

EXPLANATORY MEMORANDUM (EXPOSURE DRAFT)

Minute No. of 2013 - Minister for Financial Services and Superannuation

Subject - *Superannuation Industry (Supervision) Act 1993*

*Superannuation Industry (Supervision) Amendment Regulation
2013 (No.)*

Subsection 353(1) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the SIS Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the SIS Act.

Section 312-5 of the *Income Tax Assessment Act 1997* (ITAA 1997) provides that Division 312 of that Act, together with the SIS Regulations, implements the Arrangement between the Governments of Australia and New Zealand for trans-Tasman retirement savings portability.

The purpose of the proposed Regulation is to prescribe the details of the trans-Tasman retirement savings portability scheme. The scheme would allow individuals to move their retirement savings between Australia and New Zealand after their emigration from one country to the other.

The current superannuation laws do not allow Australians and New Zealand citizens living in Australia, who leave Australia indefinitely, to either withdraw their superannuation benefits on their departure (prior to reaching preservation age) or to move their benefits to a superannuation fund in the other country.

The scheme would assist Australians and New Zealanders to streamline their financial affairs when they cross the Tasman, consolidate their retirement savings in their country of residence and avoid paying unnecessary fees and charges on multiple accounts held in the two countries.

The scheme may also remove small or inactive accounts, belonging to former members now living in New Zealand, from the Australian superannuation system.

Details of the proposed amendments are set out in the Attachment.

The SIS Act specifies no conditions that need to be met before the power to make the proposed Regulation may be exercised.

The proposed Regulation would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The proposed Regulation would commence on the day the Arrangement between the Australian and New Zealand Governments on Trans-Tasman Retirement Savings Portability comes into force.

The Minute recommends that the Regulation be made in the form proposed.

Authority: Subsection 353(1) of the
Superannuation Industry (Supervision) Act 1993

ATTACHMENT**Details of the *Superannuation Industry (Supervision) Amendment Regulation 2013 (No.)***

Section 1 will specify that the name of the Regulation is the *Superannuation Industry (Supervision) Amendment Regulation 2013 (No.)*.

Section 2 will provide that the Regulation will commence on the day the Arrangement between the Government of Australia and the Government of New Zealand on Trans-Tasman Retirement Savings Portability, signed at Brisbane on 16 July 2009, comes into force for Australia.

Section 3 will provide that the Regulation is made under the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

Section 4 will provide that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 Amendments

Item 1 would insert Part 12A into the SIS Regulations.

Part 12A of the SIS Regulations would prescribe the operating details of the trans-Tasman retirement savings portability scheme.

The scheme is given effect by section 312-5 of the ITAA 1997.

The Arrangement

Australians and New Zealanders may travel freely across the Tasman Sea and can live and work in either country. New Zealanders living in Australia can contribute to Australian superannuation funds, while Australians living in New Zealand can contribute to KiwiSaver schemes.

On 16 July 2009, the Australian Treasurer and the New Zealand Minister of Finance signed an Arrangement between the Government of Australia and the Government of New Zealand on Trans-Tasman Retirement Savings Portability (the Arrangement). The Arrangement establishes a scheme to enable Australians and New Zealanders to transfer their retirement savings when they move between Australia and New Zealand, while preserving the integrity of the retirement savings systems of both countries.

The operating details of the scheme are outlined in the Arrangement and include:

- individuals may move their retirement savings between an Australian complying superannuation fund and a New Zealand KiwiSaver scheme;
- Australian retirement savings from an Australian untaxed source, or an Australian defined benefit scheme, cannot be transferred to a KiwiSaver scheme;

- the portability arrangements are voluntary for individuals to transfer their retirement savings, and are also voluntary for funds or schemes to accept transferred retirement savings;
- transferred retirement savings are generally subject to the rules of the host country, with limited and specified exceptions (see below);
- transferred savings must be separately identifiable within the account established in the host country, to allow the application of certain source country rules;
- any decrements to retirement savings balances are first applied to host country retirement savings, before being applied to retirement savings transferred from the source country; and
- New Zealand-sourced retirement savings transferred to Australia are subject to Australia's non-concessional contributions cap arrangements on their initial entry into the Australian superannuation system.

Under the Arrangement, New Zealand-sourced retirement savings held in Australian superannuation funds:

- may only be transferred to and held in complying superannuation funds that are regulated by the Australian Prudential Regulation Authority (APRA);
- may not be transferred to or held in self-managed superannuation funds;
- may not be transferred to a third country; and
- may not be accessed under the conditions of release for retirement or attaining preservation age, defined in the SIS Regulations, but must be preserved until the member reaches the qualification age for New Zealand superannuation, defined in the *New Zealand Superannuation and Retirement Income Act 2001*, currently age 65.

Australian-sourced retirement savings held in KiwiSaver schemes:

- may not be withdrawn to purchase a first home;
- may be accessed when the individual reaches age 60 and satisfies the Australian definition of retirement at that age; and
- may not be transferred to a third country.

The scheme is intended to apply to individuals who migrate between the two countries and intend to stay indefinitely or permanently in the host country.

For example, individuals with retirement savings in an Australian superannuation fund would be able to transfer their benefits to a New Zealand KiwiSaver scheme when they move to New Zealand. Similarly, individuals in New Zealand who hold retirement savings in a KiwiSaver scheme would be able to transfer those savings to an Australian superannuation fund when they move to Australia.

For the purposes of this Explanatory Memorandum, 'retirement savings' refers to savings held in a KiwiSaver scheme or an Australian complying superannuation fund, including individual, employer and government contributions. 'Source country' means the country in which an individual's retirement savings were first

held. ‘Host country’ means the country to which an individual’s retirement savings are transferred.

Structure of Part 12A

Proposed Part 12A is divided into four Divisions.

Division 1 sets out the purpose and application of Part 12A, relevant definitions and the payments, interests and superannuation entities to which the trans-Tasman retirement savings portability scheme applies.

Division 2 provides that New Zealand-sourced amounts in Australian superannuation funds are subject to the preliminary matters of Part 1, the benefit protection standards of Part 5, the payments standards of Part 6 and the contribution and benefit accrual standards of Part 7 of the SIS Regulations. The application of these Parts to New Zealand-sourced amounts is modified to the extent necessary to implement the Arrangement.

Division 3 contains regulations about the payment of benefits in Australian superannuation funds to KiwiSaver schemes.

Division 4 prescribes the conditions of release for New Zealand-sourced amounts in Australian superannuation funds.

Division 1 – General

Purpose and application of Part 12A

Proposed **regulation 12A.01** sets out the purpose and application of Part 12A.

The purpose of Part 12A is to implement the Arrangement between the Governments of Australia and New Zealand for trans-Tasman retirement savings portability, signed in 2009.

Part 12A applies from the day the Arrangement comes into force for Australia.

The Arrangement would come into force on the first day of the second month following the month in which the two Governments have exchanged notes informing each other that their respective constitutional or legislative matters necessary to give effect to the Arrangement have been fulfilled. The Minister will announce when the Arrangement comes into force for Australia by notice in the Gazette.

Note 1 to the regulation indicates that the Arrangement does not cover all complying superannuation funds.

Note 2 to the regulation outlines the payments to which Part 12A applies. The regulations would apply to amounts received by an Australian complying superannuation fund from a KiwiSaver scheme, and to superannuation benefits paid to a KiwiSaver scheme from a complying superannuation fund, on or after the day the Arrangement comes into force for Australia.

Note 3 to the regulation refers to Division 312 of the ITAA 1997, which provides for the taxation treatment of retirement savings transferred under the scheme.

Definitions

Proposed **regulation 12A.02** would prescribe the relevant definitions for the scheme.

The ‘*Arrangement*’ means the agreement signed by the two Governments in 2009 to establish the trans-Tasman retirement savings portability scheme.

‘*KiwiSaver scheme*’ and ‘*KiwiSaver scheme provider*’ are defined in subsection 995-1(1) of the ITAA 1997 and have the meanings given by the *KiwiSaver Act 2006* of New Zealand. KiwiSaver schemes were established in New Zealand in 2007 to help scheme members save for their retirement.

An ‘*Australian-sourced amount*’ is an amount first held in a complying superannuation fund, subsequently paid to a KiwiSaver scheme under the scheme and identified as such by the provider of the receiving KiwiSaver scheme.

Similarly, a ‘*New Zealand-sourced amount*’ is an amount first held in a KiwiSaver scheme, subsequently paid to a complying superannuation fund under the scheme and identified as such by the receiving fund’s trustee.

The separate identification of source country amounts in the host country fund or scheme is required by the Arrangement to allow the source country’s rules to be applied to the retirement savings that are transferred to the host country (in limited and specified circumstances).

Retirement savings may move between Australia and New Zealand on multiple occasions. It is likely that retirement savings moved more than once will contain both Australian-sourced and New Zealand-sourced amounts.

A ‘*returning New Zealand-sourced amount*’ is a New Zealand-sourced amount that was paid from a complying superannuation fund to a KiwiSaver scheme, and later received again by a complying superannuation fund (either the same fund or a different fund).

The effect of this definition is that a returning New Zealand-sourced amount is always a New Zealand-sourced amount as defined. A New Zealand-sourced amount becomes a ‘returning New Zealand-sourced amount’ when it re-enters the Australian superannuation system for the second (or subsequent) time.

A ‘*tax free component of an Australian-sourced amount*’ is an Australian-sourced amount that previously formed part of the tax free component of the member’s former superannuation benefits in a complying superannuation fund before being paid to a KiwiSaver scheme.

Superannuation entities, payments and interests

Proposed **regulation 12A.03** would prescribe the payments, interests and superannuation entities that are included in, or excluded from, the scheme, consistent with the terms of the Arrangement.

Part 12A would apply to payments made between an Australian complying superannuation fund and a New Zealand KiwiSaver scheme (proposed *subregulation 12A.03(1)*).

A complying superannuation fund is defined in section 42 of the SIS Act, and a KiwiSaver scheme is defined in section 995-1(1) of the ITAA 1997.

Part 12A would not apply to payments from KiwiSaver schemes to Australian superannuation entities that are not complying superannuation funds, for example, retirement savings accounts or approved deposit funds, as these entities have not been included in the Arrangement. Similarly, Part 12A would not apply to payments from Australian complying superannuation funds to New Zealand retirement savings entities other than KiwiSaver schemes.

Certain interests and Australian superannuation entities are excluded from the scheme (proposed *subregulation 12A.03(2)*). The scheme does not apply to payments between a KiwiSaver scheme and:

- a defined benefit interest in a defined benefit fund;
- an unfunded public sector superannuation scheme; or
- a self managed superannuation fund.

Certain payments are also excluded from the scheme (proposed *subregulation 12A.03(3)*). The scheme does not apply to:

- payments that contain an element untaxed in the fund; or
- benefits that are paid as a pension.

The effect of proposed subregulations 12A.03(2) and (3) is that, broadly, superannuation benefits held in an accumulation interest in an APRA-regulated complying superannuation fund may be paid to a KiwiSaver scheme.

Members of entities, or with interests, that are excluded from the scheme and who wish to move their retirement savings to a KiwiSaver scheme may, subject to the rules of the entity, roll over or transfer their benefits to an APRA-regulated complying superannuation fund before moving them to a KiwiSaver scheme.

Some defined benefit funds permit their members to hold an accumulation interest in connection with their defined benefit interest in the fund. While this regulation would not prevent the member from moving their accumulation interest to a KiwiSaver scheme, the fund rules in respect of the accumulation interest may not permit such a payment.

This regulation would not prevent members currently receiving a pension from commuting the pension, subject to the fund rules, and then moving their benefits to a KiwiSaver scheme.

Division 2 – New Zealand-sourced amounts

Proposed **regulation 12A.04** would prescribe the application of Division 2.

Division 2 applies to a New Zealand-sourced amount received by a complying superannuation fund from a KiwiSaver scheme, and to the treatment of the New Zealand-sourced amount held in a complying superannuation fund.

Under the proposed regulations of Division 2, a New Zealand-sourced amount in a complying superannuation fund would be subject to the following Parts of the SIS Regulations:

- preliminary matters in Part 1;
- the benefit protection standards of Part 5;
- the payments standards of Part 6; and
- the contribution and benefit accrual standards of Part 7.

Division 2 is consistent with the terms of the Arrangement, which provides that retirement savings transferred between Australia and New Zealand are generally subject to the rules of the host country, with limited and specified exceptions.

The Explanatory Memorandum will explain the proposed regulations of Division 2 in the following order:

- amounts received from a KiwiSaver scheme (Part 7 of the SIS Regulations);
- treatment of a New Zealand sourced-amount held in a complying superannuation fund (Parts 1 and 5 of the SIS Regulations); and
- payment of benefits from a complying superannuation fund (Part 6 of the SIS Regulations).

Amounts received from a KiwiSaver scheme

Proposed **regulation 12A.08** would prescribe that the contribution and benefit accrual standards of Part 7 of the SIS Regulations apply in relation to amounts received by a complying superannuation fund from a KiwiSaver scheme, as affected by this regulation.

Under the Arrangement, it is voluntary for a KiwiSaver scheme member who migrates to Australia to move their retirement savings to an Australian superannuation fund, and for a complying superannuation fund to accept a contribution from a KiwiSaver scheme.

A KiwiSaver scheme member who chooses to contribute their retirement savings to a complying superannuation fund may first wish to confirm with the receiving fund that their contribution will be accepted.

For income tax purposes, an amount received from a KiwiSaver scheme is a non-concessional contribution (subsection 312-10(1) ITAA 1997), consistent with the terms of the Arrangement, that New Zealand-sourced amounts are subject to the non-concessional contributions cap arrangements on their initial entry into the Australian superannuation system.

Contribution and benefit accrual standards

The contribution and benefit accrual standards of Part 7 of the SIS Regulations, as affected by this regulation, apply to an amount received by a complying superannuation fund from a KiwiSaver scheme (proposed *subregulation 12A.08(1)*).

The effect of this subregulation is that Regulation 7.04 of the SIS Regulations applies to an amount received by a complying superannuation fund from a KiwiSaver scheme.

Regulation 7.04 prescribes conditions for accepting contributions, including:

- the member must satisfy the age and work tests;
 - a member aged under 65 is not subject to the work test and may contribute up to a maximum of three times the amount of the non-concessional contributions cap, currently \$450,000;
 - a member aged 65 or over is subject to the work test and may contribute up to a maximum of the non-concessional contributions cap, currently \$150,000;
- the member's Australian tax file number (TFN) must be quoted to the fund; and
- the contribution must not exceed the non-concessional contributions cap.

The treatment of an amount received from a KiwiSaver scheme is consistent with the treatment of contributions from Australian members and from members of foreign superannuation funds.

If the member does not satisfy the age and work tests, or does not provide their TFN to the fund, the fund must return the contribution to the entity or person that paid the amount.

For the purposes of subregulation 7.04(3), an Australian-sourced amount or a returning New Zealand-sourced amount is disregarded if the trustee has received details of these amounts, consistent with subsection 312-10(3) of the ITAA 1997.

If the amount received from the KiwiSaver scheme, less any disregarded amounts, exceeds the relevant non-concessional contributions cap (depending on the member's age), the fund must return the whole amount to the KiwiSaver scheme (proposed *subregulation 12A.08(6)*). This provision provides consistency with New Zealand law, which does not permit the partial transfer of retirement savings from a KiwiSaver scheme to an Australian complying superannuation fund.

Additional information

A trustee of the receiving complying superannuation fund may request additional information before accepting a contribution from a KiwiSaver scheme (proposed *subregulation 12A.08(2)*).

Details about the New Zealand-sourced amount and any Australian-sourced amount included in the contribution may be requested under proposed *subparagraph 12A.08(2)(a)(i)*. In most cases the contribution would consist wholly of a New Zealand-sourced amount.

As retirement savings may move between Australia and New Zealand on multiple occasions, it is likely that retirement savings moved more than once will contain both Australian-sourced and New Zealand-sourced amounts. The information that may be requested under proposed *subparagraphs 12A.08(2)(a)(ii) – (iii)* relates to an Australian sourced amount included in the contribution, and includes details about:

- whether a New Zealand sourced amount or Australian-sourced amount forms part of the amount to be received;
- whether an Australian-sourced amount includes a tax free component; and

- whether an Australian-sourced amount includes restricted non-preserved benefits or unrestricted non-preserved benefits.

The additional information that may be requested under this subparagraph is consistent with subsections 312-10(3) and (6) of the ITAA 1997 and ensures appropriate tax treatment for an Australian-sourced amount and a returning New Zealand-sourced amount re-entering the Australian superannuation system.

On their re-entry into the Australian superannuation system:

- an Australian-sourced amount and a returning New Zealand-sourced amount are disregarded for the purposes of the excess non-concessional contributions tax (Subdivision 292-C ITAA 1997);
- a tax free component of an Australian-sourced amount will retain that status; and
- restricted non-preserved benefits or unrestricted non-preserved benefits of an Australian-sourced amount will retain their status.

The trustee may also request any other information that is reasonably required to accept the contribution from the KiwiSaver scheme (proposed *subparagraph 12A.08(2)(a)(iv)*).

The additional information may be provided to the receiving trustee by either the KiwiSaver scheme provider or by the member (proposed *paragraph 12A.08(2)(b)*). The information may be obtained from the statement originally provided to the KiwiSaver scheme provider and the member when the Australian-sourced amount or the New Zealand-sourced amount was previously paid to the KiwiSaver scheme provider. The statement would have been provided under section 390-12 of the ITAA 1997.

Where the additional information is provided, it must be given to the receiving trustee at or before the time the trustee accepts the contribution from the KiwiSaver scheme (proposed *paragraph 12A.08(2)(c)*).

The receiving trustee may accept the amount from the KiwiSaver scheme without the additional information. Consequently, if the contribution includes an Australian-sourced amount or a returning New Zealand-sourced amount and the information is not provided, the entire amount is treated as a non-concessional contribution for the purposes of the excess non-concessional contributions tax, an Australian-sourced amount is included in the taxable component of the member's interest and is treated as a preserved benefit.

Separate identification of New Zealand-sourced amount

A trustee of a complying superannuation fund must administer a member's benefits that include a New Zealand-sourced amount in a way that allows the trustee to separately identify the New Zealand-sourced amount at all times (proposed *subregulation 12A.08(3)*).

The effect of this subregulation is the trustee of the receiving fund must be able to separately identify the New Zealand-sourced amount when it is first received by the

fund from the KiwiSaver scheme, and maintain that separate identification while the New Zealand-sourced amount is held in the fund.

This subregulation is consistent with the terms of the Arrangement, which provide that transferred retirement savings must be separately identifiable within the account established in the host country, to allow the application of certain source country rules.

For example, a New Zealand-sourced amount may not be accessed under the conditions of release for retirement or attaining preservation age, as defined in the SIS Regulations.

The same obligation to separately identify a New Zealand-sourced amount held in a complying superannuation fund also applies under the benefit protection standards (*subregulation 12A.06(3)*) and the payment standards (*subregulation 12A.07(4)*).

No obligation to receive amount

A trustee of a complying superannuation fund is not required, in any circumstances, to accept an amount from a KiwiSaver scheme (proposed *paragraph 12A.08(4)*).

This is consistent with the terms of the Arrangement, which provide that arrangements to enhance portability will be voluntary for providers as to whether they will accept transferred retirement savings. This applies to funds receiving a New Zealand-sourced amount directly from a KiwiSaver scheme, as well as to funds receiving a New Zealand-sourced amount from another complying superannuation fund under the portability provisions of Division 6.5 of the SIS Regulations.

Contributions to a MySuper product from a KiwiSaver scheme

Paragraphs 29TC(1)(f) and 29TC(3)(a) of the SIS Act, taken together, permit the governing rules of a superannuation fund to place limitations on the source or kind of contributions to a MySuper product, if those limitations are of a prescribed kind.

Proposed regulation 9.48 of the SIS Regulations would allow funds to limit contributions where the contribution is a transfer from a foreign superannuation fund. This is designed to ensure consistency with other legislative arrangements under which funds can choose not to accept transfers from certain foreign superannuation funds.

Contributions

Proposed *paragraph 12A.08(5)* clarifies that an amount received by a complying superannuation fund from a KiwiSaver scheme is treated as a contribution as defined in the SIS Regulations (*subregulation 1.03(1)(1)* of the SIS Regulations) and a member contribution.

Proposed *paragraph 12A.08(7)* clarifies that a returning New-Zealand sourced amount received by a complying superannuation fund and an Australian-sourced amount received by a complying superannuation fund from a KiwiSaver scheme (i.e. the trustee has received details of these amounts from the member or transferring provider) is not treated as a fund-capped contribution.

Treatment of a New Zealand-sourced amount in a complying superannuation fund

Proposed **regulation 12A.05** would prescribe that the preliminary matters of Part 1 of the SIS Regulations apply in relation to a New Zealand-sourced amount received by a complying superannuation fund from a KiwiSaver scheme. The application of Part 1 is modified to the extent necessary to implement the Arrangement.

Part 1 of the SIS Regulations includes definitions used in the SIS Regulations.

Benefit protection standards

Proposed **regulation 12A.06** would prescribe that the benefit protection standards of Part 5 of the SIS Regulations apply in relation to a New Zealand-sourced amount, as affected by this regulation.

The benefit protection standards of Part 5 of the SIS Regulations apply to a New Zealand-sourced amount received by a complying superannuation fund from a KiwiSaver scheme, and to the treatment of a New Zealand-sourced amount held in a complying superannuation fund (*proposed subregulation 12A.06(1)*).

The standards apply regardless of whether the New Zealand-sourced amount was received directly from a KiwiSaver scheme, or was received after being rolled over or transferred from another complying superannuation fund.

Reduction of amount of interest

Proposed *subregulation 12A.06(2)* applies where a member's benefits that include a New Zealand-sourced amount is reduced. For example, a member's benefits may be reduced under Part 5 of the SIS Regulations by costs charged by the fund against the member's benefits, or by investment losses debited to the member's benefits.

Any reduction in the member's benefits must be first deducted from the member's Australian savings. If the full amount of the reduction cannot be deducted from the member's Australian savings, the balance is then deducted from the New Zealand sourced amount.

The same obligation to reduce a member's benefits by first deducting the amount from the member's Australian savings also applies to reductions in a member's benefits under the payment standards (*subregulation 12A.07(7)*).

Subregulations 12A.06(2) and 12A.07(7) are consistent with the terms of the Arrangement, which provide that any decrements to retirement savings balances are first applied to host country retirement savings, before being applied to retirement savings received from the source country.

Separate identification of a New Zealand-sourced amount

A trustee of a complying superannuation fund must be able to separately identify a New Zealand-sourced amount held in the fund at all times (*proposed subregulation 12A.06(3)*).

Minimum benefits

A New Zealand-sourced amount in a complying superannuation fund is treated as a minimum benefit in the same way as other amounts in the fund are treated as minimum benefits (*proposed subregulation 12A.06(4)*).

Payment of benefits from a complying superannuation fund

Proposed **regulation 12A.07** would prescribe that the payment standards of Part 6 of the SIS Regulations apply in relation to an amount received from a KiwiSaver

scheme into the Australian superannuation system, and also in relation to an amount to be paid to a KiwiSaver scheme, as affected by this regulation.

Payment standards

The payment standards of Part 6 of the SIS Regulations apply in relation to the payment of an amount from a complying superannuation fund in two circumstances (proposed *subregulation 12A.07(1)*):

- the rollover or transfer of a member’s benefits that include a New Zealand sourced amount to another complying superannuation fund (portability); and
- the payment of a member’s benefits to a KiwiSaver scheme.

Portability

Paragraph 12A.07(1)(a) applies to an amount received by a complying superannuation fund from a KiwiSaver scheme.

The effect of this paragraph is that the portability provisions of Division 6.5 of the SIS Regulations apply to a New Zealand-sourced amount. A member may request the rollover or transfer of their benefit that includes a New Zealand-sourced amount from one complying superannuation fund to another complying superannuation fund.

This paragraph is consistent with the terms of the Arrangement, which provide that transferred retirement savings are generally subject to host country rules.

No payments to self managed superannuation funds

The rollover or transfer of a New Zealand-sourced amount from a complying APRA-regulated superannuation fund to a self managed superannuation fund is not permitted (proposed *subregulation 12A.07(2)*).

Subregulation 12A.07(2) is consistent with the terms of the Arrangement, which provide that New Zealand-sourced retirement savings may not be transferred to, or held in, Australian self managed superannuation funds.

The prohibition on rollovers or transfers of a New Zealand-sourced amount to a self managed superannuation fund is a specified circumstance where source country rules apply to retirement savings held in the host country. It aligns the treatment of New Zealand-sourced retirement savings held offshore with their treatment in New Zealand.

No obligation to receive amount

A trustee of a complying superannuation fund is not required, in any circumstances, to receive a New Zealand amount that is rolled over or transferred from another complying superannuation fund (proposed *paragraph 12A.07(3)*).

This subregulation is consistent with the terms of the Arrangement, which provide that arrangements to enhance portability will be voluntary for providers as to whether they will accept transferred retirement savings. This applies to funds receiving a

New Zealand-sourced amount from another complying superannuation fund under the portability provisions of Division 6.5 of the SIS Regulations, as well as to funds receiving a New Zealand-sourced amount directly from a KiwiSaver scheme.

The trustee of the transferring fund may refuse to roll over or transfer a member's benefits that include a New Zealand-sourced amount if the trustee of the receiving fund will not accept the New Zealand-sourced amount, under paragraph 6.35(1)(a) of the SIS Regulations.

In this situation, the member may either roll over or transfer part of their benefits (i.e. amounts other than the New Zealand-sourced amount), or roll over or transfer the whole of their benefits to a complying superannuation fund which will accept the New Zealand-sourced amount.

Separate identification of a New Zealand-sourced amount

A trustee of a complying superannuation fund which receives a New Zealand-sourced amount that is rolled over or transferred from another complying superannuation fund must be able to separately identify the New Zealand-sourced amount at all times (proposed *subregulation 12A.07(4)*).

Application of data and payment regulations

The superannuation data and payment matters prescribed in regulations 6.32 to 6.34 of the SIS Regulations apply to a member's request to roll over or transfer their benefits between regulated superannuation funds. As a KiwiSaver scheme is not a regulated superannuation fund, the data and payment standards do not apply to amounts received by a complying superannuation fund from a KiwiSaver scheme, or to payments from a complying superannuation fund to a KiwiSaver scheme.

The data and payment matters do, however, apply to member requests to roll over or transfer benefits that include a New Zealand-sourced amount between complying superannuation funds. If the rollover or transfer of benefits that include a New Zealand-sourced amount cannot be made in the standard timeframe of three days, the trustee of the transferring fund must rollover or transfer the amount within 30 business days under *subregulation 6.34A(3)*.

Payment of an amount to a KiwiSaver scheme

Paragraph 12A.07(1)(b) applies to an amount to be paid from a complying superannuation fund to a KiwiSaver scheme. The effect of this paragraph is to permit the payment of a member's benefits to a KiwiSaver scheme. The operating details of making the payment are dealt with under Division 3 of Part 12A.

Condition of release

Proposed *subregulation 12A.07(5)* prescribes a condition of release for the payment of benefits to a KiwiSaver scheme. A member's preserved benefits may only be cashed on meeting a condition of release.

Under this subregulation:

- payment of an amount from a complying superannuation fund to a KiwiSaver scheme is a condition of release;
- the condition has a nil cashing restriction; and
- the condition is taken to have been satisfied.

Reduction of amount of benefits

Proposed *subregulation 12A.07(7)* applies where a member's benefits that include a New Zealand-sourced amount is reduced. For example, a member's benefits may be reduced under Part 6 of the SIS Regulations if the member satisfies a condition of release with a cashing restriction, such as release of benefits on compassionate grounds.

Any reduction in the member's benefits must be first deducted from the member's Australian savings. If the full amount of the reduction cannot be deducted from the member's Australian savings, the balance is then deducted from the New Zealand-sourced amount.

Division 6.7 (spouse contributions-splitting amounts)

Division 6.7 of the SIS Regulations, which permits a member of a superannuation fund to split certain contributions with their spouse, would not apply to a New Zealand-sourced amount, consistent with the terms of the Arrangement (proposed *subregulation 12A.07(6)*).

As a result, a New Zealand-sourced amount cannot be split with a member's spouse under this Division, consistent with the regulations that prevent the splitting of a lump sum paid from a foreign superannuation fund (paragraph 6.41(2)(c) of the SIS Regulations).

Preserved benefit

A New Zealand-sourced amount received by a complying superannuation fund is treated as a preserved benefit in the same way as other amounts in the fund are treated as preserved benefits (proposed *subregulation 12A.07(8)*).

This subregulation would apply whether the New Zealand-sourced amount is received directly from a KiwiSaver scheme or is included in benefits rolled over or transferred from another complying superannuation fund. That is, a member's preserved benefits in a fund include the New Zealand-sourced amount.

Other matters

The Arrangement specifies that New Zealand retirement savings held in an Australian complying superannuation fund may not be transferred to a third country. As the SIS Regulations do not permit the transfer of benefits to any other country, a regulation to prevent such a transfer is not required.

The Arrangement specifies that a New Zealand-sourced amount held in a complying superannuation fund may not be withdrawn to purchase a first home in Australia. As the SIS Regulations do not permit a withdrawal of benefits to purchase a home, a regulation to prevent such a withdrawal is not required.

Division 3 – Payment of amount to a KiwiSaver scheme

Proposed **regulation 12A.09** would prescribe that Division 3 applies to a payment made by a complying superannuation fund to a KiwiSaver scheme.

Under the Arrangement, it is voluntary for a member of a complying superannuation fund who emigrates to New Zealand to move their retirement savings to a KiwiSaver scheme, and for a KiwiSaver scheme to accept the benefits from the complying superannuation fund.

A fund member who chooses to move their benefits to a KiwiSaver scheme may first wish to confirm with the receiving scheme that their benefits will be accepted.

The member may also wish to consider, or seek advice about, the consequences of moving their benefits from a complying superannuation fund to a KiwiSaver scheme. Such consequences could include exit fees charged by the transferring fund, loss of insurance entitlements, and different tax rates applying to retirement savings in the KiwiSaver scheme.

Payment

Proposed *subregulation 12A.10(1)* would prescribe that the application of the SIS Regulations is modified to the extent necessary to ensure that the Regulations do not prevent the payment of an amount from a complying superannuation fund to a KiwiSaver scheme under this regulation.

Payment of the whole of withdrawal benefit

The trustee must pay the whole of the member’s withdrawal benefit to the KiwiSaver scheme. Payment of part of the member’s withdrawal benefit to the KiwiSaver is not permitted in any circumstances (proposed *regulation 12A.10(2)*).

This subregulation supports Australians who move to New Zealand to consolidate their retirement savings in their country of residence, and avoid paying fees and charges on multiple accounts in two countries. It is also consistent with New Zealand legislation that requires a KiwiSaver member to pay the whole of their retirement savings to a complying superannuation scheme on their emigration to Australia.

Information

A trustee of a complying superannuation fund must not pay an amount to a KiwiSaver scheme, unless the trustee is satisfied about certain matters (proposed *subregulation 12A.10(3)*). As the member’s benefits are leaving the Australian superannuation system and are being sent overseas, it is important the trustee is satisfied that all requirements have been met.

The trustee must be satisfied that:

- the member has emigrated permanently to New Zealand;
- the member has given the trustee a statutory declaration stating that they have permanently emigrated, and has provided the trustee with proof of residence at an address in New Zealand;
- the member has requested and consented to the payment of the whole of their withdrawal benefits to a KiwiSaver scheme;
- the whole of the member’s withdrawal benefits is able to be paid to a KiwiSaver scheme and the amount is able to be paid within 30 days;
- the member has opened a KiwiSaver scheme account;
- the member has given the trustee the KiwiSaver scheme’s name and account number to which the benefits are to be paid; and
- the KiwiSaver scheme provider will accept the payment.

Paragraphs 12A.10(3)(a)-(b) are intended to ensure that only benefits of members who intend to remain permanently or indefinitely in New Zealand are paid to a KiwiSaver scheme. The regulations do not apply to benefits of individuals on holidays, backpackers or on short-term stays in New Zealand. However, the regulations are not intended to prevent individuals from returning to Australia at some time in the future should their circumstances change.

An effect of these paragraphs is the member must have migrated to New Zealand before the payment of their benefits to a KiwiSaver scheme. A member’s benefits cannot be paid to a KiwiSaver scheme before they have left Australia, consistent with KiwiSaver scheme rules.

Proposed *paragraph 12A.10(3)(c)* requires the member to have requested and consented to the payment of their benefits to a KiwiSaver scheme before the benefits are paid.

Proposed *paragraph 12A.10(3)(d)* requires the trustee to be satisfied that the whole of the member’s withdrawal benefits is able to be paid to a KiwiSaver scheme and the amount is able to be paid within 30 days.

This paragraph is also intended to ensure there are no impediments to the payment of the member’s benefits to a KiwiSaver scheme. Such impediments could include illiquid investments in the member’s benefits, or a suspension or variation of the obligation to pay the amounts to the KiwiSaver by APRA.

The trustee may require the verification of documents, other evidence or information by oath or statutory declaration (proposed *subregulation 12A.10(4)*).

KiwiSaver scheme membership

Proposed *paragraphs 12A.10(3)(e)-(g)* require the trustee to be satisfied that the member has opened a KiwiSaver scheme account, the trustee has received the scheme and account details necessary to make the payment and the KiwiSaver scheme provider will accept the payment.

The *KiwiSaver Act 2006* sets out who is eligible to be a KiwiSaver scheme member. Membership of a KiwiSaver scheme is voluntary. An individual can join a KiwiSaver scheme if the individual:

- is entitled to live in New Zealand indefinitely; and
- is below the qualification age for New Zealand superannuation, currently 65; and
- is personally present in New Zealand at the time of enrolment in the scheme.

Broadly, Australian citizens and Australian permanent residents are entitled to live in New Zealand indefinitely and can become members of a KiwiSaver scheme. Individuals who hold temporary, visitor or student permits cannot.

Enrolment in a KiwiSaver scheme is automatic on commencing permanent employment in New Zealand, although a member may opt out. Individuals who are not employed may opt in. Individuals employed on a temporary contract for less than 28 days cannot join a KiwiSaver scheme.

Division 4 Conditions of release of benefits

Proposed **regulation 12A.11** would prescribe that Division 4 applies in relation to a New Zealand-sourced amount in a complying superannuation fund. Division 4 would prescribe the conditions of release that apply to a New Zealand-sourced amount in a complying superannuation fund.

Conditions of release

Schedule 1 of the SIS Regulations, as affected by this regulation, applies to a New Zealand-sourced amount held in a complying superannuation fund in the same way it would apply to other amounts in the fund (proposed *subregulation 12A.12(1)*).

The effect of this subregulation is that the conditions of release listed in Schedule 1 of the SIS Regulations generally apply to a New Zealand sourced amount held in a complying superannuation fund in the same way they apply to other amounts in the fund, with some exceptions.

For example, members may withdraw a New Zealand-sourced amount prior to reaching the qualification age for New Zealand superannuation, on meeting a condition of release such as terminal medical condition, permanent incapacity or on compassionate grounds (items 102A, 103 and 107 of Schedule 1 to the SIS Regulations respectively).

Some conditions of release will not apply to a New Zealand-sourced amount due to the operation of the SIS Regulations or of other legislation. For example, New Zealand citizens are excluded from the condition of release for departing temporary residents under regulation 6.20A of the SIS Regulations (item 103A of Schedule 1 to the SIS Regulations).

Proposed *paragraph 12A.12(2)(a)* provides that a New Zealand-sourced amount cannot be withdrawn when the member satisfies the condition of release for retirement or when the member attains preservation age, currently between 55 and 60

years of age, depending on the member's date of birth (items 101 and items 110 respectively of Schedule 1 to the SIS Regulations).

Proposed *regulation 12A.12(2)(b)* is consistent with the terms of the Arrangement, that New Zealand retirement savings held in an Australian complying superannuation fund will not be able to be accessed under the retirement or attaining preservation age conditions of release, as defined in the Australian SIS Regulations, until the age of retirement as defined in the *New Zealand Superannuation and Retirement Income Act 2001*.