

New Zealand Superannuation and Retirement Income (Controlling Interests) Amendment Bill

Government Bill

Explanatory note

General policy statement

This Bill amends the New Zealand Superannuation and Retirement Income Act 2001 (the **Act**) to allow the New Zealand Superannuation Fund (the **NZSF**) to take a controlling interest in an entity.

Section 59 of the Act currently requires the Guardians of New Zealand Superannuation (the **Guardians**) to use their best endeavours to ensure that the NZSF does not take a controlling stake in an entity. The original policy rationale for the control restriction was that the NZSF's purpose was to get exposure to investments and not to own businesses—if the Government wished to take ownership of businesses, it would have a policy rationale for doing so. The NZSF was also still developing its investment practices and, when the NZSF was established in 2001, direct controlling investments were uncommon within the global practice of investment management by sovereign wealth funds. Amendments in 2015 partially removed the restriction, allowing the Guardians to create and control Fund investment vehicles.

Rationale for change

Since its inception, the NZSF has significantly matured in terms of its size, capability, and operating model. The Guardians' governance has evolved in line with the NZSF's investment capability, to provide effective oversight of complex investment strategies such as direct and unlisted investments.

Removing the control restriction may enable the NZSF to access a wider group of viable investment partners and opportunities, particularly in New Zealand. This could attract institutional investors who are comfortable with the Guardians' due diligence practices, and deepen capital markets for domestic transactions, particularly as the Guardians look for scalable investment opportunities such as strategic infrastructure.

It should also provide a larger opportunity set for New Zealand investments and potential to increase the risk-adjusted return of the NZSF.

Allowing the NZSF to hold controlling interests will have a limited impact on competition with other market investors because the size and scale of the NZSF's direct investments differentiate them from the market.

Enabling controlling interests will help bring the NZSF into line with many global peers. Typically, as sovereign wealth funds mature and develop their internal expertise, more capital is managed in-house. The NZSF is in line with a number of other funds, which, as they have grown and matured, have graduated to taking on a lead investor role with the ability to own businesses. The NZSF has a reputation for being world-leading in environmental, social, and governance (ESG) integration and has a strong commitment to using its influence as a shareholder to encourage companies to manage and report on their ESG risks.

The Bill does not derogate from the Guardians' independence from political influence in relation to investment decisions (as provided for in section 64(2) of the Act). To ensure appropriate oversight, the Bill requires the board of the Guardians to establish a new statement of investment policies, standards, and procedures that covers the appropriate policy and oversight of how the NZSF direct investment strategy is given effect, including where the option to take a controlling interest is utilised.

The Bill distinguishes between the Guardians as a Crown entity, and the Guardians as manager and administrator of the NZSF. The laws that apply to public sector organisations are not intended to apply to entities as a result of the Guardians managing and administering the Fund.

The Guardians may have controlling interests in that capacity in a number of different ways, all of which are intended to be covered by *new section 59(1)* of the Act. For example, the Guardians as manager and administrator of the Fund may control an entity through ownership of shares (in the entity or an interposed holding company) or other ownership interests, rights under a trust, contractual rights, or rights to appoint directors; and entities that are so controlled may in turn control other entities in different ways. Where the Guardians form or control an entity for the purpose of holding, facilitating, or managing the investments of the Fund, interests in such entities are covered by *new section 59(1)*.

Minister of Finance's statement on consultation process followed in formulation of amendments to Act included in this Bill

Section 73 of the Act requires the Minister of Finance, on the introduction into the House of Representatives of a Government Bill that proposes an amendment to the Act, to bring to the attention of the House the consultation process that was followed in the formulation of the proposed amendment.

The statement must include—

- whether consultation has taken place with the parties that are in agreement with the Part proposed to be amended (as listed in Schedule 4 of the Act):

- whether consultation has taken place with the Guardians (to the extent that the amendment relates to Part 2 of the Act):
- the results of the consultation.

This Bill proposes amendments that relate to Part 2 of the Act.

Consultation was undertaken in late 2022

The Minister of Finance wrote to all other parties represented in Parliament. The letters advised of the Government's proposal to remove the restriction on the Guardians from holding a controlling interest in entities as part of the NZSF. It also advised of proposals to review the change in the future and to require the Guardians to have statements of investment policies, standards, and procedures that address controlled entities. The Labour Party Caucus was advised of the Bill through its usual Caucus processes.

The Guardians were offered opportunities to provide feedback at a number of stages throughout the development of the proposal, including on the draft Bill.

Results of consultation

The New Zealand National Party expressed cautious support for the proposals, subject to the details of the legislation. It recommended that the proposed legislation go through a full select committee process. The Green Party supports the proposals, with the caveat that there also be implemented statutory public interest principles to guide the activities of the Fund. The ACT Party advised it was not opposed in principle to the Fund taking controlling interests in entities.

The Guardians support the proposals and the draft Bill.

Hon Grant Robertson

Minister of Finance

Departmental disclosure statement

The Treasury is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2023&no=227>

Regulatory impact statement

A regulatory impact statement is not required for this Bill.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides that this Bill will commence on the day after the date on which it receives the Royal assent.

Clause 3 provides that this Bill amends the New Zealand Superannuation and Retirement Income Act 2001 (the Act).

Part 1

Amendments to principal Act

Clause 4 consequentially amends section 49 of the Act to remove a cross-reference to section 59, given that section 59 will no longer contain restrictions on the power of the Guardians to invest the NZSF.

Clause 5 consequentially amends section 49A of the Act, with no change in substance, to reflect the repeal of section 59A. Section 49A currently provides that a failure by the Guardians to comply with any provision of the Act or the Crown Entities Act 2004 does not affect the validity or enforceability of any deed, agreement, right, or obligation that is entered into, obtained, or incurred by the Guardians or a Fund investment vehicle. Section 49A is modelled on a similar provision in the State-owned Enterprises Act 1986.

Clause 6 replaces sections 59 to 59B of the Act.

Section 59 currently requires the Guardians to use their best endeavours to avoid the NZSF taking a controlling interest in an entity. This Bill removes that restriction. Section 49(3) of the Act also already exempts the Guardians, in relation to the NZSF, from section 100 of the Crown Entities Act 2004, which contains the normal rules for Crown entities about the acquisition of shares or interests in companies, trusts, and partnerships, etc.

Section 59A was inserted in 2015 to exclude Fund investment vehicles from the prohibition in section 59 on controlling other entities. Its primary purpose was to facilitate the efficient and effective investment of the NZSF by allowing the Guardians, as manager and administrator of the NZSF, to form or control entities for the purpose of holding, facilitating, or managing the investments of the NZSF.

Section 59B was inserted in 2019 to provide that Fund investment vehicles are not required to prepare their own annual financial statements, to have those financial statements audited, or to prepare an annual report. This had the effect of exempting Fund investment vehicles from the requirements in sections 201, 202, and 207 of the Companies Act 1993 and sections 75 and 75A of the Limited Partnerships Act 2008. The new exemption from the Public Audit Act 2001 in *new section 59(1)* means that the current section 59B exemption is no longer needed, because the vehicles will not be subject to those requirements as public entities (although they may still be subject for other reasons, for example, if they are large companies).

The purpose of *new section 59* is to ensure that the fact of an investment by the NZSF (or any related arrangements) does not result in any entity being treated as part of the Crown or subject to obligations that were designed for public sector organisations. (The reference to any related arrangements is intended to encompass management

contracts, side letters, etc that are not themselves a Fund investment but are ancillary to it and could give rise to the outcomes below.) *New section 59* extends the application of certain existing rules that apply to Fund investment vehicles. Those rules contain various exemptions as follows.

First, the relevant entities are exempt from being classed as Crown entity subsidiaries (*new section 59(1)(a)*). A company controlled by a Crown entity is normally, by definition, a Crown entity subsidiary under section 7 of the Crown Entities Act 2004. Crown entity subsidiaries are a type of Crown entity to which various requirements apply. The effects of excluding the relevant entities from being Crown entity subsidiaries include that the relevant entities will be exempt from—

- the requirements of section 97 of the Crown Entities Act 2004, which provides that Crown entity subsidiaries must not do anything the Crown entity parent does not have the power to do and must act consistently with the parent's objectives. A parent Crown entity must ensure that each of its Crown entity subsidiaries meets those requirements:
- the Public Service Commission's minimum standards of integrity and conduct. Section 17 of the Public Service Act 2020 provides that the minimum standards may apply in relation to Crown entities.

Second, the relevant entities are exempt from being part of the Guardians' Crown entity group (*new section 59(1)(b)*). This is intended to exempt the Guardians from the need to consolidate the relevant entity into the Guardians' financial statements (which would be an unintended outcome, since economically the investments are owned by the Crown and not the Guardians). The exemption mainly affects a relevant entity that is a subsidiary of the Guardians for the purpose of any financial reporting standard that applies under generally accepted accounting practice. The exemption exempts the relevant entity from—

- requirements under section 156A(3)(a) of the Crown Entities Act 2004 to include the relevant entity in its consolidated statements and reports:
- additional reporting required by the Minister of Finance under section 156B of that Act:
- requirements under section 165 of that Act (which relates to the net surplus payable by certain statutory entities and Crown entity companies).

Third, the relevant entities themselves are exempt from the Public Audit Act 2001 unless they are a public entity for another reason (*new section 59(1)(c)*). The exemption is needed because section 14 of that Act provides that the Auditor-General is the auditor of every public entity and section 5(1)(f) and (2) of that Act has the effect of including in the definition of public entity any entity that is controlled by another public entity (which includes the Crown and any Crown entity, such as the Guardians). The new exemption in *new section 59(1)(c)* does not limit section 67 of the Act, which provides that the NZSF itself is to be treated as if it were a public entity as defined in section 5 of the Public Audit Act 2001 and, in accordance with that Act, the Auditor-General is its auditor. The effect is that the Auditor-General will not have

any oversight of the relevant entities other than the value of the NZSF's investment in the entity as reported in the NZSF's financial statements.

Fourth, the relevant entities themselves are exempt from the Official Information Act 1982 and the Ombudsmen Act 1975 (*new section 59(2)*). However, the Official Information Act 1982 applies to the Guardians in respect of information held by the Guardians about the relevant entities.

Clause 7 amends section 61 of the Act to add a requirement that the Guardians' statement of investment policies, standards, and procedures must include details of the governance framework for the implementation and operation of controlled entities.

Clause 8 amends Schedule 1AA of the Act to insert a transitional provision. *New clause 11* of that schedule requires an independent person appointed by the Minister to review the operation and effectiveness of the amendments made by this Bill. The review will be carried out as part of the 5-yearly performance reviews conducted under section 71 of the Act. The Minister will report the results of the review to the House.

Clause 9 amends Schedule 3 to replace a reference to a Fund investment vehicle with a reference to an entity formed or controlled by the Guardians for holding, facilitating, or managing Fund investments.

Part 2

Amendments to other Acts

Clause 11 makes a consequential amendment to the Ombudsmen Act 1975. The effect is that that Act and the Official Information Act 1982 will apply to the Guardians and their Crown entity subsidiaries (but not any other private sector subsidiaries that the Guardians might acquire after this Bill is passed).

Clauses 13 to 17 amend the Income Tax Act 2007. Currently under that Act, any Fund investment vehicles, or companies in which interests are held by the Guardians for the NZSF, are not subject to the exemption for public authorities, and any income derived by the NZSF (including any interests in Fund investment vehicles) will be treated as if derived by a company for the purposes of the grouping rules. Sections CW 38(5)(d), CX 55(1)(bb), and HR 4B(3) and item 4B of Schedule 29 are amended by replacing a reference to a Fund investment vehicle with a reference to a Fund investment entity, which is defined in a new definition in section YA 1 as an entity formed or controlled by the Guardians for holding, facilitating, or managing Fund investments.

The amendments in this Bill do not affect the current tax treatment of NZSF investments.

Hon Grant Robertson

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Government Bill

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The Parliament of New Zealand enacts as follows:

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|----------|--|----|
| 1 | Title | |
| | This Act is the New Zealand Superannuation and Retirement Income (Controlling Interests) Amendment Act 2023 . | |
| 2 | Commencement | 5 |
| | This Act comes into force on the day after the date on which it receives the Royal assent. | |
| 3 | Principal Act | |
| | This Act amends the New Zealand Superannuation and Retirement Income Act 2001. | 10 |

**Part 1
Amendments to principal Act**

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| 4 | Section 49 amended (Body corporate status and powers) | |
| | In section 49(4), delete “, 59,”. | |
| 5 | Section 49A amended (Saving of certain transactions) | 15 |
| | Replace section 49A(1)(b) with: | |
| | (b) an entity that is formed or controlled by the Guardians for the purpose of holding, facilitating, or managing the investments of the Fund; or | |
| 6 | Sections 59 to 59B replaced | |
| | Replace sections 59 to 59B with: | 20 |
| 59 | Status of certain entities | |
| (1) | A Fund investment, and any related arrangements, do not directly or indirectly result in any entity being any 1 or more of the following: | |
| (a) | a Crown entity subsidiary of the Guardians (for the purposes of the second column of section 7(1)(c) of the Crown Entities Act 2004): | 25 |
| (b) | a part of the Guardians’ Crown entity group for the purpose of that Act: | |

- (c) a public entity as defined in the Public Audit Act 2001 or subject to that Act or section 67 of this Act.
- (2) To avoid doubt, the Official Information Act 1982 and the Ombudsmen Act 1975 do not apply to any entity by virtue of a Fund investment or any related arrangements (but the Official Information Act 1982 applies to the Guardians in respect of information held by the Guardians about the entity). 5
- (3) The Guardians’ interests in an entity that is formed or controlled by the Guardians for the purpose of holding, facilitating, or managing the investments of the Fund are Fund investments and part of the Fund.
- (4) This section does not limit sections 66 to 68. 10
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- Example**
- An entity (E) is exempted by **subsection (1)(c)** from being a public entity as defined in the Public Audit Act 2001 and therefore is not audited by the Auditor-General. Under section 67(1) of this Act, the Auditor-General is the auditor of the Fund. As part of the audit of the Fund, the Auditor-General will assess the value of the Fund investments including the value of its interest in E. 15
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- (5) This section does not apply to an entity that the board establishes as a Crown entity subsidiary of the Guardians.
- 7 Section 61 amended (Contents of statements of investment policies, standards, and procedures) 20**
- Replace section 61(fa) with:
- (fa) the governance framework for the implementation and operation of all entities that are controlled by the Guardians or that are formed by the Guardians for the purpose of holding, facilitating, or managing the investments of the Fund; and 25
- 8 Schedule 1AA amended**
- In Schedule 1AA,—
- (a) insert the Part set out in **Schedule 1** of this Act as the last Part; and
- (b) make all necessary consequential amendments.
- 9 Schedule 3 amended 30**
- In Schedule 3, clause 39(1)(c), replace “a Fund investment vehicle that is formed or controlled under section 59A” with “an entity that is formed or controlled by the Guardians for the purpose of holding, facilitating, or managing the investments of the Fund”.

Part 2 Amendments to other Acts

Ombudsmen Act 1975

10 Principal Act

Section 11 amends the Ombudsmen Act 1975. 5

11 Schedule 1 amended

In Schedule 1, Part 2, item relating to the Guardians of New Zealand Superannuation and any subsidiary of the Guardians of New Zealand Superannuation, replace “and any subsidiary of the Guardians of New Zealand Superannuation” with “and any Crown entity subsidiary of the Guardians of New Zealand Superannuation”. 10

Income Tax Act 2007

12 Principal Act

Sections 13 to 17 amend the Income Tax Act 2007.

13 Section CW 38 amended (Public authorities) 15

(1) Replace section CW 38(5)(d) with:

(d) a Fund investment entity;

(2) In section CW 38, list of defined terms, insert in its appropriate alphabetical order “Fund investment entity,”.

14 Section CX 55 amended (Proceeds from disposal of investment shares) 20

(1) In section CX 55(1)(bb), replace “a Fund investment vehicle, as referred to in section 59A of the New Zealand Superannuation and Retirement Income Act 2001,” with “a Fund investment entity”.

(2) In section CX 55, list of defined terms, insert in its appropriate alphabetical order “Fund investment entity,”. 25

15 Section HR 4B amended (Activities relating to New Zealand Superannuation Fund and Venture Capital Fund)

(1) In the heading above section HR 4B(3), replace “*Fund investment vehicles*” with “*Fund investment entities*”.

(2) In section HR 4B(3), words before paragraph (a), replace “a Fund investment vehicle as referred to in section 59A of the New Zealand Superannuation and Retirement Income Act 2001” with “a Fund investment entity”. 30

(3) In section HR 4B(3)(b), replace “Fund investment vehicle” with “Fund investment entity”.

- (4) In section HR 4B, list of defined terms, insert in its appropriate alphabetical order “Fund investment entity,”.

16 Section YA 1 amended (Definitions)

In section YA 1, insert in its appropriate alphabetical order:

Fund investment entity means an entity that is formed or controlled by the Guardians of New Zealand Superannuation for the purpose of holding, facilitating, or managing the investments of the New Zealand Superannuation Fund 5

17 Schedule 29 amended

In Schedule 29, Part A, replace item 4B with:

4B A Fund investment entity that is treated as being wholly owned by the Crown under section HR 4B. 10

Schedule
New Part 4 of Schedule 1AA inserted

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Part 4	
Provisions relating to New Zealand Superannuation and Retirement Income (Controlling Interests) Amendment Act 2023	
11	Review of amendments relating to controlling interests
(1)	The terms of reference for either the first or second performance review conducted under section 71 after the commencement of the Amendment Act must include a requirement that the reviewer form an opinion about the operation and effectiveness of the amendments made by the Amendment Act.
(2)	The written report prepared under section 71(6) must include the reviewer's recommendations for amendments to this Act (if any).
(3)	In this clause, Amendment Act means the New Zealand Superannuation and Retirement Income (Controlling Interests) Amendment Act 2023 .