

NEWSLETTER NO. 21 : 21 NOVEMBER 1990

SECTION 9A, SUPERANNUATION SCHEMES ACT 1989

INTRODUCTION

I have had various telephone calls, letters and discussions in relation to the potential impact of Section 9A, which is an implied provision as to alterations to schemes. The wording of the section is as follows -

9A. Implied provision as to alterations to scheme –

There shall be implied in every trust deed of a registered superannuation scheme a provision that no alteration to the scheme that -

- (a) Would be contrary to or have the effect of nullifying or reversing or amending any matter stated in the trust deed, or any provision implied in the trust deed by this Act; or
- (b) Would have the effect of extending or varying or limiting the scope of the trust deed in any material particular –

shall be effected otherwise than by way of amendment to the trust deed in accordance with section 12 of this Act.”

In view of the queries which have been raised with me, it would seem as though I should provide some general circulation of my views on the matters raised in case these may be of assistance. Please note that my views are given in good faith to assist administration, but cannot be regarded as a statement or interpretation of the law.

INITIAL COMMENTS

In my previous Newsletter No.19, paragraph 3.2 indicated my view that section 9A was aimed primarily at matters which are mentioned in the Act.

The Act pays particular attention to members rights and benefits, and to the protection of members rights and benefits. The Act also states the framework for major administration matters (e.g. investment policy, reports to be provided to members). But the Act makes no mention of what can be regarded as "machinery" matters - e.g. the detail as to how the trustees are to carry out their duties. I am not unaware of the fact that trust deeds do commonly contain such "machinery" clauses.

GENERAL COMMENTS - SECTION 9A

It is important to note that section 9A refers to an "alteration to the scheme".

On occasion, that seems to have been overlooked. I also think that, on occasion, that has been over-emphasised.

It has been suggested to me that there are many types of actions which trustees can resolve to take which might have the effect of being regarded as "altering" the scheme in a general sense; and that a strict and literal interpretation of section 9A could impose unnecessarily burdensome requirements on trustees.

I would tend to the views that -

- (1) an overly strict and literal interpretation may not always necessarily be correct; there is possibly some room for professional opinion;
- (2) section 9A should not be read in strict isolation, but should be read in the context of the Act as a whole;
- (3) it may be relevant to consider the background to the enactment of the Superannuation Schemes Amendment Act (No. 2) which inserted section 9A into the Act.

In relation to item (3), I draw your attention to the Minister's Press Statement dated 24 July 1990, a copy of which was enclosed as the first page of Appendix I to my previous Newsletter (No. 19). This Press Statement contained the following paragraphs:

"A change will also be made to ensure that scheme trustees cannot alter the trust deed governing a scheme in a way that avoids the safeguards in the Superannuation Schemes Act.

In particular, the law will be amended to make it clear that any Trustees Resolution which alters the benefits, terms or conditions of a scheme must be expressed in a trust deed amendment which is subject to the provisions of the Act."

EXAMPLES

The preceding paragraphs refer to the general background. It may be of some further assistance to look at specific examples.

(1) *EXPENSES*

The following extracts from an exchange of correspondence may be of interest. I am grateful to those concerned for permitting me to publish this correspondence.

(A) I received a letter, which stated –

“It has been suggested to us by a superannuation provider that the effect of section 9A is that no fee increases can be effected otherwise than in accordance with section 9, in other words that the consent of every member and other beneficiary adversely affected must be obtained. Our view is that if the trust deed provides a mechanism for fee increases, then any increase by way of that mechanism, notwithstanding that a resolution of the trustees to increase the fees is required, is not an “amendment of the trust deed”, so that the written consent of members and beneficiaries is not required under section 9. Our view is that this position is not affected by section 9A, notwithstanding that the trust deed may refer in dollar terms or by a specified percentage to the original fee level.

Section 9A would, however, apply if the trust deed did not provide for any increase in fees and the trustees endeavoured to increase the fees by way of resolution.”

(B) My response was –

“I think that the two cases to be considered are –

Case 1: the trust deed refers to the determination of a fee by reference to -

- (i) a fixed dollar amount, and/or
- (ii) a specified percentage, and/or
- (iii) a specified formula

Case 2: the trust deed contains some non-specific statement regarding the recovery of fees charged to, and/or costs incurred by, trustees.

My view on the above is as follows:

Case 1:

- (a) any alteration (increase or decrease) to the fixed dollar amount, specified percentage, or specified formula (as the case may be) must be made by a deed amendment which is in accordance with the Act. (I note, in passing, that if this did not occur, then members would not receive correct information under section 17(b)(ii) of the Act);
- (b) if the application of a specified percentage or specified formula results in an increase in the amount of the fee, then no deed amendment is required. For example: if the fee is expressed as 5% of contributions, and contributions increase from say \$10,000 to \$20,000, then the fee will increase from \$500 to \$1,000; no deed amendment is required.

Case 2:

The question here is whether "the proposed fee increase" would come within the scope of section 9A(a). In this situation -

- (a) my use of the phrase "the proposed fee increase" refers to a comparison between the proposed new fee and either the original fee or the fee other than the original fee to which members written consents had last been obtained;
 - (b) each case would need to be considered on its merits."
- (C) The reply I received was –
- "2. The situations we have in mind appear to fall between the two cases described in your letter. We contemplate a clause in a trust deed which states either that:
 - 2.1 the trustee shall be paid a fee, at a rate to be fixed by the trustee from time to time; or
 - 2.2 the fee is \$X but that fee may be varied by the trustee at any time on giving, say, three months notice in writing.
 - 3. We would be grateful for your opinion as to whether a fee increase effected under either of the above clauses would require obtaining the consents of all members and other beneficiaries who would be adversely affected by the increase, under sections 9 and 9A of the Superannuation Schemes Act 1989. While there would appear to us to be no question of any amendment to the trust deed, your letter suggests that such a fee increase may effect an "alteration to the scheme", triggering the operation of section 9A.
 - 4. Our view is that section 9A does not apply to the above fee increases, notwithstanding the different wording used in that section. While there may arguably be an "alteration to the scheme" in a general sense, there is in our opinion no alteration that, in terms of section 9A, is contrary to, nullifies, reverses or amends any matter stated in the trust deed or any provision implied in the trust deed by the Superannuation Schemes Act. Further, there is no alteration that has the effect of extending, varying or limiting the scope of the trust deed in a material particular.
 - 5. In particular, any such fee increase would not amend any matter stated in the trust deed. Further, the only relevant provision implied in the trust deed is section 9, and as there would be no amendment to the trust deed, the operation of section 9 would not be triggered.

6. Finally, we suggest that there are many types of actions which the trustee can resolve to take which would have the effect of "altering" the scheme in a general sense, for example varying the investments, but which do not come within the ambit of section 9A. Surely it is not intended that every "alteration" to a scheme require that the consent of members and beneficiaries be obtained."

(D) I replied –

"Both of your versions of trust deed wording (2.1 and 2.2 of your letter) would enable a trustee to set a fee equal to the total amount in the fund and all future income (contributions etc) from any source. If that were to happen, I would consider that section 9A(a) would be breached, as such fee increase would undoubtedly nullify benefits which might otherwise be due to members under the deed.

The foregoing is, of course, an extreme example. However, I am aware that some "fees" or "charges" have been set at extremely high levels indeed in the past; and I would be concerned with trust deed wording which would apparently permit fees to be set at a low and reasonable level initially, but have the capability of being subject to high increases without members consent.

Accordingly I consider that I must disagree with the view expressed in paragraph 4 of your letter, and prefer the view I expressed in my approach to "Case 2".

My "Case 2" approach would seem to be in agreement with the view expressed in paragraph 6 of your letter, with which I agree.

May I also indicate my view that it is unwise to consider the wording of one trust deed clause in complete isolation from all of the other clauses in the trust deed. It is this point of view that makes it difficult for me to give you a more precise answer than I have already done."

(2) ***CHANGE OF TRUSTEES***

I have been asked for my view as to whether a change in trustees is caught by section 9A and thus requires the change to be effected by deed amendment.

If the change in trustees is due to, for example -

- (a) the retirement of an employer-nominated trustee, and replacement by a new employer-nominated trustee; or
- (b) an employee-elected trustee being replaced by another employee-elected trustee in accordance with a ballot held in accordance with the trust deed;

then there would seem to me to be no "alteration to the scheme"; and accordingly section 9A would not apply. I would regard both (a) and (b) as being examples of "machinery" matters which are not "alterations to the scheme".

If, however, the trust deed provides for an employee-elected trustee; and if the intent is to do away with such a provision, then section 9A would apply (and so would section 9(b) -removing any right of the members or other beneficiaries to participate in the management of the scheme").

(3) EXERCISE OF TRUSTEES DISCRETION

- (a) Some trust deeds provide the trustees with a discretion as to the amount of the "leaving service" benefit. The trust deed states the amount of the minimum benefit, and gives the trustees the discretion to increase that minimum payment, up to but not exceeding the value of the members "equitable share" in the scheme.

It would seem to me that a consistent and proper exercise of trustees discretion would not constitute an "alteration to the scheme"; and accordingly would not be caught by section 9A.

- (b) Some trust deeds provide the trustees with a discretion as to the amount for which a pension can be commuted.

My view on this is the same as that for (3)(a) above.

Note, however, that if the trust deed gives the trustees no discretion in this matter and states the pension commutation factors which are to be used, then any change in these factors would - in my opinion - need to be made by deed amendment.

OTHER

May I emphasise that the foregoing comments have been made in good faith in case they may be of assistance. The comments are not to be regarded as being "instead of" or 'replacing" professional legal advice, and must not be regarded as a statement or interpretation of the law.

N T Malley
Government Actuary