

NEWSLETTER NO. 48: JUNE 2000

This newsletter contains:

- 1. Response to submissions made on Newsletter No. 47**
- 2. Share distributions on demutualisation of insurance companies**

Response to submissions made on Newsletter No.47

1. In Newsletter No.47 I discussed issues relating to the definition of superannuation schemes under the Superannuation Schemes Act 1989 (“the Act”) as “principally for the purpose of providing retirement benefits”, and went on to indicate the tests I had in mind for identifying where I should give serious consideration to de-registration; noting however that any definitive decision would be based on the relevant facts and circumstances at the time.
2. I invited submissions on what were described as my initial thoughts. The suggested time frame proposed proved too tight for some of those who wished to make a submission, and in fact the final one was not received until 1 May. Submissions were received from the trustees of two employer sponsored schemes and of two retail schemes, from industry bodies (ISI, ASFONZ), and from eight others, including providers and advisors.
3. I had expected to respond to submissions early in May. However, some time prior to issuing Newsletter No.47, I had given 28 days notice to the trustee of a scheme of my intention to de-register that scheme, on the grounds that I had formed the view it was no longer a superannuation scheme within the meaning of section 2 of the Superannuation Schemes Act 1989. An objection against my decision has subsequently been made, the trustee heard, and the hearing adjourned in order for me to seek clarification on points of law. In the circumstances it would be inappropriate for me to respond in any substantive manner to the matters raised in the submissions on Newsletter No.47 until I have given my decision on the objection.
4. However, I think it would be helpful, given the response to the Newsletter, to indicate the general tenor of the submissions. It was also apparent that there was some misunderstanding of what was intended by the proposals.
5. The basic approach taken by the Government Actuary has been that a scheme will be registered if it is reasonable to assume it has been established, and will be operated, principally for the purpose of providing retirement benefits. If subsequently some

concern arises about the manner in which the scheme is operating, further information will be requested, and a decision then made as to whether to take the matter further by de-registering the scheme. This approach was developed by my predecessor, Neil Malley and set out in Newsletter No.32 of May 1995; confirmation of the approach was repeated by me in Newsletter No.41 of December 1997.

6. For avoidance of doubt, I should record that where a scheme:

- is an employer sponsored scheme which provides benefits only on cessation of employment, or
- is a retail scheme where benefits are fully locked in to an age at which retirement from paid work can reasonably be assumed, and
- is operating according to its trust deed;

then in my view it would be difficult, if not impossible, to envisage any circumstances under the Act where de-registration could be contemplated by reference to the definition of a superannuation scheme. This was implicit in Newsletter No.47, but, judging from the submissions, not properly understood, and I regret what would appear to have been a lack of clarity in this respect.

7. My proposal in effect was that in the case of employer sponsored schemes, in the light of increasing levels of payment and/or provision for in-service benefits, it would be reasonable to consider de-registration where activity in respect of those particular benefits was at more than a 5-10% level. It was acknowledged that “principally” could be taken to mean only “more than half”, but that as payments on cessation of employment were frequently not actually retirement benefits from a strict superannuation standpoint, it could be considered not unreasonable to place a higher level of restriction on the “in-service” benefits that may be provided. By extension I also suggested that retail schemes be put on a similar basis in relation to pre-retirement withdrawals.

8. It may be that the changes to rates of income tax, and the consequent opportunity for tax sheltering through the use of superannuation trusts (amongst other means), lead some recipients of Newsletter No.47 to believe that its timing was related to tax matters. However, the matters raised in the Newsletter were because of the increase being observed in the use of registered schemes for purposes other than superannuation provision, and for no other reason.

9. To briefly summarise the submissions, a number of major themes emerged. These can be articulated as follows:

- A change in policy appears to be intended, but is inappropriate;
- It is the intent of a trust deed that is relevant in relation to continued registration, not actual outcomes;
- The status of benefits paid from employer sponsored schemes on cessation of service (as opposed to retirement from all paid work) is perhaps unclear, but should still be considered as provision for retirement nonetheless;
- An analysis based on proportions is unlikely to be useful, let alone appropriate;
- Interpretation needs to take into account the current environment for superannuation savings;

- Short term savings are better than none, and early withdrawal or in-service access does not necessarily mean that the proceeds are being used for other than retirement provision;
- The use of registered schemes for purposes other than provision of retirement benefits causes no harm, and it need not necessarily be of concern if substantial use of a registered scheme is made for those other purposes, provided that the scheme can still be used for long term savings if members so choose.

10. I reiterate that I intend to provide a substantive response to the matters raised in the submissions as soon as it is practicable for me to do so.

Share distributions on demutualisation of insurance companies

11. As a consequence of the demutualisation of insurance companies such as AMP, AXA (ex National Mutual), Colonial, and Tower, trustees of schemes holding policies with such companies have participated in share distributions. The trustees of such schemes have then had to decide how to allocate the shares; for employer sponsored schemes, this brings into play consideration of allocation as between member and employer interests.
12. The issue arose in a recent instance of an application for reversion from a defined benefit scheme, where consideration has to be given under section 22 of the Act to the manner in which a scheme has acquired assets. In the particular circumstances of this case, it was initially argued on behalf of the employer that the share proceeds were in the nature of an investment windfall, and hence could be properly considered to be all “employer” assets, as the employer was bearing the investment risk of the scheme.
13. We obtained legal advice which, in summary, stated:
- The share proceeds were the property of the trustee;
 - The trustee obtained those share proceeds as a consequence of holding policies with the insurance company;
 - The policies were paid for by contributions from members and the employer;
 - In absence of any agreement to the contrary by members and the employer, it would be appropriate for the share proceeds to be allocated in proportion to the relative contributions made under the policies by members and the employer.
14. An arguable corollary to this advice is that it is those members who were members as at the time the entitlement to shares crystallised that constitute the membership whose relative contributions are to be taken into account, and hence who could be considered to have entitlement to benefit from the share proceeds.
15. This advice was particular to the facts of the case under consideration. Nonetheless, I draw it to the attention of scheme advisors who may wish to consider whether any different approach taken in other cases is fully appropriate.