

# Workplace Savings NZ

Te māngai penapena ā-mahi

25 March 2010

Clerk of the Committee  
Commerce Committee  
Select Committee Office  
Room 10.04, Bowen House  
Parliament Buildings  
WELLINGTON

To the Chair of the Select Committee,

## **WORKPLACE SAVINGS NZ Submission on the Financial Service Providers (Pre-Implementation Adjustments) Bill 2009**

We wish to submit the attached in response to the Financial Service Providers (Pre-Implementation Adjustments) Bill 2009.

Workplace Savings NZ is a national, not-for-profit, apolitical membership organisation. Our current membership comprises around 100 major workplace superannuation and KiwiSaver schemes and another 50 organisations and individuals representing the various product and service providers for workplace savings arrangements. We have recently reviewed the principal goals and objectives of our organisation and changed name from ASFONZ to better reflect our objectives.

From the perspective of assets under management, the membership of Workplace Savings NZ covers around 90% of retirement savings held through workplace retirement saving arrangements (i.e. Corporate and Master Trust superannuation schemes and KiwiSaver).

Workplace Savings NZ's objective is to be the Voice of Workplace Savings; advancing the sustainable, effective, and efficient delivery of workplace savings outcomes for all involved – including the core workplace superannuation scheme members who remain at the heart of the organisation. We do this through:

- Advocating – advancing legislative and public policy initiatives beneficial to workplace savings and participation in the workplace savings industry, making submissions, engaging with policy-makers and officials and issuing media commentary to advance those causes.
- Education – promoting trustee, employer and member financial and regulatory education through dedicated training programmes, newsletters and special interest seminars.
- Networking – providing trustees, employers and service providers involved in workplace superannuation with a regular forum for sharing ideas and information on industry matters.
- Promotion – publicising the benefits of workplace savings, and helping to improve public confidence in workplace savings.

Contact:

Bruce Kerr  
Executive Director, Workplace Savings N.Z.  
PO Box 19-194, Wellington, NZ  
Ph. (04) 381 3382  
Mob. (027) 284 0481  
Email [Bruce.kerr@workplacesavings.org.nz](mailto:Bruce.kerr@workplacesavings.org.nz)  
Web Site [www.workplacesavings.org.nz](http://www.workplacesavings.org.nz)

I would be pleased to discuss our comments or answer any queries in relation to the submission.

Thank you for the opportunity to make this submission.

Yours sincerely



Bruce Kerr  
**Executive Director**

**Workplace Savings NZ**

**Submission to the**

**Commerce Select Committee**

**on the**

**Financial Services Providers (Pre-Implementation  
Adjustments) Bill (“the Bill”)**

**March 2010**

# The Workplace Savings NZ Submission

## Summary

We have been pleased to have had the opportunity to take part in the consultation process following the enactment of:

- The Financial Advisers Act 2008 (the FAA); and
- The Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the FSPA).

The consultation has been aimed at eliminating a number of practical difficulties that have been identified as progress has been made towards the implementation of this legislation. We believe that amendments proposed in the Bill will be of great assistance to the implementation process. Our submission supports the changes proposed and suggests additional amendments that we believe would further assist the implementation process.

The concerns of Workplace Savings NZ primarily relate to the position of employers and their employees where the employer offers membership of a workplace retirement savings scheme (including Superannuation Schemes & KiwiSaver) to its employees. These concerns extend to the position of the trustees of 'stand alone' superannuation schemes established for the benefit of the employees of the particular employer or group of related employers.

We have maintained that, in most situations, employers, employees, trustees and scheme administrators should unambiguously be excluded from being regarded as financial advisers performing a financial adviser service unless they actively provide advice, as that concept is commonly understood. While partial protection is included in the FAA in respect of employers under section 12(p) we believe that further clarification is required. The amendments proposed under clause 8(2) of the Bill are helpful but, we submit, could be beneficially extended.

Workplace Savings NZ is concerned that the FSPA as currently worded will require a large number of employers, and other persons involved in the governance of workplace savings, needing to register as financial service providers where they should specifically and clearly be excluded from the need to do so.

We can see no advantage to any member of the public, or regulatory body, from including employers on the public Financial Service Provider register solely by virtue of the fact that their participation in a workplace scheme will categorise them as 'promoters' for Securities Act purposes. Such a requirement, in our view, will only serve to clutter and significantly distort the intent of the public register.

Similarly, we do not see how registration is likely to assist in the prevention of criminal behaviour such as money-laundering. All that is achieved is that the integrity of the register is undermined by the inclusion of thousands of entities who would not reasonably consider themselves to be in the business of providing a financial service.

An employer who facilitates membership of a workplace retirement savings scheme for its employees should not be required to register as a financial service provider under the FSPA. In a large number of cases the employer will be involved in the membership offer simply by becoming a participating employer under a master trust arrangement. In reality, many such employers will have very little involvement in the establishment, design or operation of the scheme.

Under the Securities Act 1978, however, such an employer is often deemed to be a "promoter". We submit that an employer offering a workplace savings scheme as a component of its remuneration policies (with the employee protected by New Zealand employment law) presents a very different financial services regulatory proposition when compared with a "commercial promoter" of securities, and as such requires different treatment under both the FAA and FSPA.

We do not believe that the FSPA, as currently worded, offers clarity as to whether or not FSPA registration of employers as workplace savings scheme promoters is required, bearing in mind the definition of “the business of providing a financial service” given in section 6 of the FSPA. Again, the amendments proposed under clause 35(1) of the Bill are helpful. However, in our view these proposals do not provide a complete remedy.

Our submission seeks to take advantage of this Bill to make Pre-Implementation adjustments to provide certainty and to remove possible ambiguity from the legislation. To achieve this outcome, we believe the legislation should be very clear and should state what some may consider to be the obvious interpretation in order to remove any doubt.

We have noticed in other legislation relating to financial services that what may appear to be obvious to most, may be seen to create a risk by some. Investment Statements, being the product disclosure requirements of the Securities Act 1978 are a good example of this. The risk of being seen as not complying with parts of that Act encourages many product issuers to take a very conservative approach – if in doubt, include a comment or qualification to any representation made. This example has resulted in a proliferation of legalese and inefficiencies that benefit no-one, least of all the consumers that the legislation is intended to inform and protect.

The final parts of our submission relate to dispute resolution schemes and how they might operate. As presently worded, the FSPA will inevitably result in multiple dispute resolution schemes applying to each security. Again we believe that this is inefficient and will prove to be confusing to investors. We submit that it is preferable that a single scheme is nominated for complaints relating to any particular security.

Our submission aims to reduce the risk of such inefficiencies arising under the two Acts being considered in the Bill. Any lack of clarity, or perception of unreasonable compliance requirements, is likely to lead to reductions in the level of voluntary participation by employers in workplace savings schemes. We believe that this would not be in the best interests of the country as a whole, of individual consumers or of retirement savings.

## **The Submission**

### **1. Employers as Financial Advisers**

Clause 8(2) of the Bill relates to section 12(p) of the FAA which details certain persons who are deemed not to be performing a financial adviser service in the circumstances specified.

1.1. The Bill proposes to extend the provisions of section 12(p), which currently applies to certain employers, to clearly add the employees of that employer. We fully support this proposal;

1.2. However, section 12(p) of the FAA gives the circumstances leading to the exclusion as being “... providing assistance to an employee with the implementation of a decision to acquire or dispose of a financial product ....”.

1.2.1. We contend that restricting the exclusion to “assistance with the implementation of a decision” is overly restrictive (bearing in mind that the exclusion is already limited so as to not apply if the assistance includes a recommendation or opinion as to the suitability of the financial product). In the absence of express permission to provide factual descriptions of the terms of a financial product, as originally proposed by Workplace Savings NZ, and with investment transactions to be removed from the ambit of “financial adviser services”, the relief is of marginal practical value. The key concern for employers in this context will be the uncertainty around what is included within the concept of “guidance” meaning that risk adverse employers will restrict the extent to which they provide information or otherwise assist employees in relation to their workplace savings arrangements. Having such a

- disincentive to employer participation in workplace savings arrangements is diametrically opposed to the core objectives of Workplace Savings NZ;
- 1.2.2. The value of the exclusion to the employer (and its employees) would be in enabling them to provide factual descriptions (e.g. explaining the terms, or to elaborate on the features of the product) to assist an employee's understanding of the product disclosure at any time, without the risk of being seen as performing a financial adviser service. Clearly, to be of any value to some of the recipient employees (those receiving assistance), such assistance might well be required by employees prior to making their decision;
  - 1.2.3. Furthermore, whether or not the employee had made their decision, or the point at which the employee arrives at a decision, may not be known to the employer when giving assistance;
  - 1.2.4. We contend that it is likely that the wording, even as it appears in the Bill, would lead to employers declining to assist employees and refusing to provide explanatory information. This is far removed from being in the best interests of employees considering whether or not to join a workplace savings scheme especially when it is considered that an employer's duty of care and potential liability as an employer for getting it wrong will serve as a significant protection for the consumers involved;
  - 1.2.5. Many employers, or the employees of the employer, have the competence to explain features of a security in such a way that it would make sense to one of their employees seeking assistance prior to making a decision on whether or not to join a scheme, and are ideally placed to provide such support ;
  - 1.2.6. We submit that the exclusion should unambiguously apply to all assistance provided, irrespective of whether or not a decision to join the scheme (or "acquire or dispose of a financial product") has already been made.
    - 1.2.6.1. To that end we suggest that section 12(p) of the FAA (as proposed to be amended by the Bill) be extended to commence: "an employer, or an employee of the employer, providing a person who is an employee of the employer with a factual description of the terms of a financial product made available through the employer's workplace, or providing assistance with the implementation ...";
    - 1.2.6.2. The provision should continue to make it clear that the relief will not apply where this assistance includes any recommendation or opinion as to the suitability of the financial product;
  - 1.2.7. It is noted that section 13(3) of the FAA offers protection to those only passing on information, which is nominally the case here. However, we believe that clarity is vital in this area if employers are to beneficially assist employees in these situations, given the uncertainty surrounding the question of when the provision of information becomes categorised as "guidance". A modification of the wording of section 12(p) in the manner suggested would, we believe, remove all doubt;
- 1.3. We further submit that the trustees and administration managers of 'stand alone' workplace superannuation schemes (schemes established and operated for the employees of a particular employer or group of associated employers), and the employees and directors of a corporate trustee or scheme administration manager, are in a similar position to an employer as discussed above.
    - 1.3.1. We believe that it is appropriate to extend section 12(p) of the FAA to cover such people given that they are the people with the best knowledge of the scheme in question and are best placed to assist and provide factual descriptions. Provided they cannot offer recommendations or opinions without being authorised, we cannot see that there would be any undermining of the consumer protection ideals of the FAA if the relief were to be extended as proposed;
    - 1.3.2. Failure to do so in relation to trustees is likely to artificially restrict the numbers of people who may be willing otherwise to become trustees. This would be detrimental in situations where, for example, the rules of the

scheme dictate that one or more trustees are elected by the members of the scheme from the scheme's membership in the employer's workforce. While many are clearly capable of assuming the responsibilities of a trustee it is doubtful that it would be practical for them to become a qualified financial adviser in order to do so.

## 2. **Employers as registered financial service providers**

Clause 35(1) of the Bill proposes to amend section 7(2) of the FSPA which lists certain people who are deemed not to be financial service providers, by including employers in relation to involvement in workplace savings, in limited circumstances.

Whilst this extension of relief is welcomed, Workplace Savings NZ believes that employers providing access to a workplace retirement savings scheme for employees through either a superannuation master trust or through a 'stand-alone' scheme should be included within the scope of the exclusion.

We further believe that there should be provision for a single registration in the name of any group of individual trustees (as an unincorporated body of persons) rather than requiring multiple registrations for each individually appointed trustee or the individual directors of a corporate trustee or promoter.

2.1. The Bill proposes a new paragraph (o) to section 7(2) of the FSPA adding an employer while providing financial services for its employees through a workplace retirement savings scheme to the list of excluded persons. We fully support this proposal but feel it does not go far enough;

2.1.1. This exclusion is required as in many cases an employer is likely to be classified as a promoter participating in an offer of securities under the Securities Act 1978 in relation to their involvement in a workplace scheme, and such promoters have been included under section 5(i)(i) of the FSPA as providing a financial service;

2.1.2. Removing the need for these employers to register will significantly reduce the number of 'illogical' registrations under the Act, thus helping to preserve the integrity of the FSP Register. It also removes yet another incentive for employers to discontinue the provision of access to a superannuation scheme because of the growing burden of additional expense and compliance requirements that they can neither understand or accept any reason to incur. Accordingly, we are delighted with the philosophy behind this extension, and pleased to see that our concerns on this aspect have been heard;

2.1.3. Where the employer is a corporate body, however, the directors of that corporate body would also be considered to be promoters. As the proposed amendment is currently worded, we do not believe that such directors will fall within the ambit of this exclusion. We believe that this is an oversight and needs to be remedied;

2.1.4. Workplace Savings NZ submits that the proposed section 7(2)(o) of the FSPA should be extended to include the directors of the employer where the employer is a corporate body. Alternatively, an amendment to paragraph (l) of that section (which covers directors of other excluded corporate bodies), to extend the paragraphs covered by paragraph (l) to include paragraph (o), would be appropriate;

2.1.5. The qualifying condition at the end of the proposed new (o) limits the application of the relief to promoters of schemes in which "that employer and other employers participate for the benefit of their employees". This qualifier would therefore seem to exclude schemes in which only one or two employers participate. In our view, this is inappropriate. Instead, Workplace Savings NZ submits that the qualification should be reworded so as to apply to "a scheme in which that employer participates for the benefit of its employees, irrespective of whether or not any other employers also participate in that scheme for the benefit of their employees";

- 2.1.6. In addition, the reference at the start of paragraph (o) to the relief applying “while providing financial services” seems inappropriate. Instead, Workplace Savings NZ submits that a better formulation would be to refer to “an employer, to the extent to which the employer is regarded as providing a financial service by virtue of being a promoter participant in the offer of a security to the public, where the employer’s participation enables employees of the employer to obtain rights....”.
- 2.2. Trustees of stand alone superannuation schemes, established for the employees of a single employer or group of associated employers, are currently required to individually register as a financial service provider (FSP) under the FSPA. Many workplace superannuation schemes provide for the appointment of individuals to serve as a trustee board, as opposed to having a corporate trustee issuer.
- 2.2.1. Again it is difficult to see any value to having such people individually registered under the FSPA, as they will only fall under the FSPA when acting as a group of trustees.
- 2.2.2. We submit that it would be preferable to allow for registration of “the trustee(s) of the XYZ superannuation scheme” rather than require each individual trustee to register separately. This would;
- 2.2.2.1. reduce the numbers of parties shown in the register, particularly in respect of those that would not logically be regarded as providing a financial service;
- 2.2.2.2. help to control the costs and compliance requirements involved with registration requirements in respect of any workplace scheme on an ongoing basis;
- 2.2.2.3. avoid each trustee from individually needing to become a member of an approved disputes resolution scheme. A requirement for individual registration would result in considerable additional expense that could not be justified. We wonder how it can benefit anyone to have recourse to a disputes resolution scheme 6 times merely because there are 6 trustees? Furthermore, it is entirely conceivable such a requirement will result in a multiplicity of disputes resolution schemes being applicable to the same party (i.e. the trustee) and by extension to the same security. Potentially each party registered as an FSP could become a member of a different disputes resolution scheme, with considerable expense and disruption caused on each change in trustee. We contend that this would deliver nothing more than confusion for scheme members, with no corresponding benefit.

### 3. FSPA registration disqualification

Section 36 of the Bill relates to section 14(1) of the FSPA detailing persons who are disqualified from registering under the Act.

- 3.1. It is proposed to add persons who do not intend to offer financial services to persons in New Zealand to those who are disqualified from being registered as a financial service provider under the FSPA;
- 3.2. We note that under sections 114 and 115 of the FAA that it is an offence to perform a financial adviser service without being registered or authorised;
- 3.3. Workplace Savings NZ suggests that a person who does not intend to offer financial services to persons in New Zealand may nevertheless, inadvertently, do so. As they had no intention of offering financial services they would not have been able to register;
- 3.4. We submit that, in the circumstances, sections 114(2) and 115(3) of the FSPA should allow such a person to have a legal defence if they can prove, on a balance of

probabilities, that they did not intend to offer financial services to persons in New Zealand.

#### **4. Annual Reports**

Clause 9(2) of the Bill relates to section 13(1) of the FAA which clarifies the meaning of financial advice by excluding certain documentation.

- 4.1. Workplace Savings NZ supports the proposal to include official records relating to a company, as proposed;
- 4.2. However, Workplace Savings NZ would like to see that relief extend to annual reports and formal notifications required under the Superannuation Schemes Act 1989 or the KiwiSaver Act 2006.
  - 4.2.1. Superannuation scheme and KiwiSaver legislation requires annual reports and other information to be provided to members. In addition, certain actions relating to a superannuation scheme or KiwiSaver scheme are required to be notified to members under the governing legislation. In many cases such communications will include aspects that will constitute financial advice in terms of the FAA, but will not fall within any of the listed exclusions already contained in section 13(1) of the FAA. In particular, it is not a given that any such legislated required communication will invariably constitute an "authorised advertisement" even though such communications will invariably need to be authorised by the trustee of the scheme concerned;
  - 4.2.2. Workplace Savings NZ submits that a further paragraph (eb) should be included in section 13(1) so as to include, as a minimum, any annual report or annual return or annual personalised statement of contributions, accumulations or account balance information for members. At present, there is uncertainty as to the extent to which the extent to which further regulations might be introduced requiring further reports on investment returns etc to be given to members, and ideally we would like any relief provided to extend to any such forced communication;
  - 4.2.3. The communications in question would only ever be delivered at the corporate/trustee level – it would entirely inappropriate to require any such communication to be attributed to an individual authorised financial adviser. In most cases, the communication will be required by law to be sent by the trustee or provider of the relevant scheme;
  - 4.2.4. If the above extension of relief is included in the FAA, it would be desirable to also extend that to include any membership transfer notification under either the Superannuation Schemes Act 1989 or the KiwiSaver Act 2006, in order to remove any doubt in relation to those prescribed pieces of communication, although we accept that those communications will invariably fall within the current exclusion provided for authorised advertisements.

#### **5. Single Dispute Resolution Scheme**

A further provision of the FSPA which we believe would benefit from clarification, but that is not included in the Bill, is section 48(1) of the FSPA.

- 5.1. Section 48(1) of the FSPA says "Every financial service provider must be a member of either an approved dispute resolution scheme, or the reserve scheme, in respect of a financial service provided to the public.";
- 5.2. A Discussion Paper issued by the Ministry of Consumer Affairs in June 2009, relating to Draft Guidelines to Assist Schemes applying to become an Approved Dispute Resolution Scheme, indicated at paragraph 72 that the Ministry had interpreted section 48(1) of the FSPA as meaning that "Financial service providers should only be a member of one (dispute resolution) scheme."
- 5.3. In response to the Discussion Paper Workplace Savings NZ (then called ASFONZ) pointed out that the Ministry's interpretation would inevitably lead to multiple dispute resolution schemes being applicable to a single security. We questioned whether this

was in the interests of the consumers who the dispute resolution scheme was designed to protect and believed that having multiple dispute resolution schemes applicable to a single security would prove to be ineffective, inefficient, and confusing to consumers. However, many financial service providers offer a range of services, each of which may benefit from access to a different specialised scheme;

- 5.4. Workplace Savings NZ submits that section 48(1) should be clarified to remove any ambiguity as to whether or not any registered financial service provider can be a member of more than one dispute resolution scheme. It may be appropriate to limit a financial service provider to a single dispute resolution scheme in respect of each financial service provided.

## 6. Multiple Dispute Resolution Schemes

Workplace Savings NZ believes that it is unhelpful to consumers to have multiple dispute resolution schemes applicable to a single security. We cannot see how this can be in the best interests of consumers.

- 6.1. It is likely that the various parties to a security offering will be members of different dispute resolution schemes. It can be envisaged that, in some cases, trustees, administration managers and promoters will belong to different schemes. In addition, if any advice has been given the adviser may well belong to yet another scheme.
  - 6.1.1. Many consumer disputes are likely to involve more than one of the parties involved in the offering, and the consumer would not necessarily know which scheme to lodge a complaint with, if more than one is available, or whether they need to lodge complaints with two or more of the schemes;
  - 6.1.2. Investors may be faced with having to split their complaint so that a separate complaint is made covering only the aspect of the complaint that relates to a particular party. Even if this was possible, it is unrealistic as it is unlikely that an investor would know which party is responsible for what;
  - 6.1.3. Similarly, the parties to the offering might be unclear as to which dispute resolution scheme is appropriate in respect of any particular complaint. It would be a bizarre outcome for a complainant if their complaint was sidetracked by a dispute amongst the parties concerning which dispute resolution scheme should consider the complaint!
  - 6.1.4. There is also a risk of consumers gaming the system where multiple dispute resolution schemes are available, by taking it in turns to try different schemes if their complaint is not upheld with the first scheme, with no risk of incurring costs by doing so, leading to undue cost exposure and inefficiencies for the providers concerned;
  - 6.1.5. With fees payable for membership of a dispute resolution scheme being partly dependent on the number of complaints received, there would be a natural tendency for a party to direct a complainant to one of the other schemes available to the aggrieved investor;
- 6.2. We submit that a "deal breaker" mechanism be introduced to ensure that only one dispute resolution scheme is entitled to deal with a complaint concerning a particular security.
  - 6.2.1. A mechanism would be required to determine, in respect of any security, which dispute resolution scheme applies;
  - 6.2.2. The most logical might be that of the Issuer (in the case of superannuation schemes, being the trustee);
  - 6.2.3. The nominated dispute resolution scheme would need to be given sufficient authority to make decisions on any consumer complaint, with reference (as deemed applicable by that scheme) to the scheme of any of the other parties. Such decision to be binding on any person (or persons) who is a party to the security offering, irrespective of which particular dispute resolution scheme that party is a member of. All dispute resolution scheme rules should confirm that this is the case.

6.2.4. A further mechanism would be required to allocate responsibility for 'complaint related' fees to relevant parties.

Ends.