

**Reprint
as at 1 January 2014**



KiwiSaver Amendment Act 2011

Public Act 2011 No 8
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Commencement see section 2

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Note

Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this reprint.

Note 4 at the end of this reprint provides a list of the amendments incorporated.

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Schedule 45
**Amendments consequential on amendments to
KiwiSaver Act 2006**

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the KiwiSaver Amendment Act 2011.

2 Commencement

This Act comes into force on 1 May 2011.

3 Principal Act amended

This Act amends the KiwiSaver Act 2006.

4 Interpretation

- (1) The definition of **default KiwiSaver provider** in section 4(1) is amended by omitting “person” and substituting “manager”.
- (2) The definition of **independent trustee** in section 4(1) is amended by inserting “restricted” after “in relation to a”.
- (3) The definition of **KiwiSaver scheme** in section 4(1) is amended by omitting “a scheme that is provisionally registered under section 137 or”.
- (4) Section 4(1) is amended by repealing the definition of **trust deed** and substituting the following definition:

- “**trust deed**, in relation to a KiwiSaver scheme or a registered superannuation scheme,—
- “(a) means the trust deed that sets out the trusts governing the scheme, as amended from time to time; and
- “(b) includes a participation agreement and any other document that, under the terms of the relevant trust deed, forms part of or determines a term of the trust deed”.
- (5) Section 4(1) is amended by repealing the definition of **trustees** and substituting the following definition:
- “**trustees**,—
- “(a) in relation to a restricted KiwiSaver scheme, means the independent trustee referred to in section 116A and any other trustee who is designated or appointed as trustee of the scheme under the trust deed or the successor of that person; and
- “(b) in relation to any other KiwiSaver scheme, means the person who is designated or appointed as trustee of the scheme under the trust deed or the successor of that person; and
- “(c) in relation to any other superannuation scheme, has the same meaning as in section 2(1) of the Superannuation Schemes Act 1989”.
- (6) The definition of **umbrella trust** in section 4(1) is amended by adding “as in force immediately before its repeal by section 35 of the KiwiSaver Amendment Act 2011”.
- (7) Section 4(1) is amended by inserting the following definitions in their appropriate alphabetical order:
- “**administration manager**,—
- “(a) in relation to a restricted KiwiSaver scheme, means a person to whom the trustees have contracted some or all of the administration of the scheme; and
- “(b) in relation to any other KiwiSaver scheme, means a person to whom the manager has contracted some or all of the administration of the scheme
- “**benefit** means a lump sum, allowance, refund, or other payment arising from membership of a KiwiSaver scheme

“**investment manager**,—

- “(a) in relation to a restricted KiwiSaver scheme, means a person to whom the trustees have contracted the investment of some or all of the funds of the scheme; and
- “(b) in relation to any other KiwiSaver scheme, means a person to whom the manager has contracted the investment of some or all of the funds of the scheme

“**manager** means the person designated or appointed under the trust deed as manager of a KiwiSaver scheme other than a restricted scheme

“**New Zealand resident** means a person resident in New Zealand under section YD 1 or YD 2 (excluding section YD 2(2)) of the Income Tax Act 2007

“**nominated person**, in relation to trustees, means a person nominated by the trustees and eligible to act as a nominated person under section 116H

“**nominee**, in relation to a nominated person, means a person appointed by the nominated person and eligible to act as a nominee under section 116I

“**restricted KiwiSaver scheme** or **restricted scheme** means a KiwiSaver scheme identified as a restricted scheme on the KiwiSaver schemes register”.

5 Meaning of provider

- (1) Section 5(1) is amended by inserting “restricted” after “provider of a”.
- (2) Section 5 is amended by inserting the following subsection after subsection (1):
 - “(1A) For the purpose of anything that must or may be done by or to or in relation to a provider of any other KiwiSaver scheme under this Act, **provider**, unless the context otherwise requires, means the manager of the scheme.”

6 Application

Section 6(2)(a) is amended by omitting “(within the meaning of sections YD 1 or YD 2 (excluding section YD 2(2)) of the Income Tax Act 2007)”.

7 Effect on existing members of change, etc, in employer chosen scheme

Section 49(2) is amended by omitting “section 9BAA of the Superannuation Schemes Act 1989” and substituting “section 119G”.

8 Notification of transfers and requirement to transfer funds and information

Section 56 is amended by adding the following subsections:

“(5) Despite subsections (3) and (4), in the circumstances described in subsection (6), the provider of the old scheme must not transfer the member’s accumulation to the new scheme other than by way of distributing the assets of the old scheme as the scheme is wound up.

“(6) The circumstances are that—

“(a) the trustees (in the case of a restricted KiwiSaver scheme) have, or the manager (in the case of any other KiwiSaver scheme) has, under section 119D, notified members of the old scheme of a proposal to transfer all of the members of the old scheme to another scheme; or

“(b) the trustees have, under section 173, lodged a copy of a winding-up order or resolution with the FMA (in the case of a restricted KiwiSaver scheme) or notified the manager of a winding-up order or resolution (in the case of any other KiwiSaver scheme).”

9 Involuntary transfers

Section 57(2) is amended by omitting “section 9BAA of the Superannuation Schemes Act 1989” and substituting “section 119G”.

10 Compulsory employer contribution amount: general rule

Section 101D(5)(b)(i) is amended by inserting “or section 119G of this Act” after “section 9BAA of the Superannuation Schemes Act 1989”.

11 Schemes eligible to be KiwiSaver scheme

- (1) Section 116(1) is amended by repealing paragraph (a) and substituting the following paragraph:
 - “(a) it is established and governed by a trust deed that is interpreted and administered in accordance with New Zealand law; and”.
- (2) Section 116(1) is amended by repealing paragraphs (e) and (f) and substituting the following paragraphs:
 - “(e) it has a manager; and
 - “(f) it has a trustee.”
- (3) Section 116(2) is repealed.
- (4) Section 116(3) is amended by omitting “(i) and (ii)”.
- (5) Section 116 is amended by adding the following subsection:
 - “(5) This section does not apply to a restricted KiwiSaver scheme.”

12 New sections 116A to 116K inserted

The following sections are inserted after section 116:

“116A Requirements for restricted KiwiSaver schemes

- “(1) A scheme that is identified on the KiwiSaver schemes register as a restricted KiwiSaver scheme must—
 - “(a) meet the requirements of section 116(1)(a) to (d); and
 - “(b) have at least 1 independent trustee; and
 - “(c) have—
 - “(i) at least 1 trustee who is a New Zealand resident;
or
 - “(ii) if any of the trustees is a corporate trustee, at least 1 director of the corporate trustee who is a New Zealand resident; and
 - “(d) restrict membership of the scheme, in its conditions of entry of members to the scheme and in the way in which those conditions are applied, to 1 or more of the classes of persons described in subsection (2).
- “(2) The classes of persons are—
 - “(a) persons who are employed by a particular employer:
 - “(b) persons who are employed by a related body corporate (within the meaning of section 5B(2) of the Securities Markets Act 1988) of a particular employer:

- “(c) persons who belong to a particular profession, calling, trade, or occupation:
 - “(d) persons who belong to a particular association, society, or other body with a definable community of interest:
 - “(e) persons who are immediate family members of, or wholly or partially financially dependent on, a person in 1 or more of the classes of persons described in paragraphs (a) to (d).
- “(3) In subsection (2)(e), **immediate family member**, in relation to a person, means the persons’s spouse, civil union partner, de facto partner, parent, child, step-parent, or stepchild.
- “(4) A restricted scheme must obtain the prior written consent of the FMA before changing the conditions of entry of members to the scheme, or the way in which those conditions are applied, in a way that expands or is likely to expand the classes of persons who may become members of the scheme.
- “(5) As soon as practicable after a restricted scheme ceases to comply with subsection (1)(c), the trustees of the scheme must notify the FMA of that fact.

“**116B Requirements for managers of KiwiSaver schemes**

- “(1) The manager of a KiwiSaver scheme is responsible for performing the following functions:
- “(a) offering interests in the scheme for subscription:
 - “(b) issuing interests in the scheme:
 - “(c) managing scheme investments and property:
 - “(d) administering the scheme.
- “(2) The manager—
- “(a) must be a company within the meaning of the Companies Act 1993; and
 - “(b) must have at least 1 director who is a New Zealand resident; and
 - “(c) must be designated or appointed as manager of the scheme under the trust deed; and
 - “(d) must be a party to the trust deed or bound to comply with the relevant provisions of the trust deed as if it were a party to the trust deed.

- “(3) The manager has the same liability for its acts and omissions in the performance of its functions and duties, and the exercise of its powers, as it would if it performed those functions or duties, or exercised those powers, as a trustee.
- “(4) As soon as practicable after a manager ceases to comply with subsection (2)(b), the manager must notify the FMA of that fact.

“116C Duty of manager with respect to money received

- “(1) This section applies to all money received by the manager, or an agent of the manager, in respect of contributions.
- “(2) On receipt by the manager,—
 - “(a) the manager must pay the money into a separate bank account; and
 - “(b) the money is subject to the trusts governing the scheme that are set out in the trust deed.

“Compare: 1960 No 99 ss 14(1), 15

“116D Requirements for trustees of KiwiSaver schemes other than restricted schemes

- “(1) A KiwiSaver scheme other than a restricted scheme must not have more than 1 trustee.
- “(2) The trustee must be a body corporate that is incorporated in New Zealand.
- “(3) The trustee must supervise the manager’s performance of—
 - “(a) the functions of the manager as set out in section 116B(1); and
 - “(b) any other functions that the manager performs in relation to the scheme under the trust deed or an enactment.
- “(4) The trustee must not delegate the function described in subsection (3).

“116E Removal of trustees of KiwiSaver schemes other than restricted schemes

- “(1) The trustee of a KiwiSaver scheme other than a restricted scheme must not resign as trustee of the scheme unless—
 - “(a) all functions and duties of the position have been performed; or

“(b) the High Court consents.

“(2) Despite anything to the contrary in the trust deed, a manager must not discharge or remove a trustee unless the manager does so with the approval of the High Court.

“Compare: 1960 No 99 s 10

“116F Manager and trustee must be independent

“(1) This section applies to a KiwiSaver scheme other than a restricted scheme.

“(2) A person (**A**) must not act as trustee of the scheme, and another person (**B**) must not act as manager of the scheme, if A and B are associated persons (within the meaning of subpart YB of the Income Tax Act 2007).

“116G Investments and property of KiwiSaver schemes

The investments and property of a KiwiSaver scheme must be vested in—

“(a) the trustees; or

“(b) 1 or more nominated persons of the trustees; or

“(c) 1 or more nominees of a nominated person of the trustees.

“116H Nomination of person

“(1) If authorised by the trust deed, the trustees of a KiwiSaver scheme may nominate, in writing, 1 or more persons in which are vested any of the investments or property of the scheme.

“(2) The following persons are not eligible to be nominated as, or to act as, a nominated person:

“(a) the manager of the scheme:

“(b) a person who is an associated person (within the meaning of subpart YB of the Income Tax Act 2007) of the manager.

“(3) The trustees, in addition to their own obligations as trustees in relation to the scheme, are jointly and severally liable with the nominated person for the due and faithful performance and observance by the nominated person of all the duties and obli-

gations imposed on the nominated person in relation to the scheme either by this Act or by law.

“Compare: 1960 No 99 ss 6, 6A

“116I Appointment of nominee by nominated person

“(1) If authorised in writing by the trustees, a nominated person may appoint 1 or more nominees in which are vested any of the investments or property of the scheme.

“(2) The following persons are not eligible to be appointed as, or to act as, a nominee:

“(a) the manager of the scheme:

“(b) a person who is an associated person (within the meaning of subpart YB of the Income Tax Act 2007) of the manager.

“(3) The trustee and the nominated person that appointed the nominee, in addition to their own obligations in relation to the scheme, are jointly and severally liable with the nominee for the due and faithful performance and observance by the nominee of all the duties and obligations imposed on the nominee in relation to the scheme by this Act or by law.

“Compare: 1960 No 99 ss 6B, 6C

“116J Trust deed or other instrument must not exempt trustees, managers, or investment managers from liability

“(1) A provision in a trust deed or any other instrument is void to the extent that it would have the effect of exempting or indemnifying a trustee, a manager, or an investment manager from liability for breach of trust in the event of the trustee, manager, or investment manager failing to meet,—

“(a) in the case of a trustee of a KiwiSaver scheme other than a restricted scheme, the standard of care set out in clause 1A(b) of Schedule 1:

“(b) in the case of a manager, the standard of care set out in clauses 1B(1)(b) and 1E(2) of Schedule 1:

“(c) in the case of an investment manager, the standard of care set out in clause 1E(2) of Schedule 1:

“(d) in the case of a trustee of a restricted KiwiSaver scheme,—

- “(i) the standard of care set out in clause 1E(2) of Schedule 1; or
 - “(ii) the standard of care required of a trustee by law:
 - “(e) in the case of an independent trustee of a restricted KiwiSaver scheme, the standard of care set out in section 117(2)(a).
 - “(2) However, the trustees of a restricted KiwiSaver scheme, and the trustee and the manager of any other KiwiSaver scheme, are otherwise entitled to the same indemnities and relief as any trustee (within the meaning of the Trustee Act 1956).
- “Compare: 1960 No 99 s 24

“116K Trustees of KiwiSaver schemes other than restricted schemes may apply to High Court for order relating to scheme

- “(1) This section applies if the trustee of a KiwiSaver scheme other than a restricted scheme is satisfied that—
 - “(a) there is a significant risk that the interests of members of the scheme will be materially prejudiced; or
 - “(b) the provisions of the trust deed are no longer adequate to give proper protection to members.
- “(2) The trustee may apply to the High Court for an order under this section.
- “(3) The court may direct that the application be served on any person that the court thinks fit.
- “(4) On an application, the court, after giving the manager and any other person that the court thinks fit the opportunity to be heard, may make an order that—
 - “(a) amends the provisions of the trust deed of the scheme:
 - “(b) imposes restrictions on the activities of the trustee or the manager (including, in the case of the manager, restrictions on advertising) that the court thinks are necessary to protect the interests of members:
 - “(c) stays any or all civil proceedings before any court by or against the trustee or the manager:
 - “(d) restrains the payment under this Act of money by the manager or the trustee to members or a class of members:

- “(e) restrains the transfer under this Act of a member’s accumulation from one KiwiSaver scheme to another:
 - “(f) removes a person as manager of a scheme and appoints another person as manager of the scheme (with any powers that the court orders):
 - “(g) gives any other directions that the court considers necessary to protect the interests of members, or the public.
- “(5) The court may vary or cancel an order made under this section.
- “(6) In exercising its powers under this section, the court must have regard to the interests of all creditors in respect of the scheme.”

13 Additional duty of independent trustees

- (1) Section 117(1) is amended by inserting “of a restricted KiwiSaver scheme” after “a trustee”.
- (2) Section 117(1) is amended by omitting “sections 131, 132, 135, or 148” in each place where it appears and substituting in each case “any of the sections specified in subsection (3)”.
- (3) Section 117(2)(a) is amended by omitting “must exercise” and substituting “would exercise in managing the affairs of others”.
- (4) Section 117 is amended by adding the following subsection:

“(3) The sections referred to in subsection (1) are—

 - “(a) section 131(1) and (4); and
 - “(b) sections 131(2) and (3), 132, 135, and 148 of this Act as in force immediately before their repeal by section 31, 32, or 35 of the KiwiSaver Amendment Act 2011.”

14 Heading above section 118 repealed

The heading above section 118 is repealed.

15 KiwiSaver scheme must be treated as registered superannuation scheme for most purposes

- (1) Section 118(2) is amended by omitting “but subject to subsection (3),”.
- (2) Section 118(2)(a) is amended by omitting “except as provided in sections 119 to 123”.
- (3) Section 118(3) is repealed.

16 New headings and sections 119 to 119L substituted

Sections 119 to 122 are repealed and the following headings and sections substituted:

“Trust deeds

“119 Content of trust deeds

“(1) The trust deed of a KiwiSaver scheme must specify the following matters:

- “(a) the conditions of entry of members to the scheme:
- “(b) the conditions of termination of membership of the scheme:
- “(c) the contributions payable:
- “(d) the conditions under which benefits become payable and the way in which the benefits will be determined:
- “(e) the number of trustees, and provision for their appointment, removal from office, and retirement:
- “(f) the circumstances in which the scheme may be wound up and the way in which the assets of the scheme are to be distributed in the event of a winding-up:
- “(g) in the case of a KiwiSaver scheme other than a restricted scheme, provision for the appointment, removal from office, and retirement of the manager.

“(2) If other provisions of this Act expressly set out requirements in relation to the matters set out in subsection (1) (for example, by terms implied by the KiwiSaver scheme rules or provision for how a scheme must be wound up),—

- “(a) the trust deed is subject to those provisions; and
- “(b) subsection (1) is satisfied by reference to the relevant provisions in this Act in respect of those matters.

“Compare: 1989 No 10 s 7

“119A Implied provision as to amendments reducing accrued benefits, etc

“(1) There is implied in the trust deed of a KiwiSaver scheme a provision that an amendment requiring consent must not be made unless the trustees (in the case of a restricted KiwiSaver scheme) have, or the manager (in the case of any other KiwiSaver scheme) has, obtained the written consent of every member who would be adversely affected by the amendment.

- “(2) In subsection (1), **amendment requiring consent** means an amendment of the trust deed that would have the effect of—
- “(a) reducing, postponing, or otherwise adversely affecting the benefits, whether vested, contingent, or discretionary, that may in due course flow from, or are attributable to, membership of the scheme up to the date the amendment is made; or
 - “(b) removing a right of members to participate in the management of the scheme; or
 - “(c) increasing the contributions, fees, or charges payable by a member; or
 - “(d) providing for the reversion of any assets of the scheme to an employer to a greater extent than already provided for in the trust deed.

“Compare: 1989 No 10 s 9

“**119B Application of sections 119C to 119I**

Sections 119C to 119I apply to transfers or proposed transfers between KiwiSaver schemes, other than transfers to which subpart 3 of Part 2 applies.

“**119C Implied provision as to transfer of members, etc**

- “(1) There is implied in the trust deed of a KiwiSaver scheme a provision that no member of the scheme will be transferred to another KiwiSaver scheme, or to another section of the same scheme, unless the trustees (in the case of a restricted KiwiSaver scheme) have, or the manager (in the case of any other KiwiSaver scheme) has, obtained the written consent of the member concerned.

- “(2) This section is subject to section 119G.

“Compare: 1989 No 10 s 9B(1), (1A), (5)

“**119D Procedural requirements in case of certain transfers**

- “(1) This section and sections 119E to 119H apply if it is proposed to transfer (whether at the same time or over an extended period) all or a substantial number of members from a KiwiSaver scheme to another KiwiSaver scheme.
- “(2) The manager of each KiwiSaver scheme affected, other than a restricted scheme, must, at least 1 month before the date

- on which the manager requires members to give their written consent to a proposed transfer,—
- “(a) consult the trustee of the scheme on the proposed transfer; and
 - “(b) notify the members described in subsection (4) in writing of—
 - “(i) the proposed transfer and its implications for members; and
 - “(ii) the date on which the proposed transfer is to occur; and
 - “(iii) the date by which the written consent of members to the proposed transfer must be received by the manager; and
 - “(iv) any comments concerning the proposed transfer made by the trustee as a result of consultation under paragraph (a); and
 - “(v) the fact that a copy of the notice has been forwarded to the FMA; and
 - “(c) notify the FMA in writing of the matters described in paragraph (b)(i) to (iv).
- “(3) The trustees of each restricted KiwiSaver scheme affected must, at least 1 month before the date on which they require members to give their written consent to a proposed transfer,—
- “(a) notify the members described in subsection (4) in writing of—
 - “(i) the proposed transfer and its implications for members; and
 - “(ii) the date on which the proposed transfer is to occur; and
 - “(iii) the date by which the written consent of members to the proposed transfer must be received by the trustees; and
 - “(iv) the fact that a copy of the notice has been forwarded to the FMA; and
 - “(b) notify the FMA in writing of the matters described in paragraph (a)(i) to (iii).
- “(4) The persons who must be notified under subsections (2)(b) and (3)(a) are all members of the scheme other than those members

who, in the opinion of the FMA, are not likely to be materially affected by the proposed transfer.

- “(5) Giving notice under this section does not derogate from the need to comply with any other provision of this Act.
- “(6) For the purposes of this section and section 119E, references to the transfer of members from one scheme to another include references to transfers of members from one section of a scheme to another section of the same scheme.

“Compare: 1989 No 10 s 9B(2)–(3), (5)

“119E When requirements of section 119D not met

For the purposes of section 169, and without limiting that section, it is a ground for the FMA to have reasonable cause to believe that a particular scheme to which members are transferred fails to meet the requirements of section 119D if,—

- “(a) over any 12-month period, either—
- “(i) 20% or more of the members of another KiwiSaver scheme are transferred to the particular KiwiSaver scheme; or
 - “(ii) the number of members of the particular KiwiSaver scheme is increased by 20% or more by reason of a transfer of members from another KiwiSaver scheme; and
- “(b) the members of the particular KiwiSaver scheme who are described in section 119D(4) have not been notified of the transfer, or any notification given has not adequately set out the implications of the transfer.

“Compare: 1989 No 10 s 9B(4)

“119F Information required in case of transfer under section 119D

In respect of a transfer to which section 119D applies, the provider of the scheme from which a member (A) transfers must give the following information to the provider of the scheme to which A transfers:

- “(a) A’s name, address, and date of birth:
- “(b) A’s tax file number:
- “(c) the date on which A first became a member of a KiwiSaver scheme:

- “(d) if A is an employee,—
 - “(i) the name and address of each of A’s employers;
and
 - “(ii) the rate at which A intends each of those employers to make deductions of contributions from his or her salary or wages:
- “(e) the name, address, and tax file number of both the provider and the scheme:
- “(f) any other information that the Commissioner requires the provider to give to the provider of the scheme to which A transfers.

“119G When FMA may approve section 119D transfers without consent of members

- “(1) In respect of a transfer to which section 119D applies, the requirement in section 119C to obtain the written consent of all or any of the members of a scheme does not apply if the FMA approves the transfer under this section.
- “(2) The FMA may approve the transfer if the FMA is satisfied that—
 - “(a) the terms and conditions of the scheme to which the members are to be transferred (the **new scheme**) are no less favourable to members than the terms and conditions of the scheme from which they are being transferred (the **old scheme**); and
 - “(b) the transfer is otherwise reasonable in all the circumstances (including having regard to the value of the assets transferred from the old scheme to the new scheme); and
 - “(c) the procedure in section 119H has been followed.
- “(3) The FMA may decline to approve a transfer if the FMA considers that the transfer would adversely affect the interests of all or any of the members of the old scheme in a material way.
- “(4) In determining whether subsection (2) or (3) applies, the FMA may—
 - “(a) have regard to the likely effect of the new scheme on benefits to members as a whole; and
 - “(b) have regard to any other matter that the FMA considers relevant.

- “(5) For a transfer that the FMA has approved,—
- “(a) each relevant member of the old scheme is treated as offering to be a member of the new scheme on the terms and conditions for that new scheme; and
 - “(b) the provider of the new scheme is treated as accepting the member’s offer.
- “(6) The FMA may publish, in any form that the FMA thinks fit, guidance on matters that the FMA considers relevant under this section (including principles that the FMA may use to decide whether to approve a transfer).
- “Compare: 1989 No 10 s 9BAA

“119H How approval under section 119G may be granted

- “(1) An application for approval under section 119G may be made by—
- “(a) the trustees (in the case of a restricted KiwiSaver scheme) of the old scheme or the new scheme:
 - “(b) the trustee or the manager (in the case of any other Kiwi-Saver scheme) of the old scheme or the new scheme:
 - “(c) a relevant employer.
- “(2) The FMA may accept an application for approval if it is satisfied that—
- “(a) it is reasonable in all of the circumstances of the case that the person have standing to make the application; and
 - “(b) the person falls within a class specified in guidelines published by the FMA (if any) for the purposes of this subsection.
- “(3) The FMA may require the applicant to give the FMA, with the application or at any later time,—
- “(a) a certificate, signed by a person of a class specified by the FMA, that the transfer meets the requirements of section 119G; and
 - “(b) any other information about the new scheme, the old scheme, or the transfer.
- “(4) The applicant must give notice to every member of the old scheme—
- “(a) that the applicant has applied for approval to transfer the members without their written consent; and

- “(b) that the member may make submissions to the FMA about the transfer.
- “(5) The FMA must have regard to submissions before deciding whether or not to give approval.
- “(6) The FMA may give approval subject to any terms and conditions that the FMA may specify in the notice of approval, and the approval is effective only if the transfer is carried out in accordance with those terms and conditions.
- “Compare: 1989 No 10 s 9BAB

“119I FMA may exempt trustees and managers from requirement to obtain written consent of members

The FMA may exempt the trustees of a restricted KiwiSaver scheme or the manager of any other KiwiSaver scheme from the requirement to obtain the written consent of all members of the scheme who are required to give consent under section 119A or 119C if the FMA is satisfied that—

- “(a) the trustees have not, or the manager has not, been able to contact all of those members despite having taken all reasonable steps to do so; and
- “(b) the proposed action is not unreasonable in relation to the best interests of 1 or more of those members who have not been contacted.

“Compare: 1989 No 10 s 9BA

“119J Application and enforcement of implied provisions

- “(1) Sections 119A to 119I, 129A, and 129B apply notwithstanding anything to the contrary in the trust deed.
- “(2) Every provision implied in a trust deed in accordance with sections 119A to 119I, 129A, and 129B is enforceable by the manager, the trustees, or a member of the scheme.

“Compare: 1989 No 10 s 11

“Prospective members’ rights to information

“119K Prospective members’ rights to information

- “(1) A person who is eligible to become a member of a KiwiSaver scheme has the right, on request,—

- “(a) to look at, at any reasonable time, a copy of the trust deed:
 - “(b) to receive, on payment of a reasonable fee, a copy of the trust deed:
 - “(c) to receive, free of charge, a copy of the annual financial statements and any auditor’s report.
- “(2) In subsection (1), **trust deed** does not include a participation agreement that would not relate to the person if the person were to become a member of the scheme.
- “(3) Nothing in subsection (1) limits any provision in the Securities Act 1978.
- “Compare: 1989 No 10 s 15A

“Members’ rights to information

“119L Members’ rights to information

- “(1) Each member of a KiwiSaver scheme must—
- “(a) be given, within 6 months of the close of each financial year of the scheme, a copy of the annual report prepared under section 123 in respect of that year; and
 - “(b) have the right, on request,—
 - “(i) to receive an estimate of the member’s benefits:
 - “(ii) to look at, at any reasonable time, a copy of the trust deed:
 - “(iii) to receive, on payment of a reasonable fee, a copy of the trust deed:
 - “(iv) to receive, free of charge, a copy of the annual financial statements and any auditor’s report.
- “(2) Subsection (1)(a) does not apply in relation to a member’s account that is an inactive account unless the member requests a copy of the annual report.
- “(3) The requirement in subsection (1)(a) is treated as met in respect of a member if—
- “(a) the member has consented, in writing, to receive a World Wide Web uniform resource locator for access to an electronic copy of the annual report (the **annual report URL**); and
 - “(b) the member is given the annual report URL within 6 months of the close of the relevant financial year.

“(4) In subsection (1), **trust deed** does not include a participation agreement that does not relate to the member.

“(5) Nothing in subsection (1) limits sections 54A, 54B, or any other provision of the Securities Act 1978.

“Compare: 1989 No 10 s 17”.

17 New heading inserted

The following heading is inserted above section 123:

“Annual reports, returns, and statements”.

18 New section 123 substituted

Section 123 is repealed and the following section substituted:

“123 Requirement for annual report

“(1) The trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme) must, within 5 months after the end of each financial year, prepare a report on the scheme for that year.

“(2) In the case of a KiwiSaver scheme other than a restricted scheme, the manager must consult the trustee about the annual report.

“(3) The annual report must contain, or have attached to it, the prescribed information, statements, certificates, and documents.

“(4) The trustees or the manager (as the case may be) must, within 28 days after the annual report is completed, send to the FMA a copy of the completed report and, if not already contained in or attached to the report, a copy of the annual financial statements.”

19 Requirement for annual return

(1) Section 125(1) is amended by omitting “trustees of a KiwiSaver scheme” and substituting “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.

(2) Section 125(4) is amended by omitting “trustees of a KiwiSaver scheme” and substituting “trustees or the manager (as the case may be)”.

(3) Section 125(4)(b) and (c) are amended by omitting “trustees” and substituting “trustees or the manager (as the case may be)”.

20 New section 125A substituted

Section 125A is repealed and the following section substituted:

“125A Requirement for annual personalised statement of contributions and accumulations for members

The trustees (in the case of a complying superannuation fund or a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme) must provide annually to each person who is a member of that fund or scheme during the relevant year a statement showing the following for that person:

- “(a) the amount of each type of contribution received by the provider of the fund or scheme (as the case may be) for the year; and
- “(b) the member’s accumulation at the end of the year; and
- “(c) any other prescribed information.”

21 KiwiSaver scheme rules are implied in trust deeds establishing KiwiSaver scheme

- (1) Section 126(3)(b) is amended by inserting “, the manager,” after “trustees”.
- (2) Section 126(4) and (5) are repealed.

22 Section 128 repealed

Section 128 is repealed.

23 Terms relating to members’ tax credits implied into trust deed

Section 128A(2)(b) is amended by omitting “and by a member,” and substituting “a manager, or a member”.

24 Terms relating to back-dated validation implied into trust deed

Section 128B(2)(b) is amended by omitting “and by a member,” and substituting “a manager, or a member”.

25 Terms relating to lump sum payments by complying superannuation funds

Section 128C(2)(b) is amended by omitting “and by a member,” and substituting “a manager, or a member”.

26 Terms relating to compulsory employer contributions implied into trust deed

Section 128D(2)(b) is amended by omitting “and by a member,” and substituting “a manager, or a member”.

27 New section 128E inserted

The following section is inserted after section 128D:

“128E Provisions implied in trust deeds by regulations

A provision implied in a trust deed by regulations made under section 228(1)(bb)—

- “(a) does not apply to the extent that it is inconsistent with provisions implied in the trust deed by this Act; but
- “(b) applies despite anything else to the contrary in the trust deed; and
- “(c) is enforceable by the trustees, the manager, or any member of the scheme, unless the regulations provide otherwise.”

28 Amendment of trust deed or participation agreement governing KiwiSaver scheme

- (1) Section 129 is amended by repealing subsections (1) and (2) and substituting the following subsections:

“(1) This section applies if the trustees (in the case of a restricted KiwiSaver scheme) or the trustee or the manager (in the case of any other KiwiSaver scheme) propose to amend the trust deed of the scheme in a way that will or may affect—

- “(a) the members of the scheme in their capacity as members of the scheme; or
- “(b) the trustees of the scheme in their capacity as trustees of the scheme; or
- “(c) the manager of the scheme in its capacity as manager of the scheme.

- “(2) Before an amendment of the type referred to in subsection (1) is made, the trustees of the scheme, or the trustees’ solicitor, must give a certificate that the trust deed, when amended as proposed,—
- “(a) will comply with section 119; and
 - “(b) will not contain a provision that is contrary to those implied in a trust deed by or under this Act (including the KiwiSaver scheme rules).”
- (2) Section 129(3) is amended by—
- (a) omitting “lodge” and substituting “ensure that”; and
 - (b) inserting “are lodged” after “copy of the amendment”.

29 New sections 129A and 129B and heading inserted

The following sections and heading are inserted after section 129:

“129A Implied provision as to alterations to scheme

- “(1) There is implied in the trust deed of a KiwiSaver scheme a provision that an alteration described in subsection (2) must be effected by way of amendment to the trust deed in accordance with section 129(2) and (3).
- “(2) Subsection (1) applies to an alteration to the scheme that—
- “(a) would be contrary to or have the effect of nullifying, reversing, or amending a matter stated in the trust deed or a provision implied in the trust deed by or under this Act; or
 - “(b) would have the effect of extending, varying, or limiting the scope of the trust deed in a material particular.

“Compare: 1989 No 10 s 9A

“Reversion of scheme assets to employer

“129B Implied provision as to reversion of scheme assets to employer

There is implied in the trust deed of a KiwiSaver scheme that provides for the reversion of any assets of the scheme to an employer, a provision that no part of the assets may revert to an employer without the prior written consent of the FMA.

“Compare: 1989 No 10 s 10”.

- 30 Consent to reversion of assets to employer**
Section 130 is amended by omitting “section 10 of the Superannuation Schemes Act 1989 (as applied by section 120)” and substituting “section 129B”.
- 31 Applications for registration of scheme governed by trust deed**
Section 131(2) and (3) are repealed.
- 32 Section 132 repealed**
Section 132 is repealed.
- 33 Matters required to be specified in application**
Section 133 is amended by omitting “or 132”.
- 34 Registration of scheme**
Section 134(1) is amended by omitting “or 132”.
- 35 Heading above section 135, heading above section 148, and sections 135 to 155 repealed**
The heading above section 135, the heading above section 148, and sections 135 to 155 are repealed.
- 36 Purpose of register**
- (1) Section 158(a) is amended by inserting the following subparagraphs after subparagraph (i):
- “(ia) determine whether a scheme is a restricted scheme; and
 - “(ib) know how to contact the manager of a scheme other than a restricted scheme; and”.
- (2) Section 158(a) is amended by adding the following subparagraph:
- “(v) know how to access information about the manager or trustees that is contained in the register of financial service providers established and maintained under section 24 of the Financial Service Providers (Registration and Dispute Resolution)

Act 2008 (including details of the relevant dispute resolution scheme); and”.

37 Contents of register in relation to KiwiSaver schemes

- (1) Section 160 is amended by inserting the following paragraph after paragraph (b):

“(ba) whether it is a restricted scheme; and”.

- (2) Section 160 is amended by inserting the following paragraphs after paragraph (d):

“(da) in the case of a KiwiSaver scheme other than a restricted scheme, the name of the manager of the scheme and an address for service for the manager; and

“(db) the unique identifiers issued to the trustees and the manager by the Registrar of Financial Service Providers and contained in the register of financial service providers established and maintained under section 24 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008; and”.

38 Duty to notify changes to Government Actuary

Section 164(1) is amended by omitting “KiwiSaver scheme” and substituting “restricted KiwiSaver scheme and the manager of any other KiwiSaver scheme”.

39 Cancellation of registration and order to wind up KiwiSaver scheme

- (1) Section 168(a) is amended by omitting “trustees” and substituting “trustee”.

- (2) Section 168(a) is amended by inserting “other than a restricted scheme” after “that a KiwiSaver scheme”.

- (3) Section 168 is amended by inserting the following paragraph after paragraph (a):

“(ab) on giving 28 days’ notice to the trustees, if satisfied on reasonable grounds that a restricted scheme no longer meets the requirements set out in section 116A(1)(a) to (c); or”.

40 New section 168A inserted

The following section is inserted after section 168:

“168A Scheme may cease to be restricted scheme

- “(1) The FMA may determine that a restricted KiwiSaver scheme should cease to be a restricted scheme—
- “(a) if it is satisfied that the scheme no longer meets the requirements set out in section 116A(1)(d) or (4); or
 - “(b) at the request of the trustees of the scheme, if it is satisfied that the members of the scheme have been adequately advised of the consequences of the scheme ceasing to be a restricted scheme.
- “(2) If the FMA makes a determination under subsection (1), the FMA must—
- “(a) notify the trustees of the determination; and
 - “(b) amend the register so that the scheme is no longer identified as a restricted scheme.
- “(3) However, the FMA must not amend the register earlier than 6 months after the date of the determination without the consent of the trustees.
- “(4) The trustees must, as soon as practicable after being notified by the FMA under subsection (2)(a), notify the members of the scheme of the determination.”

41 Powers of Government Actuary in event of scheme operating in contravention of this Act, etc

- (1) Section 169(2) is amended by omitting “section 120 or 126 and” and substituting “or under this Act, including”.
- (2) Section 169(4)(a) is amended by omitting “trustees” and substituting “trustees of a restricted KiwiSaver scheme, or the trustee or manager of any other KiwiSaver scheme,”.
- (3) Section 169(4)(b) is amended by omitting “trustees or the administration manager or the” and substituting “trustees, the manager, the administration manager, or the”.

42 New section 171 substituted

Section 171 is repealed and the following section substituted:

“171 Implied terms continue to be implied on cancellation of registration

If the registration of a KiwiSaver scheme is cancelled, the KiwiSaver scheme rules and any other provisions implied in a trust deed by or under this Act must continue to be implied in the trust deed of the scheme until the scheme is wound up.”

43 Receiver or liquidator to designate or appoint independent trustee if required

Section 172(3) is amended by omitting “one” and substituting “a restricted scheme”.

44 Initial steps in winding up of KiwiSaver scheme

Section 173(1) is amended by adding “; and” and also by adding the following paragraph:

“(c) in the case of a KiwiSaver scheme other than a restricted scheme, notify the manager of the scheme of any order or resolution.”

45 Winding up report

(1) Section 174(a) and (b) are amended by omitting “accounts” and substituting in each case “financial statements”.

(2) Section 174 is amended by repealing paragraph (c) and substituting the following paragraph:

“(c) must, within 28 days after the final financial statements have been audited, ensure that—

“(i) a copy of those financial statements is sent to the FMA and to every person who was a member of the scheme immediately before it was wound up; and

“(ii) the FMA and the members are advised in writing of the manner in which remaining assets (if any) of the scheme are to be distributed; and”.

46 New section 174A inserted

The following section is inserted after section 174:

“174A Registration deemed to be cancelled when assets distributed

The registration of a KiwiSaver scheme that has been wound up is deemed to be cancelled as soon as the distribution of the assets is completed.”

47 Appointment of default providers

- (1) Section 177(1) is amended by omitting “eligible KiwiSaver providers” and substituting “managers”.
- (2) Section 177(2) is repealed.
- (3) Section 177 is amended by adding the following subsection:
“(6) A restricted scheme is not eligible to be a default KiwiSaver scheme.”

48 Power of High Court to act in respect of terms and conditions of appointment as default KiwiSaver scheme and regulations relating to default KiwiSaver schemes

- (1) Section 183(1) is amended by omitting “a provider” and substituting “the manager”.
- (2) Section 183 is amended by repealing subsection (2) and substituting the following subsection:
“(2) If this section applies, the High Court may make any orders on any terms and conditions that it thinks appropriate, including, without limitation,—
“(a) an order to restrain the trustee or the manager of the scheme, or both, from engaging in conduct that constitutes, or would constitute, the breach:
“(b) an order to require the trustee or the manager of the scheme, or both,—
“(i) to do a particular act or thing:
“(ii) to comply with the conditions of the instrument of appointment:
“(c) an interim order.”

49 Unclaimed money held by trustees of KiwiSaver scheme

Section 195(2)(b) is amended by omitting “made reasonable efforts” and substituting “ensured that reasonable efforts have been made”.

50 Offence to fail to provide information under this Part

Section 197(2) is amended by—

- (a) omitting “sections 15A, 16, and 17 of the Superannuation Schemes Act 1989, as applied by section 122 of this Act” and substituting “sections 119K and 119L”; and
- (b) omitting “trustees” in each place where it appears and substituting in each case “trustees (in the case of a restricted scheme) or the manager (in the case of any other scheme)”.

51 Application of section 13G of Trustee Act 1956 if power of investment exercised in relation to member allocated to scheme under sections 50 to 52

- (1) Section 202(1)(b) is amended by omitting “trustees of the scheme purport” and substituting “trustee or the manager of the scheme purports”.
- (2) Section 202(2) is amended by omitting “trustees” and substituting “trustee or the manager (as the case may be)”.

52 Certain sections of Securities Act 1978 modified in relation to KiwiSaver scheme

- (1) Section 210(2)(a) is amended by omitting “(as issuer)” and substituting “(as issuer in respect of a restricted KiwiSaver scheme), the manager (as issuer in respect of any other KiwiSaver scheme),”.
- (2) Section 210(2)(b) is amended by inserting “or the manager (as the case may be)” after “trustees”.

53 Regulations

- (1) Section 228 is amended by inserting the following paragraphs after paragraph (b):
 - “(ba) prescribing the information and matters that must be included in the trust deed of a KiwiSaver scheme:
 - “(bb) subject to subsection (2), prescribing provisions to be implied in the trust deed of a KiwiSaver scheme.”.
- (2) Section 228 is amended by inserting the following paragraph after paragraph (f):

- “(fa) prescribing information, statements, certificates, or documents that must, or must not, be contained in or attached to the annual report prepared under section 123.”.
- (3) Section 228 is amended by inserting the following paragraphs after paragraph (g):
- “(ga) prescribing information that must be included in annual personalised statements for members under section 125A:
- “(gb) prescribing how the information included in an annual personalised statement under section 125A must be presented, calculated, or prepared.”.
- (4) Section 228 is amended by adding the following subsection as subsection (2):
- “(2) A provision prescribed for the purposes of subsection (1)(bb) may, without limitation, do any of the following:
- “(a) specify the duties and powers of the trustee of the scheme:
- “(b) specify the duties of the manager of the scheme:
- “(c) provide for the trustee of the scheme to have the power, exercisable with the consent of the manager of the scheme (but without requiring the consent of members), to make amendments to the trust deed that do not adversely affect the interests of members.”

54 Schedule 1 amended

- (1) Schedule 1 is amended by repealing clause 1 and substituting the following clauses and headings:
- “1 Application**
- “(1) The KiwiSaver scheme rules in clauses 1A to 1D apply to KiwiSaver schemes other than restricted schemes.
- “(2) The KiwiSaver scheme rules in clauses 1E to 17 apply to all KiwiSaver schemes.

“Rules applying to KiwiSaver schemes other than restricted schemes

“1A Trustee’s duties

The trustee, in exercising its powers and performing its duties as the trustee, must—

- “(a) act in the best interests of the members of the scheme; and
- “(b) exercise the care, diligence, and skill that a prudent person engaged in the profession or business of acting as a trustee would exercise in acting as the trustee of a KiwiSaver scheme other than a restricted scheme.

“1B Manager’s duties

“(1) The manager, in exercising its powers and performing its duties as the manager, must—

- “(a) act in the best interests of the members of the scheme; and
- “(b) exercise the care, diligence, and skill that a prudent person engaged in the profession or business of acting as a manager would exercise in managing the affairs of others, unless the manager is exercising a power of investment, in which case clause 1E(2) applies.

“(2) The manager must use the manager’s best endeavours and skill to ensure that the affairs of the scheme are conducted in a proper and efficient manner.

“1C Scheme investments and property

“(1) The trustee must comply with every direction of the manager relating to the acquisition or disposal of scheme investments and property, unless subclause (2) applies.

“(2) The trustee must refuse to act on a direction of the manager relating to the acquisition or disposal of scheme investments or property if the trustee considers that the proposed acquisition or disposal—

- “(a) would be in breach of the trust deed or an enactment; or
- “(b) would be manifestly not in the best interests of the members of the scheme.

“(3) If the trustee refuses to act on a direction of the manager, the trustee must notify the manager and the FMA in writing of the trustee’s reasons for refusing to do so.

“1D Manager to provide information to trustee

If requested by the trustee, the manager must—

- “(a) make available to the trustee all documents and records relating to the scheme that are held by the manager, an administration manager, or an investment manager of the scheme:
- “(b) provide the trustee with any information required by the trustee about—
 - “(i) the scheme:
 - “(ii) the affairs of the manager:
 - “(iii) the property of the manager (whether acquired before or after the date of the manager’s appointment).

“Rules applying to all KiwiSaver schemes

“1E Investment of scheme money

- “(1) All money belonging to a KiwiSaver scheme and available for investment must be invested in accordance with the provisions of the Trustee Act 1956 as to the investment of trust funds.
- “(2) The trustees (in the case of a restricted scheme), the manager (in the case of any other KiwiSaver scheme), and the investment managers (if any) of a scheme must, in exercising a power of investment, exercise the care, diligence, and skill required of a trustee by section 13B or 13C of the Trustee Act 1956.
- “(3) Subclause (2) applies despite anything to the contrary in section 13D(1) of the Trustee Act 1956.
“Compare: 1989 No 10 s 8”.
- (2) Clause 2(1) of Schedule 1 is amended by inserting the following paragraph after paragraph (a):
“(ab) the manager of the scheme.”.
- (3) The heading to clause 5 of Schedule 1 is amended by inserting “**and managers**” after “**Trustees**”.

- (4) Clause 5(1) of Schedule 1 is amended by omitting “trustees” and substituting “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.
- (5) The heading to clause 6 of Schedule 1 is amended by inserting “**and managers**” after “**Trustees**”.
- (6) Clause 6 of Schedule 1 is amended by omitting “trustee” and substituting “trustee (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.
- (7) Clause 7(1) of Schedule 1 is amended by omitting “trustees” and substituting “trustees of a restricted KiwiSaver scheme and the manager of any other KiwiSaver scheme”.
- (8) Clause 8(7)(b) of Schedule 1 is amended by omitting “trustees” in the first place where it appears and substituting “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.
- (9) Clause 8(7)(b)(ii) of Schedule 1 is amended by omitting “trustees” and substituting “trustees or the manager (as the case may be)”.
- (10) Clause 8(7)(b)(iii) of Schedule 1 is amended by omitting “trustees” and substituting “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.
- (11) Clause 9 of Schedule 1 is amended by omitting “trustees” and substituting “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.
- (12) Clause 14 of Schedule 1 is amended by—
 - (a) omitting “trustees” in the first and second places where it appears and substituting in each case “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”; and
 - (b) omitting “trustees” in every other place where it appears and substituting in each case “trustees or manager (as the case may be)”.

- (13) Clause 17(a) of Schedule 1 is amended by omitting “**fund provider** (as defined in the Income Tax Act 2007)” and substituting “provider”.
- (14) Clause 17(b) of Schedule 1 is amended by omitting “fund provider” and substituting “provider”.

55 Schedule 2 amended

- (1) Clause 3 of Part 1 of Schedule 2 is amended by repealing paragraphs (a) and (b) and substituting the following paragraphs:
 - “(a) the trustee of the scheme and, where the trustee is a company, the directors of the trustee; and
 - “(b) the manager of the scheme and the directors of the manager; and”.
- (2) Clause 4 of Part 1 of Schedule 2 is repealed and the following clause substituted:

“4 The name and contact address of at least 1 of the directors of the manager who is a New Zealand resident.”
- (3) Clause 7 of Part 1 of Schedule 2 is amended by omitting “accounts” and substituting “financial statements”.
- (4) Clause 11 of Part 1 of Schedule 2 is repealed and the following clause substituted:

“11 A certificate by the trustee or the trustee’s solicitor stating that the trust deed—
 - “(a) complies with section 119; and
 - “(b) does not contain a provision that is contrary to those implied in the trust deed by or under this Act (including the KiwiSaver scheme rules).”
- (5) Parts 2 and 3 of Schedule 2 are repealed.

Consequential amendments

56 Consequential amendments

The enactments listed in the Schedule of this Act are amended in the manner indicated in that schedule.

Transitional provisions

57 Interpretation

In this section and in sections 58 to 71, unless the context otherwise requires,—

commencement date means the date on which this section comes into force

effective date, in relation to a particular KiwiSaver scheme, means the earlier of the dates set out in section 58(2)

existing KiwiSaver scheme means a KiwiSaver scheme registered in the KiwiSaver schemes register immediately before the commencement date

existing member, in relation to a KiwiSaver scheme, means a person who was a member of the scheme immediately before the effective date

register means the KiwiSaver schemes register established under section 156 of the principal Act

relevant enactments means the principal Act and the enactments amended by section 56 of this Act

security means an interest in a KiwiSaver scheme offered to the public for subscription.

58 Transition period for existing schemes

- (1) To the extent that the relevant enactments as amended by this Act would otherwise apply to an existing KiwiSaver scheme, those enactments continue in force during the transition period described in subsection (2) as if they had not been amended by this Act.
- (2) The transition period for a particular scheme is the period beginning on the commencement date and ending on the close of the day before the earlier of the following dates:
 - (a) the date that the trustees of the scheme elect to comply with the relevant enactments as amended by this Act; or
 - (b) 1 October 2012.
- (3) The relevant enactments as amended by this Act apply to a particular scheme on and from the earlier of the dates set out in subsection (2).

- (4) If the trustees elect an effective date that is earlier than 1 October 2012, the trustees must notify the FMA and the Commissioner of the elected date at least 20 working days before that date.
- (5) A failure to comply with subsection (4) does not limit subsection (3).
- (6) This section is subject to section 59.

59 Certain provisions have effect during transition period

Despite section 58,—

- (a) section 56(5) of the principal Act (as inserted by section 8 of this Act) applies to a KiwiSaver scheme during the scheme's transition period as if the reference in section 56(5) to the circumstances in section 56(6) were a reference to the trustees of the scheme having lodged a copy of a winding-up order or resolution with the FMA under section 173 of the principal Act; and
- (b) section 116A(4) of the principal Act (as inserted by section 12 of this Act) applies to a KiwiSaver scheme listed in section 61 or 62 of this Act during the scheme's transition period.

60 FMA must amend register

- (1) On, or as soon as practicable after, the effective date for a KiwiSaver scheme, the FMA must,—
 - (a) in the case of a scheme listed in section 61 or 62, amend the register to identify the scheme as a restricted scheme; and
 - (b) in the case of any other KiwiSaver scheme, amend the register to identify the name of the manager of the scheme.
- (2) The FMA must not amend the register to identify a KiwiSaver scheme as a restricted scheme other than in accordance with subsection (1)(a).

61 Certain employer schemes to be restricted schemes

Each of the following KiwiSaver schemes is eligible, on its effective date, to be identified as a restricted scheme on the KiwiSaver schemes register:

- (a) Allied Farmers KiwiSaver Scheme:
- (b) Douglas Pharmaceuticals KiwiSaver Scheme:
- (c) Ecolab KiwiSaver Scheme:
- (d) Foodstuffs (Wellington) KiwiSaver Scheme:
- (e) Foodstuffs KiwiSaver Scheme:
- (f) Griffins KiwiSaver Scheme:
- (g) Hexion KiwiSaver Scheme:
- (h) Ravensdown KiwiSaver Scheme:
- (i) Stevenson Group KiwiSaver Scheme:
- (j) Tait Electronics Ltd KiwiSaver Scheme.

62 Certain restricted-entry schemes to be restricted schemes

Each of the following KiwiSaver schemes is eligible, on its effective date, to be identified as a restricted scheme on the KiwiSaver schemes register:

- (a) BCF KiwiSaver Scheme:
- (b) Koinonia Fund:
- (c) Medical Assurance Society KiwiSaver Plan:
- (d) New Zealand Harbours KiwiSaver Scheme:
- (e) NZ Maritime Officers KiwiSaver Scheme:
- (f) PSBG KiwiSaver Scheme:
- (g) SRF KiwiSaver Scheme:
- (h) Supereasy KiwiSaver Superannuation Scheme:
- (i) Waterfront Industry KiwiSaver Scheme.

63 Parties to trust deed may execute amendment to trust deed

[Repealed]

Section 63: repealed, on 1 October 2012, by section 63(5).

64 Conversion of umbrella trusts to separate trusts

[Repealed]

Section 64: repealed, on 1 October 2012, by section 64(5).

65 Providers must notify existing members of changes

- (1) The provider of a KiwiSaver scheme must, no later than 3 months after the effective date for the scheme,—
 - (a) prepare a document (the **information document**) that identifies—
 - (i) the material amendments to the trust deed of the scheme made under section 63; and
 - (ii) if an existing trust deed has been replaced with a new trust deed under section 64, the material differences between the existing trust deed and the new trust deed; and
 - (iii) the material variations in the terms or conditions of a security that result from amendments to relevant enactments made by this Act; and
 - (b) send, to the address (as defined in section 4(1) of the principal Act) of every existing member of the scheme a written statement that complies with subsection (2).
- (2) The written statement must contain all of the following:
 - (a) the effective date;
 - (b) the names of the trustees;
 - (c) a brief description of the material amendments, differences, and variations described in the information document;
 - (d) in the case of a KiwiSaver scheme other than a restricted scheme, the name of the manager;
 - (e) a statement to the effect that the member is entitled to receive a copy of the information document free of charge;
 - (f) a statement to the effect that a copy of the information document is available, free of charge and at all reasonable times, on an Internet site maintained by, or on behalf of, the provider.
- (3) The provider must, if an existing member of the scheme requests a copy of the information document, ensure that a hard copy of the information document is sent, free of charge, to the member.
- (4) Until 31 December 2013, the provider must ensure that a copy of the information document is available, at all reasonable

times, on an Internet site maintained by or on behalf of the provider.

66 Application of Securities Act 1978: promoter

- (1) This section applies to a person who, in respect of a KiwiSaver scheme other than a restricted scheme,—
- (a) was a trustee of the scheme before the effective date; and
 - (b) is a trustee of the scheme on or after the effective date.
- (2) For the purposes of the Securities Act 1978, the person is not a promoter in relation to interests in the scheme offered to the public for subscription on or after the effective date by reason only that the person was, before the effective date and in the person's capacity as trustee, instrumental in the formulation of a plan or programme pursuant to which interests in the scheme are offered to the public.

67 Application of Securities Act 1978: offer of securities to public

To avoid doubt, none of the following constitutes an offer of a security to the public for the purposes of the Securities Act 1978:

- (a) an amendment to a trust deed under section 63;
- (b) a replacement of an existing trust deed with a new trust deed under section 64;
- (c) if an existing trust deed is replaced with a new trust deed under section 64, a difference between the existing trust deed and the new trust deed;
- (d) the change of issuer in relation to an interest in a Kiwi-Saver scheme other than a restricted scheme from the trustees to the manager (*see* the definition of **issuer** in section 2(1) of the Securities Act 1978 as amended by section 56 of this Act);
- (e) any other variation in the terms or conditions of a security resulting from amendments to relevant enactments made by this Act.

68 Certain participation agreements executed before registration continue to have effect

The repeal of section 128 of the principal Act by section 22 of this Act does not affect the status of a participation agreement as forming part of the trust deed.

69 Certain scheme provider agreements continue in force

- (1) This section applies to a scheme provider agreement that—
- (a) relates to a KiwiSaver scheme other than a restricted scheme; and
 - (b) was entered into before, and has effect immediately before, the effective date.
- (2) On and from the effective date, the scheme provider agreement is binding on and enforceable by, against, or in favour of the manager as provider of the scheme.

70 References to department in instruments of appointment

Unless the context otherwise requires, a reference (express or implied) to the department in an instrument of appointment made under section 177 of the principal Act before or on the commencement date must be read as a reference to the FMA.

71 Transitional regulations

[Repealed]

Section 71: repealed, on 1 January 2014, by section 71(5)(a).

Schedule
Amendments consequential on
amendments to KiwiSaver Act 2006

s 56

Part 1
Acts amended

Financial Reporting Act 1993 (1993 No 106)

Section 4(1)(a)(i): insert “or an interest in a KiwiSaver scheme other than a restricted scheme” after “unit trust”.

Section 4(1): insert after paragraph (a):

“(ab) every manager of a KiwiSaver scheme other than a restricted scheme (within the meaning of the KiwiSaver Act 2006) in which securities have been allotted, whether before or after the commencement of this paragraph, pursuant to an offer of securities to the public within the meaning of the Securities Act 1978:”.

Section 9A(2): insert “, including a restricted KiwiSaver scheme (within the meaning of the KiwiSaver Act 2006) but not any other KiwiSaver scheme,” after “Superannuation Schemes Act 1989”.

Financial Transactions Reporting Act 1996 (1996 No 9)

Section 3(1)(h): add “, including a KiwiSaver scheme within the meaning of the KiwiSaver Act 2006”.

Section 3(1): insert after paragraph (h):

“(ha) a manager of a KiwiSaver scheme other than a restricted scheme within the meaning of the KiwiSaver Act 2006:”.

Income Tax Act 2007 (2007 No 97)

Heading above section DV 4(2): repeal.

Section DV 4(2): repeal.

Securities Act 1978 (1978 No 103)

Paragraph (f) of the definition of **issuer** in section 2(1): insert “(including a restricted KiwiSaver scheme but not any other KiwiSaver scheme)” after “superannuation scheme”.

Part 1—*continued***Securities Act 1978 (1978 No 103)**—*continued*

Definition of **issuer** in section 2(1): add:

- “(g) in relation to an interest in a KiwiSaver scheme other than a restricted KiwiSaver scheme, or to an advertisement, investment statement, prospectus, or registered prospectus that relates to such an interest, the manager of the scheme”.

Definition of **manager** in section 2(1): add:

- “(c) in relation to an interest in a KiwiSaver scheme other than a restricted KiwiSaver scheme, has the same meaning as in section 4(1) of the KiwiSaver Act 2006”.

Section 2(1): insert in their appropriate alphabetical order:

“**KiwiSaver scheme** has the same meaning as in section 4(1) of the KiwiSaver Act 2006

“**KiwiSaver trustee** means a person who is designated or appointed as trustee of a KiwiSaver scheme other than a restricted scheme, or the successor of that person

“**restricted KiwiSaver scheme** and **restricted scheme** have the same meaning as in section 4(1) of the KiwiSaver Act 2006”.

Definition of **manager** in section 5C: repeal and substitute:

“**manager**,—

- “(a) in relation to a KiwiSaver scheme other than a restricted scheme, has the same meaning as in section 4(1) of the KiwiSaver Act 2006; and
- “(b) in relation to any other scheme, means an administration manager or an investment manager (as those terms are defined in section 2(1) of the Superannuation Schemes Act 1989)”.

Section 37AF(1)(d): insert after subparagraph (ii):

- “(iia) in the case of an interest in a KiwiSaver scheme other than a restricted scheme, the KiwiSaver trustee; and”.

Section 37AK(3): insert after paragraph (f):

- “(fa) in the case of an interest in a KiwiSaver scheme other than a restricted scheme, the KiwiSaver trustee:”.

Part 1—*continued*

Securities Act 1978 (1978 No 103)—*continued*

Section 37AK(5): insert after paragraph (c):

“(ca) in the case of an interest in a KiwiSaver scheme other than a restricted scheme, the KiwiSaver trustee:”.

Section 37F(1): insert after paragraph (e):

“(ea) in the case of an interest in a KiwiSaver scheme other than a restricted scheme, the KiwiSaver trustee:”.

Insert after section 50A:

“50B Duty of auditor to report to KiwiSaver trustee

“(1) This section applies to the auditor of an issuer of interests in a KiwiSaver scheme other than a restricted scheme.

“(2) If the auditor provides the issuer with any report, financial statement, certificate, or other document required by an Act or a trust deed relating to the scheme, the auditor must, as soon as practicable, send a copy to the KiwiSaver trustee.

“(3) If, in the performance of the auditor’s duties, the auditor becomes aware of a matter that, in the auditor’s opinion, is relevant to the exercise or performance of the powers or duties of the KiwiSaver trustee, the auditor must, within 7 working days of becoming aware of the matter, send—

“(a) a written report on the matter to the issuer of interests in the scheme; and

“(b) a copy of the report to the KiwiSaver trustee.

“(4) The auditor must, from time to time, at the request of the KiwiSaver trustee, provide the KiwiSaver trustee with any information relating to the issuer—

“(a) that the KiwiSaver trustee requests; and

“(b) that is within the auditor’s knowledge; and

“(c) that is, in the auditor’s opinion, relevant to the exercise or performance of the powers or duties of the KiwiSaver trustee.

“(5) This section does not limit the duties or liability of a KiwiSaver trustee or an issuer of interests in a KiwiSaver scheme other than a restricted scheme.”

Part 1—*continued***Securities Act 1978 (1978 No 103)—*continued***

Section 51(8): insert after paragraph (c):

“(ca) in the case of interests in a KiwiSaver scheme other than a restricted scheme, the KiwiSaver trustee.”

Section 53D: insert “KiwiSaver trustee,” after “statutory supervisor,”.

Section 56(3)(a): insert “KiwiSaver trustee or” after “statutory supervisor or”.

Section 56(3)(b): insert “KiwiSaver trustee or” after “statutory supervisor or”.

Section 57(2)(b): insert “KiwiSaver trustee or” after “statutory supervisor or”.

Superannuation Schemes Act 1989 (1989 No 10)

Section 14(4): repeal.

Taxation (Annual Rates, Trans-Tasman Savings Portability, KiwiSaver, and Remedial Matters) Act 2010 (2010 No 109)

New clause 4B of Schedule 1 of the KiwiSaver Act 2006 in section 189(1): omit “trustees” and substitute “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.

New clause 14(1) of Schedule 1 of the KiwiSaver Act 2006 in section 189(4): omit “trustees” and substitute “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.

New clause 14(2) of Schedule 1 of the KiwiSaver Act 2006 in section 189(4): omit “trustees” in the first place where it appears and substitute “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.

New clause 14(2) of Schedule 1 of the KiwiSaver Act 2006 in section 189(4): omit “trustees” in the second place where it appears and substitute “trustees or the manager (as the case may be)”.

Part 1—*continued*

**Taxation (Annual Rates, Trans-Tasman Savings Portability,
KiwiSaver, and Remedial Matters) Act 2010 (2010 No
109)—*continued***

New clause 14B(1) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” and substitute “trustees or the manager (as the case may be)”.

New clause 14B(2) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” in the first place where it appears and substitute “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.

New clause 14B(2) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” in the second place where it appears and substitute “trustees or the manager (as the case may be)”.

New clause 14B(3) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” and substitute “trustees or the manager (as the case may be)”.

New clause 14B(4) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” in each place where it appears and substitute in each case “trustees or the manager (as the case may be)”.

New clause 14B(5) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” and substitute “trustees or the manager (as the case may be)”.

Part 2

Regulations amended

KiwiSaver Regulations 2006 (SR 2006/358)

Definition of **administration manager** in regulation 3: revoke.

Regulation 9(2): insert “, the manager,” after “trustees” in each place where it appears.

Regulation 9(3): omit “administration manager” and substitute “provider”.

Regulation 9(3): omit “administration manager’s” and substitute “provider’s”.

Part 2—*continued***KiwiSaver Regulations 2006 (SR 2006/358)**—*continued*

Schedule 2: omit “section 9BAA of the Superannuation Schemes Act 1989 (as applied by section 120 of the Act)” and substitute “section 119G of the Act”.

Schedule 2: omit “regulation 7” and substitute “section 123 of the Act”.

Schedule 2: omit “in accordance with section 10 of the Superannuation Schemes Act 1989 (as applied by sections 120 and 130 of the Act)” and substitute “for the purposes of section 129B or 130 of the Act”.

Reprints notes

1 *General*

This is a reprint of the KiwiSaver Amendment Act 2011 that incorporates all the amendments to that Act as at the date of the last amendment to it.

2 *Legal status*

Reprints are presumed to correctly state, as at the date of the reprint, the law enacted by the principal enactment and by any amendments to that enactment. Section 18 of the Legislation Act 2012 provides that this reprint, published in electronic form, will have the status of an official version once issued by the Chief Parliamentary Counsel under section 17(1) of that Act.

3 *Editorial and format changes*

Editorial and format changes to reprints are made using the powers under sections 24 to 26 of the Legislation Act 2012. See also <http://www.pco.parliament.govt.nz/editorial-conventions/>.

4 *Amendments incorporated in this reprint*

KiwiSaver Amendment Act 2011 (2011 No 8): sections 63, 64, 71(5)(a)
