- Penalties for breach
- Risk mitigation:
  - precision!
  - qualifiers:
    - *"as at the date of this investment statement"*

# Disclosure obligations (cont'd)

- *details are subject to legislation and policy*
- *incorporation by reference – SA 1978 s55(b)(iii) (e.g. provider/KiwiSaver/hnzc websites)*
- Renewals and Variations Notice
- Externally Managed Schemes  
Exemption

# Questions/Discussion