

## NEWSLETTER NO. 58: MAY 2004

This Newsletter contains:

1. SUPERANNUATION SCHEMES AMENDMENT ACT 2004
2. SECURITIES AMENDMENT ACT 2004

### 1. Superannuation Schemes Amendment Act 2004

The Amendment Act came into force on 15 April 2004. There are a number of changes to the Superannuation Schemes Act 1989 which will affect Trustees who are preparing 2004 trustee reports. I have offered some comment as to how we see the changes operating; however we appreciate feedback.

#### Changes to Annual Reports

The Second Schedule to the Act has been amended to allow abridged annual accounts to be included in the Annual Report provided the full annual accounts' audit report is unqualified.

Where abridged accounts are included, those abridged accounts must be prepared in accordance with generally accepted accounting practice and include a report from the auditor to the effect that the abridged accounts have been correctly extracted and the information reported in the financial summary is consistent in all material respects with the annual accounts.

For those schemes where a section 13(2) certificate is relied on, the Auditor of the administration manager must have provided a "certificate" to the effect that "As Auditors we certify that adequate accounting systems, records, and methods of internal control are in place to ensure that the abridged accounts prepared by [the Administration Manager] in respect of each scheme fully managed by [that manager] correctly present each scheme's financial affairs."

The trustee report must clearly state that abridged accounts are included if that is the case and where, at no cost, a member may obtain a copy of the full annual accounts.

Paragraph (f) of the Second Schedule has been amended to enable trustees to certify whether the market value of the assets of the scheme at the close of the financial year *equalled or exceeded* the total value of benefits that would have been payable had all members of the scheme ceased to be members at that date and had provision been made for the continued payment of all benefits being paid to members and other beneficiaries as at the close of the financial year.

Trustee reports are now also required to provide the following additional information:

Paragraph (l) requires the names of, and any changes to, the directors of any corporate trustee since the last annual report;

Paragraph (m) requires, that if any benefits payable from the scheme are based on the investment returns of the scheme assets, a statement of the crediting rate or rates applied during the year; and

Paragraph (n) requires the registration date of the most recent prospectus for the scheme if a prospectus is required by the Securities Act 1978.

Section 14(3) now requires the trustees to supply a copy of the full audited accounts to the Government Actuary if the annual report contains abridged accounts.

***Comment:** We are taking the view that these changes will apply to Annual Reports where the audit report is dated after 14 April 2004 (the date the Amendment Act received Royal Assent). We would therefore anticipate that all annual reports whose balance date is on or after 31 March 2004 will include the new requirements.*

*With respect to paragraph (m), we would expect the actual crediting rate or rates which applied to be shown. However for unitised schemes we would expect that the change in unit prices over the period covered by the annual report be provided.*

#### Prospective and existing members' rights to information

A new section 15A has been added to the Act which now gives prospective members rights on request, prior to joining a scheme:

- (a) to look at, at any reasonable time, a copy of the trust deed, or a copy of any report of an actuarial examination required under section 15;
- (b) to receive, upon payment of a reasonable fee, a copy of the trust deed or a copy of any of those reports;
- (c) to receive a statement of the specific interest, mortality, and other assumptions and bases of calculation applied in determining the value of the assets and liabilities of the scheme for the purposes of an actuarial examination required under section 15; and
- (d) to receive a copy of the annual accounts and any auditor's report or, if that report is not required or produced, the certificates required by section 13(2).

An addition to section 17(1) of the Act also gives existing members the additional right, on request, to receive a copy of the annual accounts and any auditor's report or, if that report is not required or produced, the certificates required by section 13(2).

### Receiver or Liquidator

Section 20A has been tightened. Where an employer is in receivership or liquidation and either:

- (a) the receiver or liquidator is designated or appointed as a trustee of a relevant superannuation scheme; or
- (b) before the appointment of the receiver or liquidator, the employer had the power to appoint a trustee of a relevant superannuation scheme,

the receiver or liquidator must at all times be satisfied that at least one of the trustees of the relevant superannuation scheme is an independent person. If the receiver or liquidator is not satisfied, the receiver or liquidator must designate or appoint an independent person as trustee of the scheme.

A “relevant superannuation scheme” in this context is one:

- (a) to which the employer has contributed in respect of the employees of the employer who are members of the scheme; or
- (b) for which the employer has paid any of the administration costs in respect of the employees of the employer who are members of the scheme.

### Winding up of registered schemes

Section 21 now requires the trustees to prepare final accounts within 5 months of the date at which a scheme is wound up, and the members and the Government Actuary must receive a copy of the audited accounts (together with the advice as to how the assets are to be distributed) within 28 days of the audit being completed. A new section 21 (1A) has been introduced giving me the power to extend the time periods now specified in the Act.

***Comment:** This amendment brings into line from a timing perspective the requirement to provide members with timely accounting information. I also remind trustees that members are required to receive a copy of the accounts and advice as to how the assets are to be distributed prior to the actual distribution. Except in exceptional circumstances, I would not expect to need to extend the timeframes specified in the legislation.*

## **2. Securities Amendment Act 2004**

I would also like to draw to your attention the changes to the Securities Act 1978 which affect employer superannuation schemes’ prospectus requirements. These also took effect on 15 April 2004.

The Securities Act has been amended to make an exemption from the requirement to prepare and file a prospectus under the Securities Act, as a condition of admitting new members, potentially available to many employer-based schemes subject to complying with certain conditions. Previously, a prospectus exemption was only available to a “small employer superannuation scheme” as defined.

The exemption is now potentially available only to an “employer superannuation scheme” (as defined). Given the consequences that can arise if trustees improperly place reliance on the exemption (memberships may be invalid, resulting in a requirement to refund contributions with interest) trustees will need to take great care to ensure that any reliance on the new exemption is well-founded and, in particular, that they are correct in concluding that their scheme qualifies as an “employer superannuation scheme”. Legal advice should be obtained in that regard.

In order to qualify for the exemption, an employer superannuation scheme must meet each of the following additional requirements:

- An investment statement must be provided to all prospective members before they join the scheme, incorporating a prescribed “health warning” concerning the non-availability of a prospectus (the wording for this “health warning” now differs from that previously required for small employer superannuation schemes);
- Additional information must be included in the trustee annual report for each financial year during which the exemption is invoked, namely:
  - (i) if any trustee, promoter, or manager of the scheme, or any director of that trustee, promoter, or manager, has, during the 5 years preceding the balance date, been adjudged bankrupt or insolvent, convicted of any crime involving dishonesty, prohibited from acting as a director of a company, or placed in statutory management or receivership, a statement to that effect including the name and any alternative or former name or names of the trustee, promoter, manager, or director concerned;
  - (ii) if more than 10% of the value of the scheme’s assets (calculated in accordance with generally accepted accounting practice) was, at any time during the year preceding the balance date, represented directly or indirectly by any securities that were issued by a trustee, manager or custodian of the scheme (or any associated person of any of them), a description of those securities;
  - (iii) a brief description of any legal proceedings or arbitrations that were pending at the balance date and that may have a material adverse effect on the scheme;
  - (iv) a statement by the trustees (or, if a trustee is a body corporate or unincorporate, by the directors of that body) as to whether, in their opinion, after due enquiry by them, either or both of the following have materially and adversely changed since the balance date:
    - the value of the scheme’s assets relative to its liabilities (including contingent liabilities); and
    - the ability of the scheme to pay its debts as they become due in the normal course of business.

- If requested by a member, the trustees must provide within 5 working days (without fee) a brief description of the investment objectives and policy for the scheme, and of the means by which changes can be made to those objectives and that policy, except to the extent that those matters have already been disclosed in the scheme's investment statement.



David Benison  
Government Actuary

### **Addendum**

A “small employer superannuation scheme” (as previously defined) now requires a prospectus as a condition of admitting new members unless it qualifies as an “employer superannuation scheme” (as now defined) and also complies with the reporting and disclosure requirements outlined above. We understand that ASFONZ and other industry participants have advised the Securities Commission about concerns in this regard, in particular that some previously exempt small employer superannuation schemes may not now be exempt and that there is no transition period. An application is being made for additional exemptions to address those concerns.

We have been advised that the exemption request has been favourably received by Securities Commission representatives, who have agreed to look at a formal application for exemptions as a matter of urgency. In the meantime, small employer superannuation schemes' trustees should consider ceasing to admit any new members until the exemptions sought take effect.