

NEWSLETTER NO. 49: OCTOBER 2000

This newsletter contains:

1. *Government Actuary Annual Report*
2. *“Principally for the purpose”*
3. *Newsletter Address Listing*

1. *Government Actuary Annual Report*

A copy of the Annual Report by the Government Actuary prepared under section 28 of the Superannuation Schemes Act 1989 is enclosed, for the year ending 30 June 2000. The report has now been tabled in the House. I would be happy to respond to any comments or questions that people may have on the report.

2. *“Principally for the purpose”*

In Newsletter No 47 I set out some preliminary views on the appropriate interpretation of the definition of a superannuation scheme for the purposes of the Superannuation Schemes Act 1989. In Newsletter No 48 I reported the general tenor of responses, commenting that I hoped to make a substantive response in due course. The following comments are that response, and also serve to set out the manner in which the office intends to continue the policy first enunciated by my predecessor, Mr Malley, in Newsletter No 32 (May 1995).

Some of the issues that arise in the interpretation of the expression “principally for the purpose of providing retirement benefits” are discussed in the Annual Report to the Minister. I will not elaborate on those comments, other than to note that I remain of the view that use of an arrangement for accumulating savings can not of itself be taken to mean that it is for the purpose of providing retirement benefits; the test is the extent of provision of benefits from the scheme to a beneficiary near or upon or in retirement, where retirement means cessation of significant participation in the paid labour force.

A number of submissions drew my attention to the fact that the full definition is “Any trust established by its trust deed principally for the purpose of providing retirement benefits ..”; and argued from that that if a scheme is registrable, it must remain registrable unless the trust deed is altered. One could of course argue that “established by its trust deed” refers to the trust, as a contrast to “Any arrangement constituted under an Act of Parliament ..”, and hence not to the purpose of the trust. I will not pursue that point at this time. I am in any case advised that it is appropriate for me to look into the operation of a scheme, no matter its expressed purpose.

On this matter, I received the following advice: “Were the Government Actuary to refuse to register a scheme because it has discretionary powers to allow payment prior to retirement, the sponsors of the scheme would complain that he should “wait and see”. But having waited and seen, the sponsors complain that the Government Actuary is not

entitled to look at events post establishment. That can not be right.” This to me sums up the position very succinctly.

In respect of the argument that the Government Actuary should not be concerned with member activity, where a trust deed gives flexibility, I am advised that from reading of relevant cases, one in this context is not limited in considering “purpose” to reading the document alone, but can look at extrinsic evidence drawn from the actions and statements of the parties to the document. Scheme sponsors, in conferring flexibility on members, have created the problem, and it is inappropriate for them to attempt to wash their hands of the consequence by saying it is not appropriate to examine that very consequence.

In conclusion, the advice I have obtained is that before applying section 19 of the Act, the Government Actuary should consider both the terms of the trust deed **and** how it is operated in practice. This will be particularly relevant where a trust deed confers discretions on both trustees and members.

So where to from here? As I observe in the Government Actuary’s Annual Report, there is a view in some quarters, and which came through in the responses to Newsletter No 47, that a Savings Act would be preferable to a Superannuation Act. There are however existing regimes for savings, so the rationale for a special “Savings” Act appears doubtful. While there appears little disagreement that there will always be a need for a specific regulatory regime in respect of employer-sponsored superannuation, because of the different positions of employers, members, and trustees, it is less clear that retail schemes should enjoy specific legislation if they are not established and operated for a clear purpose of providing retirement benefits, in the proper sense of the term.

In any case, I am required to administer the legislation as it stands, and not as some might prefer it to be. I am persuaded after considering the submissions made on Newsletter 47, and other advice, that a numerical approach is unlikely to be as helpful as I had initially thought it could be. I will however continue to require trustees to demonstrate that they are operating schemes in compliance with the principal purpose (that is, the schemes are in fact principally providing benefits when retirement occurs from paid labour force participation or, in the case of employer sponsored schemes, on permanent cessation of employment with that employer), and accordingly particular matters that will be considered are:

- The extent of “on demand” payments, by relation to annual contributions and accumulated entitlements, and taking into account frequency of payments per member;
- The ages at which “on demand” payments are being made;
- Marketing material supplied to potential members;
- Operational policy guidelines set down by trustees for the exercise of discretions conferred on them by the deed governing the scheme;

together with any other matters that may be relevant to a particular case.

3. *Newsletter Address Listing*

Currently we send out around 370 Newsletters. Not all of these may be wanted, and if you wish to be taken off the mailing list, it would be appreciated if you could send us a facsimile at (04) 495 1254.