

Departmental Disclosure Statement

New Zealand Superannuation and Retirement Income Amendment Bill

2013 No 166

The disclosure statement for a Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill;
- some of the key processes followed to develop and test the content of the Bill;
- certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and might warrant an explanation.

This disclosure statement was prepared by The Treasury.

The Treasury certifies that, to the best of its knowledge and ability, the information provided is complete and accurate at the date of finalisation below.

17 October 2013

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PART ONE: GENERAL POLICY STATEMENT

The primary purpose of this Bill is to facilitate the efficient and effective investment of the New Zealand Superannuation Fund (the Fund) by allowing the Guardians of New Zealand Superannuation (the Guardians), as manager and administrator of the Fund, to control entities formed for the purpose of holding, facilitating, or managing the investments of the Fund (i.e. Fund investment vehicles (FIVs)).

FIVs are likely to be used as (but are not limited to being used as) -

- investing entities for non-controlling equity stakes in entities and investment funds:
- internally or externally managed funds investing in non-controlling equity stakes, debt instruments, commodities, financial derivatives, and other investment securities:
- investing entities for real property assets (eg, timber, farming, and investment property assets).

Allowing the Guardians to control FIVs will enable the Guardians to structure and access investments more efficiently and will help protect the Guardians from liability. This is consistent with the Guardians' mandate to invest the Fund on a prudent, commercial basis and in a manner consistent with best-practice portfolio management and maximising return without undue risk to the Fund as a whole.

The Guardians are responsible for ensuring compliance with Part 2 of its governing legislation, the New Zealand Superannuation and Retirement Income Act 2001 (the Act) whether a FIV is used or not. Within this framework, the Guardians will have discretion in relation to the use of FIVs for the purpose of investing the Fund. However, the Guardians will continue to be prevented from holding or taking substantial controlling interests in any underlying operating entity, such as through takeovers of listed companies or acquisitions of majority interests in unlisted entities for the Fund. This rule will apply to any investments of the Fund, whether held directly or in a FIV.

The Guardians will establish an appropriate governance framework for the implementation and operation of FIVs and this framework will be detailed in the Guardians' statement of investment policies, standards, and procedures.

All of the income arising from the Fund will be included in the New Zealand tax base. This Bill amends the Income Tax Act 2007 so that any FIVs, or companies in which interests are held by the Guardians for the Fund, will not be subject to the exemption for public authorities.

Any income derived by the Fund will be treated as if derived by a company for the purposes of the grouping rules, and these rules will apply in the ordinary manner as if the Fund were a company that held interests in the FIVs, or were companies that are held by the Guardians for the Fund, for income tax purposes.

The Bill also proposes a number of other amendments to the Guardians' governing legislation. These amendments will also facilitate the efficient and effective investment of the Fund and include—

- allowing the Guardians to delegate the operational duties of appointing investment managers, appointing custodians, and granting powers of attorney in respect of the management of the Fund. This is expected to improve the efficiency of the operations and investment of the Fund without compromising the Guardians' responsibility for determining the governance framework within which these operational functions are undertaken:
- protecting the Guardians against claims that acts of the Guardians are invalid on the grounds that they are contrary to, or outside the authority conferred by, any Act. This will enable the Guardians, and parties transacting with the Guardians, to transact with confidence (eg, in competitive bidding processes):
- removing any ambiguity about the nature of the Fund by explicitly stating that the Fund is not an entity separate from the Crown.

PART TWO: BACKGROUND MATERIAL AND POLICY INFORMATION

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	NO
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Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any class of persons to experience a substantial unavoidable loss of income or wealth?	NO
There are no additional direct costs to the Government of the intended policy. Investment costs associated with the Guardians' investment of the New Zealand Superannuation Fund (the Fund) are, and will continue to be, borne by the Fund itself. There are expected cost (both direct expenses and opportunity costs) and risk benefits to the Fund from the proposed policy. These are difficult to quantify but in some circumstances these could be significant.	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be affected by:	
(a) the level of effective compliance or non-compliance with any relevant obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO

PART THREE: TESTING OF LEGISLATIVE CONTENT

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with NZ's international obligations?

No formal steps have been taken. The Guardians, under section 58(c) of the Act are required to avoid prejudice to New Zealand's reputation as a responsible member of the world community with respect to the investment of the Fund. This obligation will continue to apply following the amendments proposed in the Bill.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

No formal steps have been taken but there are no obvious areas where the intended amendments would potentially conflict with the principles of the Treaty of Waitangi.
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Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether the provisions of this Bill are consistent with the New Zealand Bill of Rights Act 1990?
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YES

Offences, penalties and court jurisdictions

3.4. Does this Bill contain any provisions relating to offences, penalties, or the jurisdiction of a court or tribunal?
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NO

3.4.1. Was the Ministry of Justice consulted about these provisions?

N/A

Privacy issues

3.5. Does this Bill contain any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?

NO

3.5.1. Was the Privacy Commissioner consulted about these provisions?
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N/A

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>Consultation with the Guardians was undertaken on the original policy decisions prior to submission to Cabinet. The Guardians were also consulted during the drafting process and have agreed to the wording of the proposed Bill as it relates to the Fund.</p> <p>The Inland Revenue Department, the State Services Commission, the Ministry of Economic Development and the Office of the Auditor General were also consulted on relevant issues during drafting.</p> <p>After the Cabinet policy decision, the Minister of Finance wrote to the leaders of each other parliamentary party, outlining the proposed changes and making Treasury officials available to brief any interested members or their advisors. Treasury officials subsequently met with representatives of the Green Party and United Future. The main questions raised by both parties related to taxation and responsible investment. It was confirmed that:</p> <ul style="list-style-type: none">a. all income of the Fund (including that generated by interests in Fund investment vehicles) would continue to be captured in the New Zealand tax baseb. the proposed amendments are not inconsistent with the OECD-led Base Erosion and Profit Shifting (BEPS) work, andc. all Fund investments (including any interests in Fund investment vehicles) would continue to be subject to the responsible investment obligations under section 58 of the New Zealand Superannuation and Retirement Income Act. <p>There were no changes to the Bill as a result of these meetings.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
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PART FOUR: SIGNIFICANT LEGISLATIVE FEATURES

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill contain a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the burden of proof for offences

4.4. Does this Bill contain any provisions relating to strict liability offences or a reversal of the burden of proof?	NO
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Civil or criminal immunity

4.5. Does this Bill contain any provisions relating to a civil or criminal immunity for any person?	NO
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Significant decision-making powers affecting individuals

4.6. Does this Bill contain any significant decision-making powers or discretions that could affect the rights, powers, privileges, immunities, duties, or liabilities of individuals?	NO
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Powers to make delegated legislation

4.7. Does this Bill contain a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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4.8. Does this Bill contain any other powers to make delegated legislation?	NO
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Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p data-bbox="225 434 699 465"><i>Protection from a claim of ultra vires</i></p> <p data-bbox="225 468 1370 667">The Bill offers the Guardians protection from a claim of ultra vires under section 19 of the Crown Entities Act 2004. More specifically the Bill seeks to protect the Guardians against claims that acts of the Guardians are invalid on the grounds that they are contrary to, or outside the authority conferred by, any Act; and to prevent parties who contract with the Guardians, or Fund investment vehicles, from using a breach of an Act as an excuse to unwind the contract.</p> <p data-bbox="225 703 1370 869">This exception, which has been recognised for comparable public funds in other jurisdictions (e.g. Canada Pension Plan), removes the potential for investment decisions made by the Guardians to be subjected to third party challenge on the basis of an alleged lack of authority. This will enable the Guardians, and parties transacting with the Guardians, to transact with confidence.</p> <p data-bbox="225 904 1370 969">Following consultation with the State Services Commission (which administers Part 2 of the Crown Entities Act 2004), the proposed amendment is based on:</p> <ul data-bbox="225 992 1370 1227" style="list-style-type: none">• the nature of the statutory powers that the Guardians have been delegated (i.e. limited to investment of the Fund),• the likely characteristics of interested parties (generally institutions, most likely very commercially aware), and• the view that it is inappropriate that parties may be able to use judicial review as a cause of action in a commercial dispute (e.g. in a competitive bid situation). <p data-bbox="225 1263 507 1294"><i>Delegated authorities</i></p> <p data-bbox="225 1308 1370 1406">The Bill seeks to amend the powers that can be delegated by the board of the Guardians. Currently, the Act provides that the board must not delegate any of the following powers:</p> <ul data-bbox="225 1413 836 1507" style="list-style-type: none">• the power to grant a power of attorney;• the power to appoint an investment manager;• the power to appoint a custodian. <p data-bbox="225 1543 1370 1742">The Bill proposes to remove these restrictions. The effect will be that the Crown Entities Act 2004 will apply in full, and those powers may be delegated to a range of persons (as detailed in section 73 of the Crown Entities Act 2004 plus clause 39 of Schedule 3 of the principal Act, which is also being extended to include Fund investment vehicles) and subdelegated by those persons to the extent permitted by section 74 of the Crown Entities Act 2004.</p> <p data-bbox="225 1778 1370 1910">These amendments are expected to improve the efficiency of the operations and investment of the Fund without compromising the Guardians' responsibility for determining the governance framework within which these operational functions are undertaken.</p>	

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p><i>Consequential amendments to the Income Tax Act 2007</i></p> <p>This Bill amends the Income Tax Act 2007 so that any income derived by the Fund, including income derived from any interest the Guardians hold in a Fund investment vehicle, will be treated as if derived by a company for income tax purposes.</p> <p>The proposed amendments were drafted by the Inland Revenue Department and agreed with the Guardians prior to inclusion in the Bill.</p>	