

NEWSLETTER NO. 27 : DECEMBER 1993

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1. ANNUAL REPORT TO MINISTER OF FINANCE

A copy of my annual report under section 28 of the Superannuation Schemes Act 1989 for the year ended 30 June 1993 to the Minister of Finance is enclosed.

The report could not be released until it had been laid before the House of Representatives by the Minister. The delay in its release has been caused by the Election and the House not sitting.

2. TRUSTEES ANNUAL REPORTS

The Superannuation Schemes Act 1989 requires trustees to provide an annual report to scheme members, and to forward a copy of that annual report to the Government Actuary.

(a) Contents of the Reports

I am pleased to see that most reports now comply fully with the Act's requirements.

Where there has been non-compliance, it is often due to the report not stating -

- (i) numerical changes in the membership of the scheme during the financial year; and/or
- (ii) a summary of any amendments to the trust deed that have been made since the date of the last annual report of the trustees;
- (iii) names of, and any changes to the trustees, administration manager, insurer, etc.

Trustees and administration managers are asked to note that, for statistical purposes, we require an analysis of payments made according to -

Retirement - Pensions

Retirement - Lump Sums
Death and Disablement
Resignation
Redundancy
Transfers to/from another registered scheme
Other payments

and this information should be provided to us even if it is not stated in the trustees report.

(b) Timeliness of receipt of Reports

The Act requires that copies of the report be given to scheme members and the Government Actuary within six months of the end of the financial year.

Whilst most reports are submitted on time, there is still a significant number of reports which are filed after the six month deadline has expired. Where any such reports are filed late in future, we are likely to adopt a strict approach, which could include, inter alia -

- (i) prosecution of trustees;
- (ii) direction to trustees to use another administration manager and/or investment manager and/or auditor.

(c) Check List

You may find it useful to compare your reports with the Check List which we use as an aide memoire when considering each report forwarded to us. Accordingly, a copy of that Check List is enclosed.

3. HUMAN RIGHTS ACT 1993

I am aware that there are a number of areas where trustees are uncertain of the precise intent of the legislation.

The trustees of a particular superannuation scheme are to seek the guidance of the High Court (in Auckland) on aspects of this legislation as it impacts on their own scheme's trust deed. The principal party to the proceedings is the Human Rights Commission, but Senior Counsel from Crown Law will be present to represent the Government Actuary.

4. CULLEN ETC.

I think it may be helpful to state the stance of the Government Actuary's office on trust deed amendments and members consents.

The Appendix to this Newsletter states our current views. You are asked to note -

- (a) if the deed amendment may be regarded as the normal type of amendment associated with the on-going administration of a "defined benefit" superannuation scheme -

e.g. improvement in the "vesting" scale on resignation; improvement in the method of calculating "final average salary",

then the amendment is not likely to be investigated in depth by the Government Actuary - reliance will probably be placed on the certificate required by section 12 of the Act.

- (b) if the deed amendment has an unusual feature -

e.g. the "amalgamation" of two schemes, where one scheme is in deficit and the other is in surplus,

then the Government Actuary will probably take a detailed interest in the matter.

5. OFFICE CLOSURE : CHRISTMAS AND NEW YEAR

The Office will be closed from 25 December 1993 to 4 January 1994 (both inclusive)

On behalf of all the staff of the Government Actuary's Office, and myself, I wish you Seasons Greetings and Best Wishes for the New Year.

N T Malley
Government Actuary

Encls.

APPENDIX

I have received advice from Crown Law, and other persons who have a particular expertise in legal matters affecting superannuation schemes, as regards "Cullen". This advice has been in respect of "particular cases" as well as "in general". At the present time, I may summarise their advice and my stance as follows -

1. In both "Cullen" and "UEB" it was the employer who stood to benefit, to the detriment of members.

But the issue is not the identity of who benefits from a proposed amendment, but whether the proposed amendment would have the effect of adversely affecting any members or other beneficiaries.

2. Surplus in a "defined benefit" scheme, particularly if it is a continuing scheme, is very much in the eye of the actuary.

However, it is, I think, inescapable that an increase in the level of benefits without a compensatory increase in the level of contributions will reduce any surplus which might accrue.

I understand that both "Cullen" and "UEB" have held that there need not be any surplus existing at the date the amendment is made, and the future may show that there may never actually be any surplus. However, the loss of a prospective entitlement to share in any surplus which might arise is a sufficient detriment in terms of section 9 of the Superannuation Schemes Act 1989.

3. As well as the issue of detriment in terms of section 9 of the Act, attempts by employers or trustees to discriminate between members are likely to be regarded with disfavour by the Courts - see references to "Imperial Group Pension Trust Ltd" by Cooke P at page 9 of his judgement in "Cullen", and by Richardson J at page 5 of his judgement in the same case.
4. The foregoing states the basic principles. How they are applied in the real world depends on the proper construction of the trust deed.

In this respect, I note the following two comments by Richardson J in "Cullen" -

- (a) "The objectives of the deed and amendments and the factual matrix in which they were entered into are important considerations in determining the intentions of the parties. It is the parties deed. It is what they intended which counts" (page 5).
- (b) "This is pre-eminently a field where the interpretation answer necessarily depends on a consideration of the particular terms of the particular documents construed in their particular setting" (page 6).

In my view, in the context of my responsibilities under section 20 of the Act, it is not for me to construe a trust deed in minute detail. Indeed, as Cooke P said in "Cullen" (page 6) -

"I do not think, however, that the requirement of a member's consent depends upon a purported weighing by the employer of pros and cons from the employee's point of view. Nor is it the function of the Court to undertake that exercise."

5. That said, there is a question as to what bench-mark(s) (if any) would cause me reasonably to come to the beliefs set out in section 20 of the Superannuation Schemes Act 1989.

At the present time, these benchmarks are when, at the date of the amendment –

- * there already was a surplus, and/or
- * as in "Cullen" there definitely would be a surplus, and/or
- * when a proposed discrimination between members appeared to be unreasonable or capricious.

In this respect, I note that Parliament has removed from me the responsibility of approving proposed amendments; and has passed this responsibility back to the trustees etc with the certification requirements of section 12 of the Superannuation Schemes Act 1989. Absent fairly obvious situations to the contrary, I consider that I am entitled to rely on that certificate.

6. I tend to consider that trustees (and employers) should tread carefully in this area. In this regard, I note the comments by Cooke P in "Cullen" (page 6) -

"If there is some adverse effect it is for the member to decide whether to consent to the change. It is the member who is entitled to make up his or her mind about whether on balance the proposed change, taking all its features into account, is or is not disadvantageous."

The underlining is mine. I note that this reinforces my views on members fully informed consent.

7. One final point. I note that there are occasions when trust deed wording can have more than one meaning. Under the previous superannuation regime, it was not uncommon for approval/classification to be gained on the basis of one interpretation, and for a different interpretation to be used in practice in order to secure a tax preference. This type of behaviour would seem to me to be unusually hazardous in the current environment, and something which I could not ignore.