

22 December 2006

Review of Financial Products and Providers
Ministry of Economic Development
PO Box 1473
WELLINGTON

Attention: Financial Sector Team
Regulatory and Competition Policy Branch

ASFONZ SUBMISSION ON THE Discussion Documents issued under the Review of Financial Products and Providers

We wish to submit the attached responses in respect of the Discussion Documents issued under the Review of Financial Products and Providers.

ASFONZ is an independent national, non-profit organisation founded in 1969. Its current membership comprises around 100 major workplace superannuation schemes and around 50 organisations and individuals representing the various product and service providers for workplace superannuation.

The mission of ASFONZ is to promote workplace superannuation in New Zealand.

ASFONZ seeks to achieve that mission through:

- 1 **Advocacy** – being the recognised voice for all employers and trustees involved in workplace superannuation, through:
 - (i) advocating legislative and public policy initiatives beneficial to the industry;
 - (ii) making submissions and commentary on existing legislative and public policy initiatives;
 - (iii) issuing regular press releases and other public commentary on matters of wider concern or interest to members; and
 - (iv) staying in regular contact with responsible Ministers, regulatory and industry bodies, the Retirement Commissioner and Government Departments to project, promote and advance members' interests.
- 2 **Education** – promoting trustee, employer and member education through dedicated training programmes, newsletters and special interest seminars.
- 3 **Networking** – providing trustees, employers and service providers involved in workplace superannuation with a regular forum for sharing ideas and information on industry matters.

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I would be pleased to answer any queries in relation to these responses. Thank you for the opportunity to make this submission.

Yours sincerely

John Melville
Chairman

Review of Financial Products and Providers

ASFONZ response to the Discussion Documents

This submission follows the order of the questions in each Discussion Document. The points made generally reflect the areas of prime concern to ASFONZ and its members although there may be some exceptions to this where we feel it is of value to add comment. In general, therefore, we do not comment on aspects that are specific to, in particular, debt, equity or participatory securities and policies of life insurance.

Submissions are being made on five of the Discussion Documents released. These are:

- Collective Investment Schemes (this submission),
- Consumer Dispute Resolution and Redress,
- (Oversight of the Review and) Registration of Financial Institutions,
- Supervision of Issuers.
- Securities Offerings,

Wherever possible we have avoided duplicating commentary where similar topics have been covered by more than one of the Discussion Documents.

The ASFONZ submission on the Discussion Document on Collective Investment Schemes.

1. In general terms we believe that the proposed definition of a CIS works towards meeting the objectives for regulating CISs. However, the definition as such cannot meet these objectives in isolation.

For example, the first point identified refers to investors being adequately informed about the characteristics of CISs and their associated risks. There is little value in disclosing the features of a particular CIS if the population as a whole has no understanding of the underlying features of investments generally.

It is recognised that disclosure relating to the various products is dealt with in another document. It should be noted though that there is a role for New Zealand's education system in ensuring that the level of financial literacy is raised across the country.

We also note the fourth bullet point under paragraph 20 relating to effective supervision and do not believe that the case for requiring independent trustees as supervisors of issuers has been demonstrated. Indeed, the proposal to maintain a transitional regime for stand alone employer superannuation schemes suggests that alternatives can and do operate adequately.

The aim of producing a regime that is free from potential conflicts of interest sounds theoretically sound, but is it actually necessary, desirable or achievable in the NZ context? Experience seems to suggest, for securities that currently require separation of duties between issuers and trustees, that trustees' prime concern is, on occasion, protecting their own position rather than the interests of investors – are we merely substituting one set of potential conflicts with another?

2. Yes, we agree with the range of securities included in the CIS definition. We note the references to KiwiSaver schemes and agree that these schemes should be included in the definition and, as far as is practicable, treated in the same way as other CISs.
3. No, all parts of the definition appear to be appropriate.
4. No, we cannot see any missing elements from the CIS definition.
5. No comment.

6. No, we do not consider that the legal form for CISs' should be prescribed. We agree with the principles described in paragraphs 44 to 46.
7. We agree that superannuation schemes, including KiwiSaver schemes, can be included in the general definition of a CIS. Subject to the comments made below (question 8), the objectives of a superannuation scheme are generally similar to those of, say, unit trusts and many "retail" group investment funds, and commonly operate in a substantially similar manner. For many investors, particularly those that are nearing retirement or actually in retirement, the only real difference between the various types of security offered is the tax treatment.

A superannuation scheme could often be regarded as a special purpose investment as most people would, logically, believe that the scheme name is indicative of its purpose. However, government action in treating superannuation schemes as being no different to other sorts of savings in the years since 1987 has undermined this concept.

8. Yes - in general we do not see it as necessary to regulate employer-sponsored superannuation schemes differently. Similarly, employer master trusts are fundamentally the same.

We believe that it is recognised that employers have a part to play in an employer-sponsored superannuation scheme, irrespective of whether this is a stand-alone scheme or provided under a master trust. Any regulations should therefore allow for, reflect and enhance this role – some work in identifying what this role should ideally be might be required.

Of particular note is that employers will often provide a degree of the supervision that is suggested to be one of the benefits of using an 'independent' trustee. The ability to change administration or investment manager, or to another master trust provider, allows employers to monitor performance and to make changes when they consider it appropriate. This is likely to prove a more effective form of supervision than the introduction of an independent trustee.

While we believe that defined benefit superannuation schemes can also fall under the same underlying regulations as other CISs, their special characteristics need to be acknowledged. The Superannuation Schemes Act 1989 includes provisions that apply only to these schemes and these will need to be carried forward (possibly in a modified or "improved" form).

9. In principal there should be no implications of regulating superannuation schemes in the same way as other CISs.
10. No comment.
11. No comment.
12. Before commenting on this next group of questions, it is appropriate to record that ASFONZ is far from convinced that the justification for, or desirability of, the "CIS trustee model" has been demonstrated. We note that this Discussion Document does not invite discussion on the proposal to extend the model (which essentially applies now to unit trusts) to superannuation schemes. We believe that the artificial separation of duties between a manager and a trustee is unnecessary, unhelpful and confusing to investors.

Having made this point, we see nothing wrong with the functions proposed. From the perspective of carrying out the assessments required under paragraph 97.b, we do question a potential CIS trustee's competence to make such an assessment. Presumably the Commission will issue guidelines to assist and would be expected to monitor the quality of assessments being made as part of their oversight of the CIS trustee?

13. Yes, accountability (and hence liability) must feature. There seems to be little prospect of achieving the purpose outlined in paragraph 95 if the trustee is not to be liable.

14. No comment.
15. The duties of CIS trustees' included seem to be appropriate.
16. Yes, for reasons similar to those given under question 13, the trustee should be liable for its actions (or inactions).
17. As far as the concept of not acting if the proposal is "manifestly" not in the best interests of members:
 - 17.1. this generally allows the issuer the flexibility needed to manage the investments of the scheme and avoids the need for the trustee to 'second guess' the issuer as to whether the action is in the best interests of the investors. In fact, the idea of only making (or disposing of) an investment if making the investment is in the best interests of the investors is almost unworkable – it is only in hindsight that that particular judgement can be made. It seems to be an appropriate threshold.
 - 17.2. There will always be scope for differences in interpretation if judgement is required. "Manifestly" is no different. However, the definition is fairly clear and the term suggested has been in common use in respect of unit trust investments for some years.
18. A reasonable number of investors should be able to call a meeting and require the CIS trustee to act on their directions. The current provisions relating to unit trusts seem to have worked in this regard.
19. The powers indicated appear to be appropriate.
20. Yes, for reasons similar to those given under question 13, the trustee should be liable for its actions (or inactions).
21. Yes. Statutory power to require reporting would be needed to satisfy the purpose outlined in paragraph 95.
22. We believe that it would be reasonable for orders to be made for the issuer to comply with the trust deed to remedy breaches. Similarly, it would be reasonable to make an order for compensation if a loss has occurred as a result of a breach. In general, the current provisions of section 49 of the Securities Act appear to be reasonable.
23. Overall the proposed remedies for breach by the CIS trustee of its duties seem to be appropriate, although it is noted that neither the issuer nor a 'sponsoring' employer are included as being able to take (either in isolation or with others) any of the actions proposed. This may be covered elsewhere but we believe that either could be a useful ally of the investors on the rare occasions when action may be needed.

It is not clear, under paragraph 109, whether the envisaged meetings would cover situations where a breach is merely suspected, as opposed to a situation where it is known that a breach has occurred? Is it proposed that a meeting could be called to consider whether a breach might have occurred as well as to consider what actions to take if there has been a breach?

24. We do not see that members of a superannuation scheme should be treated differently to other investors in a CIS in being able to call meetings. For that reason they should have the same ability to call meetings.

Again, we believe that the position of sponsoring employers should be recognised as parties who might be involved in calling a meeting. This could have application with a stand-alone scheme or where the scheme operates under a master trust arrangement.

It would be important that the ability of members to make decisions at a meeting also recognises the special position of employers. The rights of employers need to be protected and the ability of members to make directions, impacting on employers, limited.

25. See the response to question 22.

26. While we agree that the fit and proper requirements appear to be appropriate, we have reservations regarding the ability of CIS trustees and the Commission in forming judgements on those matters mentioned in paragraph 127. For this reason we believe that the ability to appeal any decision, firstly to the Commission and then to a higher authority, is important.
27. No other useful fit and proper requirements spring to mind.
28. Subject to the reservations expressed above (see response to question 26) this is a logical process for the approval of an issuer.
29. The issuer should initially have the right of appeal to the Commission, with the ability to require the Commission to justify their decision and to present new information.
30. Again, subject to our reservations on the ability of CIS trustees, this monitoring proposal is logical.
31. Yes. It is important that a single authority makes the final decisions so that consistency can be expected.
32. The proposed reporting requirements appear to be appropriate. We believe that the self-reporting requirement under paragraph 138 should relate to a material breach.
33. The options proposed for remedying a breach seem reasonable and appropriate.
34. See comment in the response to question 29 – this is similar.
35. If an issuer is removed, it is possible that another issuer could take over. A procedure for appointing a new manager under current unit trust legislation is commonly part of a trust's trust deed and could be used as a basis. However there will be circumstances where it will be in the best interests of the investors' for the investment to be wound up and this option should be available to the trustee.
36. These functions for issuers are appropriate.
37. The list of duties for issuers outlined appears to be appropriate. With respect to paragraph 150.h, the legislation should attempt some future proofing by including websites and/or 'other similar methods of communication'.
38. We believe that issuers and trustees should have a similar level of liability in respect of those functions, powers and duties for which they are responsible. It is difficult to envisage circumstances in which a trustee should expect to have a lesser level of liability than the issuer. On reflection, it is this sort of question that leads ASFONZ to query the desirability of the artificial splitting of responsibilities.
39. Accounting and Investor information, such as that currently provided in Financial Statements and to the Government Actuary in respect of registered superannuation schemes is useful. Only data that might allow individuals or specific entities to be identified, or that is claimed with good reason to be commercially sensitive, should be regarded as confidential.
40. These powers for issuers are appropriate. The trust deed should enable the issuer to operate under all circumstances envisaged and the power to make amendments should then cover most developments that were not foreseen. The additional power to seek the assistance of the courts should cover anything else.
41. The options included for remedying a breach are appropriate.
42. The proposed whistle-blowing provision should meet the objectives – it is similar to that which appears to be working for superannuation schemes. It would be worth considering, under paragraph 159, that information can be given to the Commission as an alternative

that satisfies the requirements of this provision in all circumstances. Some parties might not know whether the problem is with the CIS trustee or not and this avoids putting them in the position of having to find out.

43. In general we believe that the provisions included in most modern superannuation scheme trust deeds can prove to be satisfactory from both an investors perspective and for the provider. They offer an appropriate level of protection for investors and of flexibility to providers.

Many older deeds, and some newer ones, are written in an inflexible way and difficulties arise because of this – this is not something that the current review is likely to be of assistance with.

Having said that, changes that are necessary because of a law change are difficult to predict and the likely impact on existing deeds should be considered when legislation is drafted. Where appropriate the legislation should include enabling clauses that imply provisions into trust deeds.

44. We can see no advantage in requiring changes that have been agreed between issuer and CIS trustee to be approved by the Regulator, beyond the sort of 'approval' given by the Government Actuary currently when deed amendments are filed. This process primarily considers the question of any possible effect on any member's accrued benefits.

Regulator approval merely introduces another time consuming and potentially costly delay in the process. If the parties have agreed to a change they will both be aware that they are liable for their own actions.

45. It would be helpful for the Regulator to be able to make a ruling on whether one party was unreasonably withholding consent to a change if the issuer and trustee could not agree.
46. While the principle of obtaining the consent of a member if a change will adversely affect an accrued benefit of an investor should be retained, it would be helpful if there were to be a mechanism for overriding this in certain, restricted, circumstances.

For example, if the issuer and trustee agree that an immaterial but nevertheless adverse impact may be experienced by a minority of investors, but they believe a change to be in the best interests of the majority, then they may seek the agreement of the Commission to make the amendment. Approval might be subject to specific conditions (that must be realistic from a cost perspective).

47. Yes – broadly in line with the new sections 9BAA and 9BAB of the Superannuation Schemes Act. This should lead to the more efficient provision of products to investors and avoid wind-up situations when products are rationalised. Where the terms and conditions of the new scheme are no less favourable to the investor than those of the old it is likely that such a provision will work to the advantage of the investor. In most circumstances the investor would be in a position to exit the scheme when notified of the change if they disapproved.

We believe that it is actually the issuer who is best placed to decide whether investors are likely to be adversely affected by a proposed transfer. The issuer maintains the register and is therefore familiar with the determination of accrued benefits. The issuer is also responsible for the preparation of disclosure documents and it is these documents that detail the terms and conditions of the investment (in reality to a greater extent than the trust deed).

Under the proposed model we believe that it is appropriate for the issuer to make a determination. Part of the notification process could be to advise the investor that the transfer would take place after, say, 1 month, unless they believed that the new scheme offers less favourable terms and conditions than the original scheme. If an investor objected on these grounds, then the question would be referred to the Regulator for a determination.

There could also be a provision for an issuer to gain the prior approval of the regulator for a proposal.

48. Yes, we agree that these transfer provisions should be extended to all CISs. Again we believe that the issuer is best placed to make the assessment.
49. We agree that in general it is preferable for any transfer provisions to be flexible. Unless there is a good reason for prescription, legislation should not impose restrictions.

The comment, in paragraph 193, relating to the Unit Trusts Act specifically providing for the investor to be able to transfer their holdings, is noted. However, we believe that in practise many unit trust providers have differentiated between 'transferring' and 'assigning' benefits.

Unit Trust trust deeds will specify how transfers can be made, as required. These are seen as permanent arrangements. Assignments, which are seen as temporary arrangements, are commonly prohibited under trust deeds, or are available only at the discretion of the manager.

In general, receiving, noting and administering assignments is a labour intensive and expensive exercise that many providers prefer to avoid.

We also note that Investment Statements commonly indicate whether or not assignments of interests can be made

50. As indicated, KiwiSaver legislation imposes restrictions on a member's ability to assign benefits. From a consistency viewpoint, as most investors may well regard KiwiSaver as just another superannuation scheme, it may be preferable to restrict access in respect of all registered superannuation schemes. This would reduce the potential for confusion.

If restrictions on access to accrued benefits are made common in superannuation schemes, the existence of a right to assign benefits will operate to defeat that restriction. This is another point in favour of restricting superannuation schemes.

51. We believe that investors should continue to have options similar to those currently available in these circumstances when they reach retirement age.
52. In general, we believe that matters that are important for investors to be aware of are best covered in disclosure material relating to the investment. That is not to say that it is not important to include details of the investment, how it will operate and the rights and obligations of providers and investors in the trust deed but we need to consider carefully the purpose of each document such that information appears in the most appropriate place without undue repetition.

We do not see any value in including objectives in the trust deed, other than an overall generic objective.

53. This suggestion takes the current Superannuation Schemes Act requirement for the trust to be established *principally* for the purpose of providing retirement benefits a stage further – the omission of the word *principally* would make a significant difference. We are uncertain as to whether this change was intended.

The current definition has caused a number of problems for investors, providers and the Regulator as no one knows what it means in reality. A number of observers have queried the justification for its inclusion given the lack of any obvious advantage to investors gained by investing in a superannuation scheme (for example there are no tax advantages) compared to other vehicles.

Extending the requirement as suggested would clearly be restrictive.

We do not see any value in this proposal unless there are other reasons for treating superannuation schemes differently to other CISs. If, for example, government decided that it is desirable for some reason for investors to save specifically for retirement and

provided incentives (say, through the tax system) to encourage this, then specific objectives including lock-in provisions may be justified.

54. We think that it is important to consider what purpose would be achieved by including an objective in the trust deed. There would appear to be a multitude of possible objectives depending on how specific the description of the objective is required to be.

An overall generic objective, for example, “assisting investors to save and accumulate wealth” might be helpful in indicating what the trust has been established for in general terms. We do not believe that anything more specific in the trust deed would serve any useful purpose and would be likely to lead to unproductive discussion from time to time as to whether the objective was being met (or what it actually meant).

There is little doubt that the inclusion of specific objectives would restrict the flexibility of the regime. We repeat that our view is that disclosure material is a more suitable place for information of this sort.

55. Yes, conditions of entry and exit should be included in the trust deed. We cannot see that such a provision would have any practical impact as most deeds appear to cover this topic already.
56. We do not believe that it should be compulsory to offer portability, but it should be encouraged. It needs to be recognised that there may be cost implications to both investors and providers in providing portability and it seems to be unreasonable to artificially restrict the ability of the provider to attempt to ensure that an investor creating the cost should not bear the cost.
57. We believe that the emphasis should be put on clear disclosure of the provisions for accessing funds. This must cover whether or not there may be restrictions and/or costs associated with any withdrawals.
58. Clear disclosure of any restrictions on access is essential.
59. We do not agree that minimum contribution levels, or the actual process by which these are established or revised should be included in trust deeds. We believe that the fact that the issuer may impose a minimum and that the issuer may revise the minimum at its discretion upon giving, say, 3 months notice, should be in the trust deed.

The fact that there may be a minimum level of contributions and the level of any minimum currently in force must be included in the disclosure documents. Similarly the ability of the issuer to alter this level and the basis used (including at the discretion of the issuer if this is the case) should be in the disclosure documents. In addition it should be stated whether or not any revised minimum can be applied to existing investors.

By adopting the above we believe that investors will be adequately informed on the position relating to contributions. We note the point made in paragraph 217 that it will be important for an investor to have ongoing certainty about the regular contribution levels. We do not see that including something in the trust deed gives any more certainty than inclusion in disclosure documents (particularly as even less investors will read the trust deed than the disclosure documents!). Furthermore, surely the purpose of disclosure is to give potential investors the opportunity to decide what is actually important to them and between differing products and their features. If an investor is not comfortable with the way in which any minimum contribution level is determined (or any other feature) then they should not invest in that product.

Incidentally, we do not think that the comments made under paragraph 217 are entirely accurate in that while superannuation scheme trust deeds are required to specify the level of contribution payable, this is not uncommonly specified by the investor or agreed between the member and the employer. This is particularly so with personal superannuation schemes (sometimes known as retail schemes) and with employer schemes under master trusts.

We also disagree that the general nature of superannuation schemes is that a member makes small regular payments rather than lump sums. This is probably correct as far as employer schemes are concerned but does not necessarily reflect the nature of personal schemes.

Finally, the view that other CISs are not generally used for regular payments is somewhat outdated. A significant number of unit trusts and retail group investment funds successfully offer regular contribution facilities.

60. There are likely to be a number of differing investment strategies in operation at any one time as trust deeds commonly cover a multitude of trusts. An overall reference to the existence of appropriate investment strategies should be included in the trust deed, together with reference to the mechanism for reviewing and altering the strategy. Details of the strategy for any trust currently in place are more appropriately included in the disclosure documents.
61. Similar provisions should be in place for all CISs. This avoids the question of what is meant by a material strategy. It should be obvious from the description of the strategy how specific the strategy is.
62. We agree that these issues should be covered in the trust deed. Again, the level of detail that is required to be in the trust deed should not be too restrictive for the practical operation of the scheme. This needs to recognise that it is virtually impossible to predict all likely eventualities and that at times the issuer will need to make best endeavours. This applies particularly to issues of pricing and valuation.
63. We support the view that trust deeds specify a process for valuation of assets. We do not understand the second part of this question but would add that the process included in the trust deed should be of a nature that makes it clear what the principles behind the process are. The precise details that comprise the process should not be required.
64. Valuations for a particular scheme should be completed as at a consistent time for each valuation period. This would provide for each valuation period measuring markets over similar periods.

We see absolutely no value in prescribing a consistent time for valuations across schemes. This should be left to the issuer. Prescribing a particular time presupposes that asset valuation and pricing exercises are precise sciences and that all issuers will make the same assumptions in managing the investments and accounts for a scheme.

Similarly, standardisation of the timing of currency conversion would be a meaningless exercise. It assumes that there is only one rate available at any one time whereas there will always be differences between traders. Use of a standard rate would also be meaningless as the only meaningful rate is that which would have been obtained by that investment manager at that time.

There is no indication as to why we would wish to impose these timing requirements and what advantage this gives to investors. Unless it is also proposed to ensure that all providers' actual costs and expenses are the same, their fees are all the same and their investment decisions are all the same we cannot see that these restrictions serve any useful purpose. Ultimately the 'value' of any particular asset, in NZ dollars or any other currency, are the amounts obtained at point of sale and we presume that there is no suggestion that all trades are concluded at the same time.

65. We agree that the process for valuation (and see this as disclosure document information) should include how expenses are dealt with. This would include reference to the sorts of expenses that might be covered under the asset valuation.

With regard to the use of buy/sell spreads, we believe that the potential for their use should be mentioned in the trust deed, together with an indication of what the spreads are designed to cover. This would normally be the costs associated with buying or selling assets or, on occasion, to cover the payment of commission to intermediaries. The actual

spreads in existence from time to time, and an indication that these are reviewed by the issuer and can be varied if this is the case, should be disclosed in the disclosure documents.

We agree with the comments in paragraph 237 and 238 relating to the difficulties that provisioning for tax losses can create. We do not believe that a consistent mechanism for their valuation is practical.

66. The trust deed must indicate where there are discretionary powers and who is involved in exercising those discretions. We do not agree that only trustees should be able to exercise these discretions as long as the trust deed states who is involved.

We believe that there are circumstances under employer sponsored superannuation schemes where it is justified for the employer to exercise discretions. This is particularly so if the trustee is not the employer or the employer is not otherwise involved in administering the scheme (i.e. where the trustee is independent or the scheme is a master trust).

The payment of discretionary benefits for example is often a function of the employer's HR policy and we see no reason for other parties to make decisions in these circumstances. The disclosure of these discretionary powers should be included in the disclosure documents.

67. The specifying in the trust deed of the types of fees that can be charged is not necessary; reference to the ability of the issuer to make charges is sufficient. Full disclosure of fees currently in force and the provisions for them to be varied in the future should be included in the disclosure documents. As mentioned earlier, we believe that this gives the investor as much certainty as inclusion in the trust deed.

68. We agree with this proposal relating to the appointment and removal of trustees and issuers.

69. We generally support the current provisions of the Superannuation Schemes Act regarding the winding-up of a scheme. We note that many trust deeds include a general power for the trustee to wind up a scheme at their discretion. We also note that many unit trust trust deeds also include a power for the manager to wind up the trust which perhaps suggests that, under the current proposals, it would be the issuer that would have this power.

The current provisions appear to work in practice.

70. If there is a requirement for the circumstances that will lead to winding-up being included in the trust deed, we do not see any need for standard trigger points.

71. We agree with the proposals relating to the initiation of meetings as far as the suggestion surrounding the number of members required is concerned. Five percent of the number of members or holders with 5% of the total value, minimum 100 members, sounds reasonable.

On the other hand, we do not agree with the proposal regarding the release of personal information to other investors and, more particularly, other market participants. Bearing in mind that employer sponsored schemes involve an employer as a vital ingredient, we do not believe that this suggestion is appropriate.

It should be remembered also that the issuer would commonly not have address details for individual investors in an employer sponsored scheme, with contact being made through the employer.

Perhaps an answer that might be applicable for all CISs would be a requirement for issuers to pass on a notice to all investors from an investor in circumstances where it is proposed to call a meeting? This should be at a reasonable cost that must be met by the investor making the request.

72. Given that the likelihood of meetings is low, we do not have any problems with the quorum and voting procedures suggested.
73. We are not able to comment.
74. The proposals appear to give the trustee sufficient powers.
75. Nothing to add.
76. Before commenting on the specific question raised, we feel that it would be helpful to make a couple of observations.

Paragraph 272 seems to imply that employees' perceptions of the role of the employer are automatically different if the scheme is a stand-alone scheme to those where a master trust is being used. We do not believe that this is necessarily the case.

Master trust providers frequently go to great lengths to "disguise" the relationships such that employees are given the impression that they are joining their employer's own scheme. In reality, the majority of members are not conscious of the roles of issuers, trustees, promoters or managers. All they are usually aware of (or interested in) is that they are a member of the company scheme – that the scheme is part of a master trust or stand-alone is of no consequence.

As indicated under question 66 above, we do not agree that employers should not be able to make discretionary decisions as long as the fact that they will have this power is disclosed to members in the disclosure documentation. We believe that the concerns raised within the superannuation working group were extreme examples where it was felt that the discretionary power had not been properly exercised.

However, it was also stated that in the vast majority of cases the current arrangements had worked well. The discretions had been included to allow the employer who used a master trust to make decisions that were appropriate to a particular situation in the context of the employment relationship. It has been recognised that the trustee would not be in a position to make valid judgements in these circumstances.

We believe that to remove the ability to exercise discretions in appropriate circumstances would have a negative impact in that it will lead employers to conclude that their role in the scheme is diminished. This is likely to lead to a "lowest common denominator" effect to the detriment of the vast majority of members.

We think that if there is a perceived issue with employers exercising discretion properly, the issue could be overcome by the issuing of guidelines to employers who have any discretionary powers. Guidelines would be designed to indicate the steps that it is expected would be taken in the exercise of the powers.

77. While we believe that the trustee (under the CIS trustee model) should agree to any proposed reversion, we do not believe that the trustee should make the final decision. We feel that this is best left with the Regulator.

It is not uncommon for trust deeds for defined contribution superannuation schemes (stand-alone and master trust) to include a provision for the reversion of assets subject to the consent of the Government Actuary – and this is, in any case, an implied provision. The requirement to refer requests and justification for reversion to the Regulator is very effective in deterring requests which might have little merit and we do not believe that the requirement for a decision by a trustee would have this effect. We also believe that the need for consistency here means that a single point of decision making is important.

78. We agree with the principle of a transitional framework for existing registered superannuation schemes given their current structures. We note that the impact of the CIS trustee model will be fairly modest on other vehicles where the roles of issuer and trustee are already separate.

Our understanding is that that it is felt to be desirable for all CISs to be structured in a similar way rather than a change being necessary to overcome any particular problems. Indeed, the regulator for superannuation schemes has confirmed that the current legislation and structures are working well. While some will not agree, it is perceived that the CIS trustee model is the preferred option going forward and we have to accept that.

We agree that, in the circumstances, it is sensible to retain the current structure for existing superannuation schemes. This will avoid disruption and cost which it has been agreed is not necessary to overcome any current problems.

It is, however, difficult to understand the need to complicate the situation by distinguishing between existing employer stand-alone schemes, existing master trusts and existing personal schemes. Whilst the costs associated with revising structures may be more widely spread for a master trust or personal scheme, they nevertheless need to be allowed for and, eventually, it will be investors who will suffer the costs. Costs involved in rewriting trust deeds, appointing a CIS trustee and amending systems to provide information specific to the requirements of a CIS trustee will be involved.

The superannuation scheme Regulator has indicated that comments relating to the satisfactory nature of current arrangements did not distinguish between employer stand-alone schemes, master trusts and personal schemes.

There seems to be a general misapprehension that master trusts are automatically larger (by numbers of members or funds) than an employer stand-alone scheme might be and therefore costs can be more widely spread. This is far from the case. In many cases master trusts are relatively small while many stand-alone schemes are large.

We believe that there is just as much likelihood of smaller master trusts and personal schemes being terminated if forced to make changes at this time as for stand-alone schemes.

We suggest that the transitional arrangements are applied to all existing registered superannuation schemes. This avoids the need to define employer stand-alone schemes.

79. The proposals for powers and duties appear to be reasonable, other than the requirement to maintain a website and to act on the directions of investors at a meeting.

Theoretically a scheme could have just one or two members who have no access to a website – perhaps it would be reasonable to require this if the scheme has, say, more than 100 members? It would be easier to comment on this question if there was an indication of what existing powers and duties are to be excluded.

We have some difficulty in understanding how a requirement to act on the direction of members of a superannuation scheme (the investors) might work in practice. The position of the employer and the requirement for the trustees to act in the interests of all members seem to make this problematic.

There is one aspect mentioned under paragraphs 289 and 290, relating to Regulatory Controls, that we do not understand. There does not seem to be an earlier reference to “Specification of the number of units in the scheme”. As far as we are aware all schemes that are unitised are open ended with no limit on the number of units on issue. What is this reference intended to cover?

80. We do not have a feel for the level of costs involved and would suspect that it would vary considerably between schemes. Bearing in mind that ASFONZ cannot see the justification for any alterations to the current structure and are not convinced of the benefits of the CIS model, we do consider that costs associated with the proposal are outweighed by any benefits.

Costs in respect of trusts deed amendments felt to be vital could be limited by the use of implied provisions in resulting legislation.

81. While it is difficult to attempt to assess costs, the costs associated with the transitional framework do not appear to be significant. Costs associated with moving to the general CIS structure appear to be related primarily to totally rewriting the trust deed, appointing a CIS trustee and modifying registry and reporting systems. These could be major.
82. Given the current Regulator's views on the operation of superannuation schemes in general to date, it is not obvious why any significant change to the current regime is required – other than to overcome problems which we are told do not exist! We recommend that the current system be continued as it is.

If the need to change is compelling, then all but the first bullet point in paragraph 294 appear to be reasonable additions given that they all currently exist already. We believe that the current provisions of securities legislation are sufficient to cover the first bullet point suggestion and that it is the issuer's/trustee's responsibility to ensure compliance. Again, we are not aware of any problems arising to date in these areas.

83. We are a little confused by some of the comments under paragraphs 295 to 300 as it is not clear how these ideas fit in with a transitional arrangement that essentially retains the current structure for existing superannuation schemes? Surely the idea of a transitional arrangement is that the new rules do not apply to this group of schemes – otherwise why bother to have a transitional arrangement?

We can see that a fit and proper entry requirement for personnel involved in the issuer/trustee functions can be introduced for personnel appointed in the future could work, other than the requirement to be independent. Given that the issuer and the trustee are the same, how can this be contemplated?

The problems associated with competence of superannuation scheme trustees who are appointed, whether under transitional arrangements or under the CIS trustee model, have been identified. We believe that there are significant advantages to having employee representation amongst the trustees. This would be undermined if some outside body (the Regulator or any other) could overturn, say, a vote of members to elect a representative.

Any prospective trustee would need to understand that the role has a number of responsibilities and, as such, there are some requirements. Any person who could not satisfy any of the negative assurance tests should not stand for election. Competence though could only come with experience and we believe that new trustees should be given time to attain a satisfactory level of competence. Organisations such as ASFONZ can provide formal trustee training and we suggest that completion of certain training modules would need to be completed within a prescribed period.

We do not believe that it is reasonable for existing trustees to be subject to negative assurance tests. It would be reasonable for some form of competence attainment to be evidenced within, say, two years of the commencement of any changed requirements. It is agreed that any fit and proper requirement should be applied to the Board of trustees as a whole.

84. We believe that the idea of a transitional framework is such that the independence requirement for existing schemes is not applicable.

Furthermore, we believe that the general principles surrounding the role and responsibilities of trustees means that there is no need to require representation from any particular source.

85. The case for independence of trustees has not, in our view, been demonstrated. We believe that the perception that there are insurmountable conflicts of interest are just that.
86. We suspect that it would be necessary for trust deeds to reflect legislation as interpreted and expressed by the Regulator. To that extent the Regulator would need to issue clear guidelines describing satisfactory procedures.

87. We are not uncomfortable, in general terms, with the use of the term “unallocated funding” in the Superannuation Schemes Act and do not see that a formal definition offers any advantages. The benefit of the current wording is that it describes a general principle and does not therefore suffer from being specific. It might be improved if the Government Actuary had the power to determine that a particular scheme operated on the principle of unallocated funding.

Incidentally, we do not believe that the description included in paragraph 301 is helpful in that it uses the word “guarantee”. We do not believe that any scheme guarantees a defined benefit for a member. It will usually provide for a defined benefit – this is not a guarantee.

In addition, we feel that the description does not accurately reflect the position of a member’s own contributions to the scheme. These contributions are invariably allocated to an account in the member’s name and this account, often with interest at a prescribed rate, commonly forms the basis of a withdrawal benefit (at least as a minimum). It is contributions from the employer and actual investment earnings that are not allocated to a particular member until a benefit becomes payable.

Paragraph 303 also uses the term “guaranteed” incorrectly where it says that “the employer has guaranteed the payment of a pension”. Again, this implies that there is a guarantee of future payments of a pension – which there is not. In addition, and importantly, it is the scheme that provides the benefit (the pension) and not the employer. We do agree, however, that member perceptions in this area may also be incorrect.

The conclusion has been reached that defined benefit superannuation schemes generally provide pensions. Many do but this is not a prerequisite as it is not uncommon to allow retirement benefits to be taken as a lump sum. This lump sum may be calculated actuarially or may merely be a given rate for commuting a benefit expressed as a pension to cash (e.g. \$10 cash for each \$1 pa of pension). While benefits may initially be calculated in a particular way (e.g. as an annual pension), the form of the benefit can be as a pension, as a lump sum or as a combination of the two.

Incidentally, the payment of a lump sum rather than cash works to limit the risk to the scheme (and hence the employer) as the longevity of the member ceases to be of relevance once the benefit has been paid.

Paragraph 306 highlights one of the principle differences between defined benefit superannuation schemes and other investments. It could be argued that such schemes are not investments made by a member at all and that we are incorrect in trying to treat them as such. It might be preferable to exclude such schemes from securities legislation and deal with them as employee benefits to which the employee may contribute?

Paragraph 307 misses one of the prime factors for determining what sort of benefit to take – taxation. The market for annuities in NZ has never been large but reference to the review from the “Todd Task Force” will show that there were, in the late 1980’s, around a dozen annuity providers at that time. The tax position in NZ has not been encouraging to investors considering annuities and the number of providers has shrunk.

88. If there is general comfort that defined benefit schemes should continue to come under this legislation, we agree that the transitional framework would be appropriate. This includes the ‘checks and balances’ referred to.
89. Defined benefit schemes will commonly go through periods where they may be said to be under-funded or over-funded. This often reflects recent experience, compared to the actuary’s assumptions, in such areas as investment income, salary inflation, employee turnover and the like.

The first years of this century resulted in very poor investment returns; well below those that would have been assumed. Many funds (a world wide phenomena, not just NZ) that had shown a healthy surplus in the late 1990’s suddenly found that they faced a shortfall. They went from being over-funded to under-funded in a couple of years. It is likely that the

position of many of those funds has improved markedly in the years since as returns have been sound.

This situation is not new and is the reason for regular actuarial reviews for these schemes. In general we do not believe that there is a significant problem at this time and there is no history of schemes defaulting in the NZ market. There will, in the normal course of events, be a number of schemes that would be considered to be, for the time being, under-funded and we believe that this is probably the case now.

90. We do not agree that specifying target funding levels is a helpful initiative.
91. We agree that actuarial assumptions used in valuations should be transparent and that they should be internally consistent. As stated, assumptions need to be relevant to a particular situation and to demand consistency at all times ignores this requirement.
- We would be concerned to see additional legislative prescription of assumptions although we believe there is scope for actuarial standards to specify ranges of generally accepted assumptions for the time being as guidelines. The use of assumptions that are outside of the guidelines would need to be justified.
92. The governance structures proposed for actuarial standard setting for insurance appear to be equally applicable to superannuation in general terms. Our view is that there is room for improvement in the current governance arrangements. We also believe that the powers of the Regulator currently given in the Superannuation Schemes Act need to be strengthened in this area to enable the Government Actuary to intervene in certain circumstances (e.g. where differing assumptions have been used as per the above in question 91).
93. We believe that a full actuarial valuation every three years should, in most circumstances, be sufficient. To require more frequent valuations automatically would serve only to increase costs.
- The Government Actuary could be given the power to require an additional valuation in certain circumstances (e.g. where the sponsor was not following the recommended rate for funding and there is a deficiency).
94. We see no objection to the method of valuing withdrawal benefits being included in the trust deed. Logically this would provide for the assumption that all withdrawal benefits are payable at the valuation date.
95. We cannot see, with reference to paragraph 336, that members who may have made similar contributions are necessarily entitled to the same benefits. Benefit entitlements are as determined by the trust deed and if, in certain circumstances, the trust deed gives precedence to a certain group then that group are entitled to their benefits as they have been determined.
96. If the concept of equity on a scheme wind up is felt to be important, then these issues can be effectively addressed for new schemes by prescribing wind up provisions. The legislative provision could specify that equitable benefits must be provided under the trust deed in these circumstances and the Government Actuary given the power to determine the factors that need to be taken into account when determining these values when a scheme winds up.
97. We believe that it would be helpful for the trustees, with the agreement of the Regulator, to make such amendments to current trust deeds. Having said that, we feel that this power would need to be exercised with caution as it could disadvantage those members who currently have precedence under a wind-up provision in a trust deed, where all benefits are not "fully funded". To that extent, any amendment might be unfair.
98. We cannot see how the absence of an established annuities market in NZ has any impact on the equity situation on wind-up of a scheme which has come about due to a precedence in the trust deed. The existence of an annuities market would be helpful in that benefits

equivalent to pensions in payment could be purchased and therefore a market cost of those benefits to the scheme established. It would remove the need for any assumptions to be made in respect of the cost.

Any inequities are not affected by this purchase.

The question of enhancing the attractiveness of annuities and encouraging an active market in NZ is quite wide and we feel that it is worthy of considered debate. However, at this point that we do not believe that an active annuities market would help resolve perceived inequities on wind up.

99. We do. Comments to that effect appear above.
100. We certainly support mechanisms that reinforce the position of the Regulator to work with scheme trustees and encourage the parties to work together towards a satisfactory conclusion. This would include the ability to direct an employer to participate in good faith in discussions.
101. It is essential that principles are developed to guide the Regulator and to indicate to trustees and their advisers how it is anticipated that discretions will be applied. We believe that it is preferable for principles to be developed by an independent body. They would need to cover all areas where the Regulator has the power to intervene.
102. We are extremely uncomfortable with the idea of giving the Regulator the ability to direct an employer in relation to funding levels. We feel that the Regulator should use persuasive arguments to encourage employers in this area, while retaining the ultimate power to order that the scheme be wound up.

It is reasonable to assume that the management of the employer's business are best positioned to determine which, of a number of competing demands, should take priority. At certain times it may be prudent management to defer payment of contributions to a superannuation scheme or to make payment at other than the recommended rate. They are charged with managing the business from a long-term perspective. A Regulator cannot have the necessary information to make a better decision.

It is our belief that giving the Regulator this power would encourage the termination of a number of existing schemes, as employers would resent the possibility of a government agency potentially determining the fate of the company.

- 103 - 109. We have no further comments.
110. We have no specific comments relating to the need for transitional arrangements. However, we would emphasize the need to consider the costs involved if implementing changes at differing times. Costs associated with amending trust deeds, disclosure documents, administration systems and reporting requirements should be considered.

ASFONZ response to
the Discussion Document on
Consumer Dispute Resolution And Redress

ASFONZ believes the present dispute resolution process for the financial services industry is inadequate. ASFONZ is also of the view that to achieve the “independence and fairness” criteria, significant emphasis needs to be placed on improving the financial literacy of consumers and future consumers. ASFONZ supports three specific initiatives;

1. The Retirement Commission should be charged with and funded for the provision of additional consumer education.
2. The Ministry of Education and the New Zealand Qualifications Authority should be charged with and funded for the development of appropriate standards to be built into the education curriculum in to improve the financial literacy of the next generation of consumers.
3. The existing Banking and Insurance and Savings Ombudsman schemes should be supplemented by a dispute resolution scheme for Financial Intermediaries and such other approved collective schemes as other industry participants establish, to produce a mandatory dispute resolution system for all participants. Terms of reference for these schemes should be all embracing. Funding arrangements for each of the schemes should be established by the participants.

GENERAL COMMENTS

Education in financial matters is of paramount importance. Often disputes arise due to consumers misunderstanding the terms of the financial product or service being offered. With the advent of KiwiSaver and the opt-out process, there will be a cohort of consumers who will not have made an active decision to invest. It is conceivable that many of these “passive consumers” will be less informed as to the terms of their investments than those who have made an active investment decision.

It is essential that consumers are provided with disclosure documentation that provides information in a clear and concise format. The current investment statement and prospectus regime fails to provide this and we support the review of the format for these documents.

In our experience dispute issues that arise in relation to employer sponsored superannuation schemes can often be linked to employment dispute issues. Appropriate mechanisms need to be put in place to ensure that employment disputes are dealt with in the appropriate forum.

Consumers need to be reminded of the dispute resolution procedures that are available to them. We support the requirement for a periodic (at least annual) reminder to investors of those processes.

RESPONSES TO QUESTIONS FOR SUBMISSION

1. What are the types of problems currently experienced by consumers in the financial sector? What problems do consumers experience in obtaining redress from financial providers?

Response: We do not solicit this type of information from our members. However the Government Actuary would likely have the best understanding of the problems faced by beneficiaries of registered superannuation schemes. One area that does cause issues for our members is the assessment of entitlement to disablement benefits. Consumers may find that there is no authority to which a problem can be taken when the financial provider is not willing to address the issue satisfactorily. It may also happen that a problem is not, or is not seen to be, within the ambit of issues considered by such an authority.

2. Are the gaps in the current dispute resolution system inhibiting consumers' access to redress and affecting consumer confidence?

Response: The major inhibition is the inability of a consumer to find an authority to consider an issue for some financial providers.

3. Is there a need for government intervention to promote consumer confidence in financial sector dispute resolution and redress? What is the appropriate role for government?

Response: There needs to be an appropriate low cost avenue established to provide consumers with a channel to deal with matters of dispute. It does appear that such avenues will not be provided voluntarily by all sectors of the industry so Government intervention will be necessary. The role of Government should be to establish such a process then leave it to the process to deal with the issues that arise.

4. What effect will other regulatory changes proposed under the Review of Financial Products and Providers have on consumers' access to redress? Do these changes support greater or lesser government intervention with respect to dispute resolution and redress?

Response: There will be always be disputes regardless of the overarching regulatory environment. The Government need only ensure that all financial providers give their customers access to an approved disputes resolution process.

5. Do you think the current framework of voluntary dispute resolution schemes works well? Do you think it could be improved? How should the gaps be addressed?

Response: The current framework works well where well established processes, such as Ombudsman schemes, are in effect. As there needs to be recourse to dispute resolution across the whole of the financial sector, further schemes need to be established. We anticipate that one (or more) of these will relate to Financial Intermediaries.

6. Would more consumer education and information sufficiently address the concerns with the status quo approach to consumer dispute resolution? Who should be responsible for such consumer education and information and its funding?

Response: Consumer information and education would certainly help, although this is not enough. In today's environment it would be reasonable to expect the

financial providers within the financial services industry to be at least partially responsible for education and information about the industry. This is happening currently (to a limited extent), but should be extended and the role of the Retirement Commission is relevant. An early introduction to financial matters would assist in building the confidence of young New Zealanders as consumers of financial products and services (including Student Loans), so we support the development of financial literacy standards from early in the school curriculum.

7. How do the advantages and disadvantages/costs and benefits of enhanced civil remedies and improvements to the court system for consumer dispute resolution weigh against the status quo?

Response: The enhanced civil remedies and improvements to the Courts system are not sufficient to deal with those claims that occur and are outside of the scope of the Small Claims Tribunal but are not sufficiently large to require the time of the Courts. Many consumers will not wish to take such an "aggressive" step despite having concern about their situation.

8. Should participation in an industry-based dispute resolution system be mandatory or voluntary for financial providers?

Response: Participation should be mandatory. A transitional period should apply.

9. How should an industry-based dispute resolution system be funded?

Response: Ultimately the consumer will pay – either through taxes or through charges from the provider. We support the funding being shared between Government and the providers who work in the industry. The model currently applied in the banking sector for provider funding would be an obvious model to emulate. As with insurance pools, the funding model would be expected to charge like risks similar amounts and be expected to encourage good practices through a levy linked to activity.

10. What is the appropriate definition of "consumer" for the purpose of determining access to the dispute resolution system?

Response: A consumer is someone who has dealings with a participant engaged in the financial sector. We do not believe that dispute resolution schemes should be limited in terms of dollar amounts.

11. What type of cases should be within the scope of an industry-based dispute resolution system?

Response: All activity between a consumer and a participant should be able to be referred to a disputes resolution system.

12. Which financial products or providers are outside the proposed scope of the dispute resolution system? Should mandatory participation extend to these products and/or providers?

Response: There should be no providers or products that are within the financial services industry that should fall outside the scope of the disputes resolution system. Mandatory participation is appropriate for all participants.

13. What are the advantages and disadvantages of an industry-based dispute resolution system? What are the costs and benefits?

Response: The main advantage of an industry-based dispute resolution system is that every dispute is able to be dealt with. The major disadvantages are likely to be around the areas of time and cost of running such a system.

14. What is the appropriate form of an industry dispute resolution system, i.e. multiple schemes, multiple schemes with shared resources, or a single scheme?

Response: With the present models as a guide, a multiple scheme arrangement is the most appropriate form for the financial services industry.

15. What are the advantages and disadvantages of a mandatory system of multiple industry-based dispute resolution schemes?

Response: The advantages of such an approach are that disputes around a specific section of the industry are dealt with by specialist procedures within a specialist arrangement. There will be disadvantages in that some information which could easily be shared might not be.

16. What procedures are needed to ensure consistent decisions between different schemes, and mutual recognition of schemes' decisions?

Response: A sharing of the decision-making processes associated with each of the schemes is sufficient to ensure consistent decisions are made.

17. What procedures would need to be put in place to ensure that dispute resolution schemes meet appropriate standards to ensure consumer confidence? Should the Minister be responsible for approving schemes?

Response: Procedures that currently apply to the Insurance and Savings Ombudsman and the Banking Ombudsman have proved to be both reliable and consistent. They should be used as the model for any other schemes.

18. Do you see sharing resources amongst dispute resolution schemes as a plausible option? What are the advantages and disadvantages?

Response: There are limited sharing options. The present arrangements between the Insurance and Savings Ombudsman and the Banking Ombudsman would show that there is little to be gained by a strict adherence to a sharing principle.

19. Should a single entry point be mandatory or voluntary? Should there be government approval and/or minimum standards for the single entry point? What are the costs and benefits?

Response: There should be multiple entry points to a dispute and resolution service. It may be appropriate to have a common entry point if consumers are unsure as to which scheme a dispute ought to be referred to, but this common entry point will need to be established, maintained and supervised by the schemes that it services. It may be sufficient for process and coverage information to be shared between approved schemes so that they can direct

consumers to the correct schemes. This will almost certainly require an independent arbiter.

20: What resources and functions should be shared by schemes?

Response: A common entry point, together with processes and outcomes.

21: What are the advantages and disadvantages of a single mandatory dispute resolution scheme? What are the costs and benefits?

Response: The financial services industry encompasses a significant variety of entities with different modes of operation. A single resolution service would need to subdivide the work into broad categories of entity; this is effectively what exists now. There seems to be very little cost savings associated with a single mandatory dispute resolution scheme.

22: What procedures should be adopted for appointment of the governing board of a single industry-based dispute resolution scheme?

Response: The procedures should follow those which currently operate for the Banking and for the Insurance and Savings Ombudsman schemes.

23: What scheme rules would be needed to ensure that the dispute resolution scheme promotes consumer confidence?

Response: The scheme rules should be similar to those which currently apply to the Banking and the Insurance and Savings Ombudsman schemes.

ASFONZ response to
the Discussion Document on
Registration of Financial Institutions

103. We have no opinion on the appropriate categories of financial services but would comment that it is important that it is clear what is a financial service and what comes under each category. Definitions must be comprehensive and unambiguous.

While not specifically covered by this question in the Discussion Document we do have some queries relating to the Registration and "Approval" process envisaged in respect of employee superannuation schemes.

Schemes established under master trust arrangements will generally be provided by an organisation that provides financial services in the accepted sense and do not appear to raise any issues. The issuer will be a Financial Institution and can be registered as such.

We can, however, foresee some circumstances where the issuer will not generally be in the business of providing financial services and believe that the registration regime needs to recognise this. Will there be a requirement to be registered as a Financial Institution?

The most obvious circumstances where this will arise will be the employer who establishes a stand alone scheme. This employer may be an incorporated body but need not be. While we feel that it is unlikely for an unincorporated body to establish a stand alone scheme, the regime must be flexible enough to cope with the possibility without imposing artificial barriers to the establishment of a scheme.

The applicability of the fit and proper test is also unclear in these situations. Furthermore, our understanding is that the fit and proper test is to be applied in respect of existing stand alone schemes.

Is it intended that employees of, say, a sole trader who might not be considered to be fit and proper under the proposals are not able to be offered membership of a superannuation scheme established by the employer, even though there may be no restriction on that person operating a business? Similarly, if an organisation happens to employ such a person in a "senior management" position (however this may be defined), how is this to be dealt with?

As a general comment, we note that paragraph 193 raises the prospect of an appeal provision where the fit and proper test is not satisfied. We believe that such a process is essential.

104. The information proposed to be available appears to be sufficient.
105. The suggested process appears to be reasonably cost effective. There is no mention of any charges that may be imposed by the Companies Office for performing the Registration process or by the Securities Commission for their part in the Approvals process. It is hoped that any charges imposed would be minimal.
- 4.- 9. We have no views on these questions.

ASFONZ response to
the Discussion Document on
Supervision of Issuers

1. Yes, we agree that the Securities Commission (SC) should have this power. We note that the Discussion document does not appear to address the next question – what will be the SC basis for determining the consequences and the potential remedies?
2. Yes, the power to make a declaration will be helpful.
3. Yes, the SC should have this power.
4. The registration role of the Registrar is sufficient.
5. No comment.
6. We agree with the statements made in paragraph 82. Current situation is sufficient and adequate.

We would add that we believe that issuers have had difficulty on occasions of determining whether a matter might be considered to be material or immaterial. It is acknowledged that any term that is of a subjective nature is likely to lead to this dilemma. However, we believe that typical risk averse issuers have been likely to act in an over-cautious manner in these situations and that some guidelines should be available.

7. No, the summary given under paragraph 83 suggests that the scope is adequate.
8. Yes, defences seem to be adequate.
9. Yes, penalties are adequate.
10. We see no reason for not extending the SC powers as suggested.
11. We believe that there are significant advantages to the current regime as it applies to superannuation schemes. The main advantage, from an investor's perspective, is that it is easy to determine the party responsible and accountable for ensuring compliance with legislation and the trust deed. This will be the scheme trustee.

There is, therefore, only one party for an investor to rely on; one that they know has an overall obligation under the Trustee Act to act in the interests of all of the members of the scheme. We note that the summary of responsibilities and obligations contained in paragraph 133 does not seem to mention that superannuation scheme trustees are subject to the same duty to comply with common law and other legislation as a debt security trustee (as per paragraph 91) and unit trust trustees (as per paragraph 122).

Anecdotal evidence suggests that investors have little knowledge, or interest, in the various roles and responsibilities of the parties looking after their investment. As far as they are concerned, they will be sold an investment branded, for example, AMP, and this means that the investment is provided by AMP. They are not surprisingly confused if advised by, say, a trustee that their query is appropriate to 'the issuer' (or unit trust manager).

We do not believe that the advantages of artificially separating issuer and trustee responsibilities and accountabilities have been demonstrated. This view appears to be supported by the superannuation schemes regulator. It is accepted that there is scope for potential conflict of interest, but we feel that history has shown that trustees have generally acted responsibly.

It is our view that trustees' responsibilities are clear under the Trustee Act and that trustees must be held accountable in terms of that Act.

We note the comments, under paragraph 149, from the Trustee Corporations; in particular that they would be concerned to protect their reputations and therefore act in an appropriate manner. We do not doubt that this is the case. However, we understand that under the model proposed it is not intended to perpetuate the protected position of the Trustee Corporations as currently applies in respect of unit trusts.

We agree that it would not be appropriate to restrict the provision of trustee services as they are currently, - the barriers to entry in this market are too high. However, the removal of the restriction does seem to imply that this 'advantage' is not likely to continue.

It is also noted that the general benefits of the trustee model summarised under paragraphs 154 – 163 apply equally to many superannuation scheme trustees, particularly where the master trusts are concerned. We wonder whether the comment in paragraph 158 is accurate when separate trustees are involved (trustees funded entirely by issuers)? There is invariably an additional 'trustee fee' mentioned in unit trust investment statements, correctly indicating that investors pay additional fees for this service.

12. We believe that the problems identified for superannuation schemes are overstated.

There is no evidence or past experience to support the assertion that superannuation schemes in New Zealand are at any more risk of unfair and fraudulent conduct because of the perceived relationship and monitoring problems. It is our experience that trustees of employer based superannuation schemes take their responsibilities very seriously under the current regime.

We also doubt that defined benefit superannuation schemes have additional potential risks of fraudulent or unfair conduct. These schemes are periodically reviewed by an actuary, an independent professional, and the actuarial report is also filed with the Regulator, in this case the Government Actuary. For the employer and/or trustee to act fraudulently or act in a way to minimise benefits would need the collusion of the scheme's actuary – an unlikely event.

13. As mentioned above in our response to question 12, those investments using separate trustees generally identify additional trustee fees. The duplication of information and additional reporting that is inevitable if duties are split has a cost that investors will be expected to meet.
14. The only area that occurs to us is the potential for a separate trustee to seek information and/or indemnities from issuers that the issuer may not see the need for. Requests and negotiations for, in particular, indemnities may suggest that the trustee is more concerned to protect their own position than that of the investors.
15. We believe that the overall objective must be to protect the interests of investors. In essence this is already enshrined in the Trustee Act.
16. We have no particular problem with approval on an all-securities basis. We make the point that the different classes of issue do have their own peculiarities requiring specialist knowledge. An all-securities approved CIS trustee must satisfy the Commission that they have the expertise to cover the different classes of issue.
17. In general, we support the entry requirements proposed. However, we share your reservations in the application of these to stand alone superannuation schemes. We believe that special arrangements are appropriate to these schemes, particularly avoiding the more onerous requirements for individuals so as to encourage participation. This could involve looking at the Board of Trustees as a whole and specification of particular training programmes for new trustees.
18. As the discussion documents have highlighted there are points of difference between CIS regime in New Zealand and those overseas. It would be sensible to require an approved

trustee company to be based in New Zealand. Similarly, a majority of individuals that make up the trustee, or Trustee Board, should be NZ resident.

19. No, the entry requirements are generally appropriate. The SC should be enabled to vary the requirements if appropriate.
20. By Regulation. Any requirements in the primary legislation should be generic in nature. The detail can be set in regulation.
21. We support an appeal process that enabled the CIS trustee to first seek the Commission to reassess the application. If it is not resolved after that then there would be a right of appeal to the High Court.
22. We do not support the involvement of the Minister in the process. This would delay the process and add to the costs.
23. Yes, we agree with the proposed reporting requirement.
24. In principal, no. We cannot be certain without seeing the details.
25. Only data that might allow individuals or specific entities to be identified, or that is claimed with good reason to be commercially sensitive, should be regarded as confidential.
26. No comment.
27. We agree with the proposal made in paragraph 224.
28. Yes, the suggested powers seem to be appropriate.
29. No comment.
30. This could possibly happen and provision in the legislation should be included. The only option would appear to be that the trust is wound up in accordance with the trust deed. The issuer and Regulator could Act jointly.
31. No comment.
32. No comment.
33. No comment.
34. – 67. No further comments