

SLAUGHTER AND MAY

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Welcome to Edinburgh and the APL Annual Conference.

The speakers and chairs have worked hard to present a programme which we hope is thought-provoking and relevant, with sessions aimed at moving forward the thinking on the key issues we are all having to consider at the moment, leavened with some wider perspectives of policy and regulation.

This app is an innovation for this conference and we would like the sessions to be as interactive as possible, so please do use the app to ask questions, vote and participate.

We hope you will enjoy Thursday's gala dinner in the Grand Gallery of the National Museum of Scotland, with an opportunity to view the Discoveries of Scotland exhibition, sample some different whiskies, enjoy a haggis amuse bouche and dance to a ceilidh pop and rock band.

Charles Cameron, Isobel Carruthers and Julia Godfrey
Slaughter and May



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SR Galbraith	RA Swallow	CNR Jeffs	GE O'Keefe	JP Stacey	MJM Cox	KA O'Connell		
SRB Powell	CS Cameron	SR Nicholls	MD Zerdin	LJ Wright	RCT Jeans	N Yeung		
AG Ryde	CA Connolly	MJ Tobin	RL Cousin	JP Clark	V MacDuff	CJCN Choi		

GALA DINNER		
Coaches depart at 18.45 for Gala dinner at National Museum of Scotland		
Drinks Reception at 19.15		
Return Coaches from 22.30 – 12.00		

Day 2 – Friday 15 November

Session chaired by Catherine McAllister, Addleshaw Goddard, Chair of L&P Sub-Committee

TIME	SUBJECT	SPEAKER
09.15 – 10.00		
Tea and Coffee		
09.30 – 10.00		
Annual General Meeting		
10.00 – 10.45 (including 15 mins Q&A)	A focus on pensions legislation 1: Legislative priorities, factors influencing approach to legislation	Jamey Johnson, Deputy Director, Pensions Department of Work & Pensions
10.45-11.45 (including 15 mins Q&A)	A focus on pensions legislation 2: Legislating for Pensions	Elizabeth Gardiner, First Parliamentary Counsel
11.45-12.00		
Tea and Coffee		
12.00 – 12.45	A focus on pensions legislation 3: Overriding legislation	Philip Stear, Outer Temple Chambers
12.45 – 13.30		
Lunch		

Session chaired by Wendy Mathers, Radcliffe Chambers

TIME	SUBJECT	SPEAKER
13.30 – 14.15	Owing Me, Owing You Legal issues arising from the overpayment and underpayment of occupational pension scheme benefits	Paul Newman QC, Wilberforce Chambers

Session chaired by Anna Rogers, ARC Pensions Law

14.15 – 15.30	Consolidation – panel presentation on Superfunds/Consolidators	Adam Saron, Clara Pensions Michael Jones, Pinsent Mason Camilla Barry, Macfarlanes Eva Schram, De Brauw
15.30 – 17.30		
Transfers to airport/station/check in		
17.45 -		
Flights/trains		

The virtue of prudence and other funding puzzles

Jonathan Hilliard QC, Wilberforce Chambers
Leonard Bowman, Bath Actuarial

Chaired by Däna Burstow, Allen & Overy LLP

The two faces of prudence

Two main meanings of prudence

- Good judgment
- Caution

1. VALUING LIABILITIES THE ACTUARY'S DARK ARTS

How do you value liabilities?

- Why are you asking?
 - (1) Because you want to price an immediate market transaction? eg. s.75
 - (2) Or because you want to fund the liabilities? e.g. damages for personal injury- *Wells v Wells* [1999] 1 AC 345
- An actuary in an occupational pension scheme is asking the question because he wants to work out what present sum would be needed to meet the future pension payments.....
- But he is doing so in order to help work out what needs to be paid to allow the scheme to fund those liabilities. Therefore, we are in the territory of (2).

The value of prudence

- How much you need in order to allow a scheme to fund pension liabilities, you need to know how certain you want to be that those liabilities are met.
- That is a policy judgment.
- This is where prudence comes in. It is meant to provide a measure of security that those liabilities are met.
- Therefore, prudence has a lot of work to do.
- Before we find out more about it, let's look back into its past.

2. THE HISTORY OF PRUDENCE

Where does prudence come from? (1) EU

1999 Green Paper “*Towards a Single Market for Supplementary Pensions*”

- Introduction of “*prudential rules*”
- Not just protection- but also about (for example) stopping unnecessary restrictions on investment. “*it is considered more prudent to invest a substantial part of the asset portfolio in equities because they can better meet the long term nature of pension liabilities*”. The prudent person for investment purposes. Maps back to prudence as *good judgment*.
- Nevertheless, key part is ensuring appropriate link between assets and liabilities taking into account the defined benefits promise. So a considerable part is about protecting pensioners through this route. Maps back to prudence as *caution*.

Where does prudence come from? (1) EU

Proposal for a Directive 27 March 2001

- *“The security of pensions is of prime importance: the rights of future pensioners must be protected by strict prudential standards”*. And already have detailed prudential rules for credit institutions, insurance companies and undertakings for collective investment
- §1.1: *“The proposed Directive lays down prudential rules designed to ensure that occupational pension transactions attain a high level of security and efficiency”*. So again the twin aims mapping the two meanings of prudence.
- Description of art.15- *“In cases where the institutions operate schemes in which biometric risks are covered and/or where the institution bears the investment risk, the technical provisions must be calculated on a sufficiently prudent basis”*.

Where does prudence come from? (1) EU

Art.15(4)

The calculation of the technical provisions shall be executed and certified...according to the following principles:

- (a) the minimum amount of the technical provisions shall be calculated by a sufficiently prudent actuarial valuation, ...
- (b) the maximum rates of interest used shall be chosen prudently ...
- (c) the biometric tables used for the calculation of technical provisions shall be based on prudent principles...

Art.18- a prudent investor rule.

Where does prudence come from? (2) Domestic

Meanwhile in England:

Thornton & Wilson (1992) *“A realistic approach to pension scheme funding”*

- (Even before scheme specific funding) actuaries are incorporating margins of prudence into assumptions
- Prudence means on the conservative side of a best estimate basis.
- Prudence means 60% chance of being fulfilled as a finger in the air (but this is in a pre-Maxwell world: Cowling & others (2019))

3. PRUDENCE IN DOMESTIC LAW

The Scheme Funding Regs (2005)

With that, the scene is set for the Pensions Act 2004 and Occupational Pension Schemes (Scheme Funding) Regulations 2005. Start by just focusing on reg.5(4):

(4) The principles to be followed under paragraph (3) are—

(a) **the economic and actuarial assumptions must be chosen prudently**, taking account, if applicable, of an appropriate margin for adverse deviation;

(b) **the rates of interest used to discount future payments of benefits must be chosen prudently**, taking into account either or both—

(i) the yield on assets held by the scheme to fund future benefits and the anticipated future investment returns, and

(ii) the market redemption yields on government or other high-quality bonds;

(c) **the mortality tables used and the demographic assumptions made must be based on prudent principles**, having regard to the main characteristics of the members as a group and expected changes in the risks to the scheme, and

(d) any change from the method or assumptions used on the last occasion on which the scheme's technical provisions were calculated must be justified by a change of legal, demographic or economic circumstances.

Early interpretations and controversies

1. TPR Mortality assumptions guidance 2008:

“8. All assumptions must be chosen prudently. We interpret prudence as taking a margin on the cautious side of a best estimate (or expected value) (Code, para 85)“

2. Deborah Cooper article-

- do we have to take the tPR approach to prudence?
- does prudence have to mean this?

3. Institute and Faculty of Actuaries work on discount rates more generally (2010-2):

- discount rates used for different purposes here
- a “matching” approach looks at the value of the liability, so look at *market* value of it
- a “budgeting” approach looks at how these liabilities are to be *financed*, so need to ask how much comfort you want that will be financed properly, and therefore into the territory of whether you want to introduce an element of caution / prudence into the calculation”.

Bringing this up to date

4. TPR Code of Practice 3 “Funding Defined Benefits” (July 2014):

5. Cowley & others (2019)- consider still a tension in what the funding regime is trying to achieve:

“**1.2.1.** The funding of a pension scheme is simultaneously trying to achieve two objectives which are not always aligned:

- Financing a long-term obligation – funding benefits as they fall due.
- Providing security for members’ benefits...”

4. PRACTICAL DIFFICULTIES TODAY

The challenges of prudence

- Intended to provide a measure of security

But

- (1) Can't guarantee the survival of the sponsoring entity, so can't provide full security.
- (2) Is only part of answering what an appropriate funding package is, so doesn't tell you the level of contributions the employer must pay.
- (3) The intention that it provide some but not full security leaves significant room for determining what prudence should mean in a given situation.

Practical points

- (1) How much more conservative, must you be at all, than best estimate?
 - Can you put a % chance of success on it?
 - (a) Overlooks that assumptions will be assuming the survival of the employer
 - (b) Saying there is a 60% chance of meeting the target doesn't tell you how bad the other 40% of situations are
 - (c) Will be a limit to the % that a weak employer can offer.

Practical points

(2) Can the recovery plan be best estimate when the technical provisions are not?

Yes

- TPR Code of Practice §§147-148 of 7.14 funding code: in some situations it may be appropriate to assume a higher investment return for the recovery plan than the discount rate used to calculate technical provisions- extend to which appropriate depends on the assumptions used in the technical provisions.
- Any outer limits on this and if so what?

Practical points

(3) How do trustees' duties here interact with their ordinary fiduciary duties in setting funding under the *rules* given (a) this is a statutory regime enacted against a backdrop of EU law and (b) tPR's role under s.231 with their broader objectives?

- Trustee's ordinary role: *MNRPF* (2015), *BA* (2018)
- Whereas the SSF regime is a statutory one implementing EU law, so trustee's duties depend ultimately on that regime
- Prudence in a particular case is something on which people can disagree
- And statute ultimately makes tPR the gatekeeper, with particular objectives that are very different to those of trustees

Practical points

(4) Can you have too much of a good thing? When would a trustee or actuary be using excessive prudence and how can this be challenged?

- What is the balance of power under the particular scheme?
- How much discretion does a trustee have?
- How much does it turn on the investment decisions?
- What scope is there for challenging the actuary?

Practical points

(5) What are the outer limits of a permissible valuation and (critically) a recovery plan for the (many) schemes in a difficult position? s.11 Pensions Act 1995

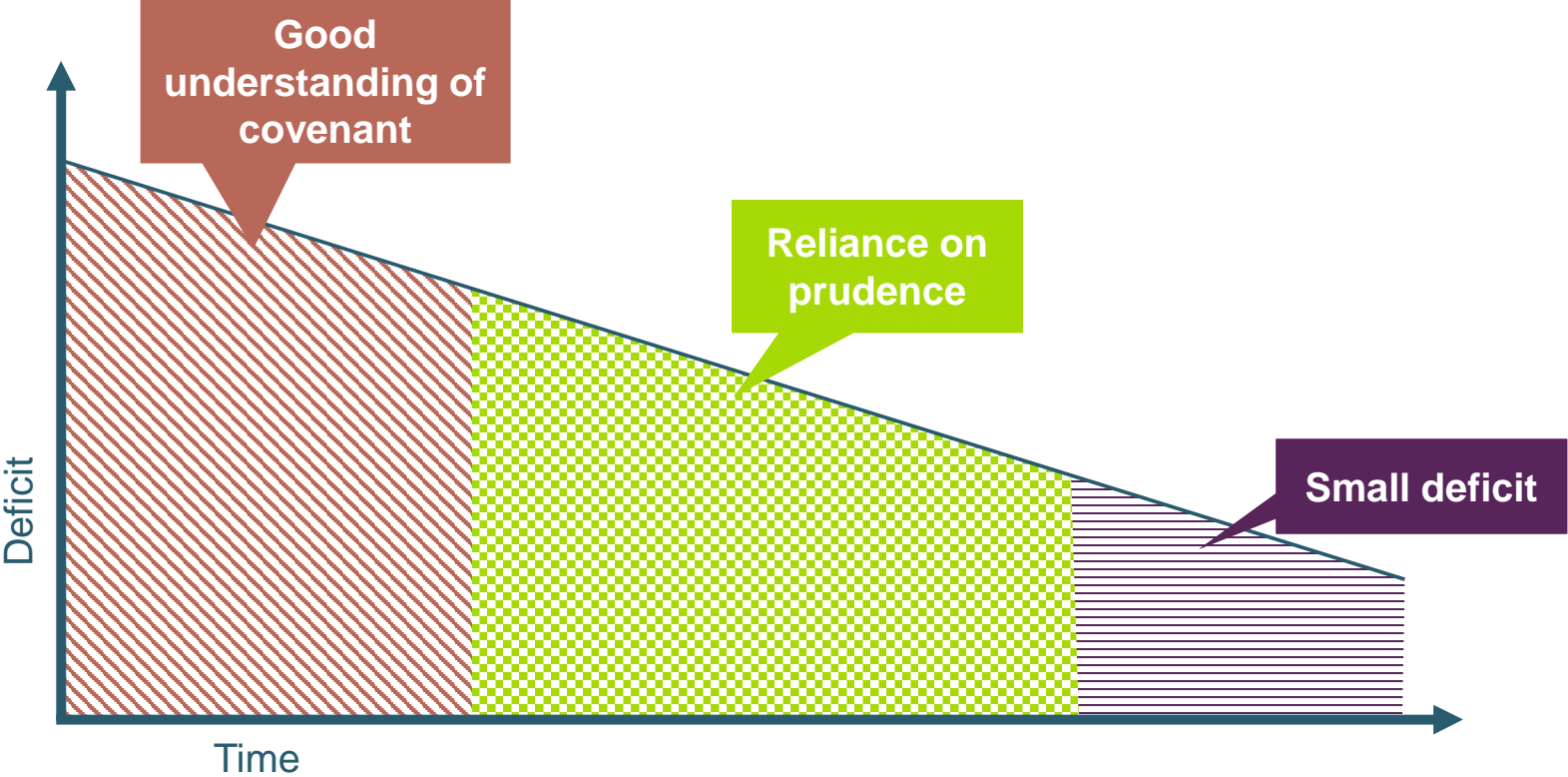
(6) Difficulties in working out the balance of power under scheme specific funding-
e.g. *Allied Domecq* (2008)

- when does the actuary set out the rate?
- what are “conditions” under §9(4) of Sched.2?

(7) What happens to the valuations under the rules after the Pensions 2004 and 2005 Regs? See the Philip Stear session...

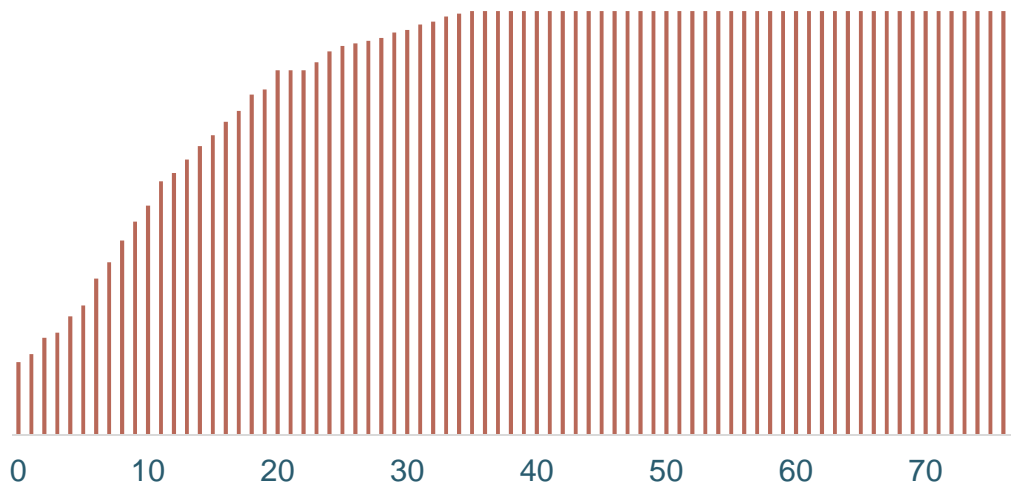
5. THE DEVELOPMENT OF PRUDENCE FROM AN ACTUARIAL PERSPECTIVE

Impact of prudence over time



In the beginning...

Cashflow profile of a typical Scheme



- Limited focus on long term covenant
- No risk of trapped surplus
- Less regulation
- Ability to smooth financial volatility in company accounting

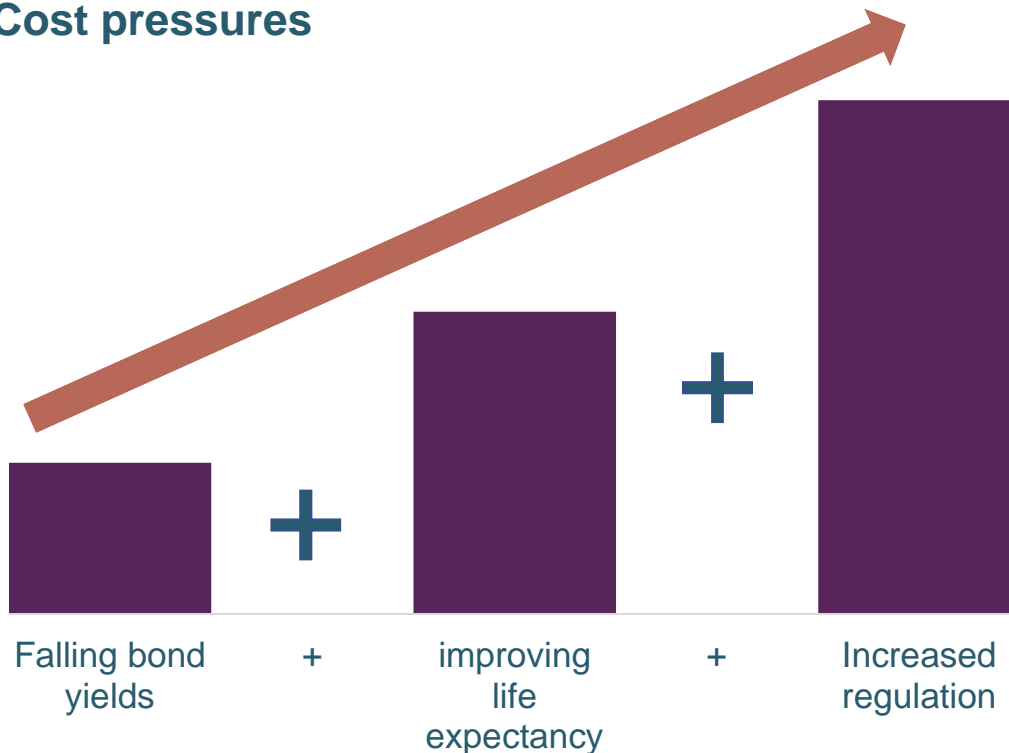
Focus on stable funding costs, not managing through to an endgame.

What did prudence look like?

- Often the Scheme was in surplus on the funding basis – prudence meant not taking a refund or contribution holiday!
- Too prudent and an issue would emerge with the “GAD surplus test”
- If there was a funding deficit, expectation that Scheme would move into surplus before the end of the recovery plan and cost of future accrual could possibly be offset
- Concept of wind-up very different from today.

The 90's and early 2000's

Cost pressures



- Maxwell scandal and regulatory response
- Equity market shocks
- Falling bond yields
- Mandatory pension increases and two year vesting
- Pension reporting in Company accounts become volatile
- Closure to future accrual accelerates
- Greater focus on improving life expectancies

What did prudence look like?

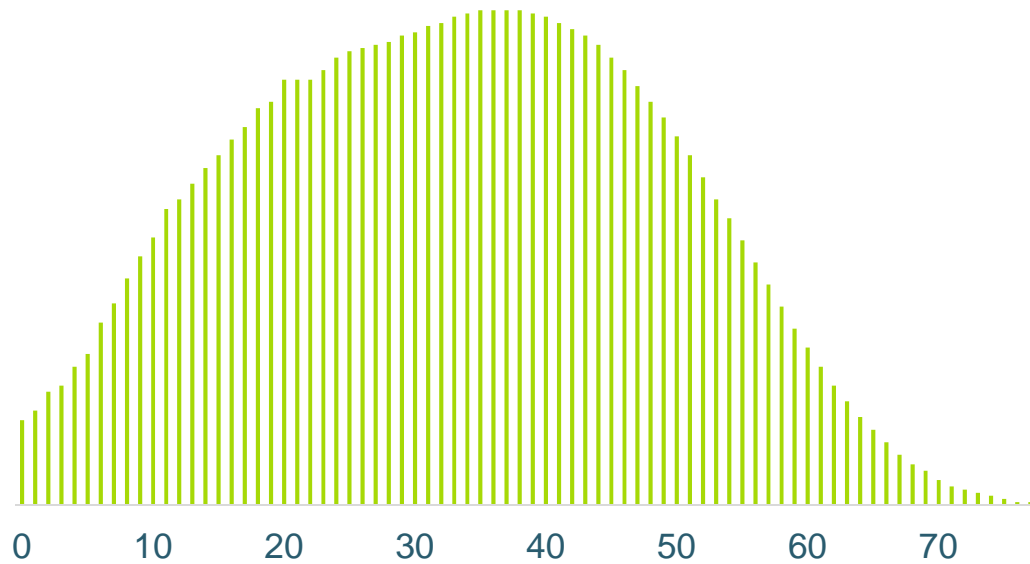
- 60% - 70% chance of full funding on Technical Provisions basis by end of recovery plan
- When fully funded, scheme projected to be 75% - 90% funded on “solvency” basis – but “solvency” cost less than today...

Often the above assumed the investment strategy would remain largely unchanged over the recovery period

6. HOW DO YOU DEAL WITH PRUDENCE TODAY AS AN ACTUARY?

Today

Cashflow profile of a typical Scheme



- Majority of DB schemes now have a finite life span
- Significant investment de-risking has already taken place
- Much greater focus on “end-game” strategy
- Emergence of substantial buy out market
- High profile corporate failures

2019 (and beyond?) What does prudence look like?

A range of approaches

Approach 1

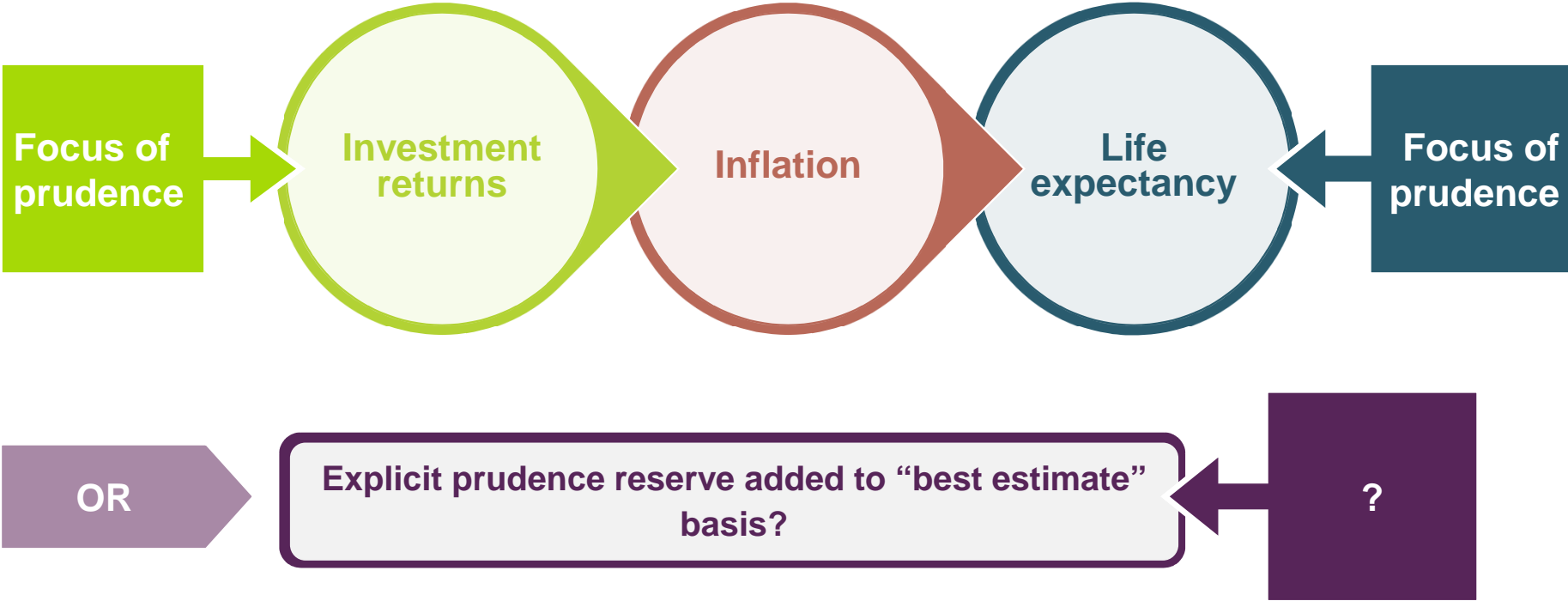
- High probability of being fully funded on traditional Technical Provisions by end of recovery period
- When fully funded schemes projected to be 90%+ funded on current buyout basis
- Allowance for further asset de-risking?

Trend towards approach 2

Approach 2

- Focus on long term, very low risk, funding target
- 60% - 80% chance of full funding within 15 – 25 years (95% - 100% of buyout)
- Allowance for full asset de-risking over funding period

2019 (and beyond?) Key funding assumptions



When is “prudence”, prudent?

Scheme A

- 70% chance of being fully funded on Technical Provisions in 7 years time
- No allowance for further asset de-risking

Scheme B

- 60% chance of being fully funded on current buyout terms in 12 years time
- Allowance for further investment de-risking

Which Scheme is funding more prudently?

When is “prudence”, prudent? – Part II

Scheme A

- 70% chance of being fully funded on Technical Provisions in 7 years time
- No allowance for further asset de-risking

Scheme B

- 60% chance of being fully funded on current buyout terms in 12 years time
- Allowance for further investment de-risking

But...

Scheme A

- Annual deficit contributions of £50m a year (for 7 years)

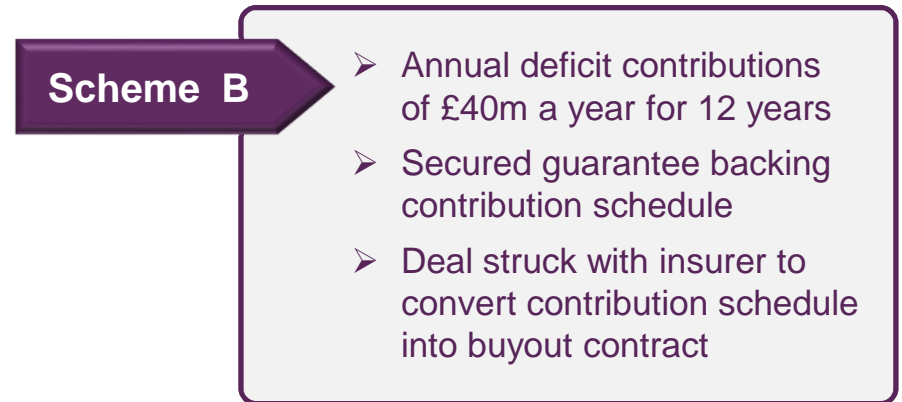
Scheme B

- Annual deficit contributions of £40m a year for 12 years

Which Scheme is funding more prudently?

When is “prudence”, prudent? – Part III

But...



But...



A possible approach to setting prudence

- A realistic view of the endgame
 - Buyout, consolidation or run off
 - how will the investment strategy need to evolve?
- Key risk factors and mitigations already in place
 - investment returns
 - certainty of cashflow profile
 - sponsor failure
- A transparent discussion on where to build in prudence and how to measure it
- Regularly review the above and adjust (contingency planning is key)

Considerations when Actuary has a significant role in setting funding requirements?

- Being clear on the extent of the actuary's expertise to consider relevant factors
- Usually an actuary is not an expert on covenant and affordability considerations
- Actuary needs to consider
 - seeking own legal advice
 - ability to rely on Trustee or Company advice
 - any fiduciary duties
- The role of peer review

And what are the actuary's duties and liabilities here?

- When can you attack such an actuary decision?
- What is his role?
- Negligence duty and liability?

6. TWO CASE STUDIES

Case study 1

- Strong employer
- No affordability constraints
- Small deficit on Technical Provision basis
- Substantial buyout deficit, but not relative to employer resources
- Company wants to use cash for other purposes

Case study 1 continued...

	The past	Now
Strength of funding basis	<ul style="list-style-type: none"> Weak 	<ul style="list-style-type: none"> Median to Strong, possibly with a secondary long term funding target, e.g. buyout
Investment strategy	<ul style="list-style-type: none"> Weighted to return seeking 	<ul style="list-style-type: none"> Moderate risk but with future de-risking built into funding plans
Dividend policy/cash usage	<ul style="list-style-type: none"> Heavy weighting to non-pension uses 	<ul style="list-style-type: none"> Much greater weighting to pension deficits, but still a long way from parity to other users
Length of recovery period	<ul style="list-style-type: none"> 5-10 years 	<ul style="list-style-type: none"> Less than 5 years
Interpretation of prudence	<ul style="list-style-type: none"> Deliberate low allowance for prudence in funding measure or pace of cash funding. Heavy weight given to long-term strength of employer and role of investment returns 	<ul style="list-style-type: none"> Significant prudence within funding basis. Modest prudence in pace of cash funding. Much less weight given to future investment returns

Case study 2

- Weak employer
- Significant affordability constraints
- Large deficit on Technical Provision basis
- Very substantial buyout deficit, relative to employer resources
- Company must use cash for other purposes

Case study 2 continued...

	The past	Now
Strength of funding basis	<ul style="list-style-type: none"> Weak 	<ul style="list-style-type: none"> Very strong
Investment strategy	<ul style="list-style-type: none"> Weighted to return seeking 	<ul style="list-style-type: none"> Immediate de-risking and very low risk strategy going forwards
Dividend policy/cash usage	<ul style="list-style-type: none"> Some dividends but majority used for business investment 	<ul style="list-style-type: none"> No dividends, greater weighting to pension deficit, majority used for business investment
Length of recovery period	<ul style="list-style-type: none"> 10 years plus 	<ul style="list-style-type: none"> 10 years plus
Interpretation of prudence	<ul style="list-style-type: none"> Deliberate low allowance for prudence in funding measure or pace of cash funding Heavy weight given to long-term strength of employer and role of investment returns 	<ul style="list-style-type: none"> Very significant prudence within funding basis No prudence in pace of cash funding (due to affordability constraints) No weight to investment outperformance

THE FUTURE?

Over to TPR...

QUESTIONS?



**The
Pensions
Regulator**

Making workplace pensions work

A focus on funding 2: TPR in practice

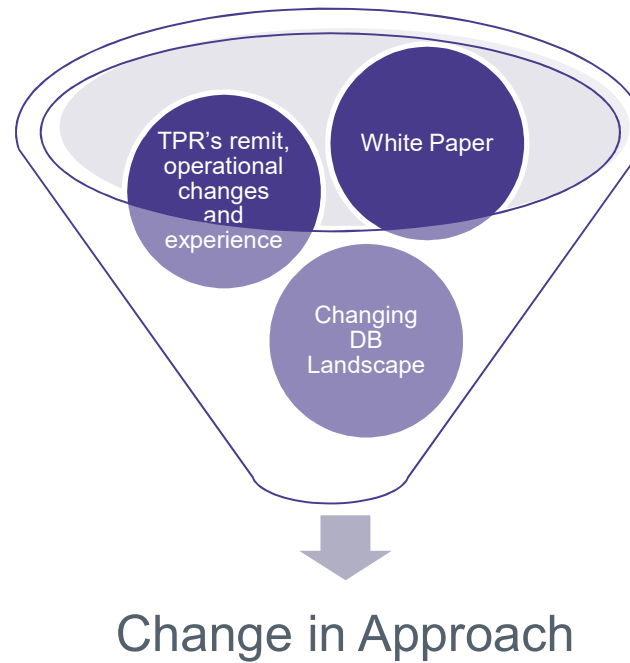
Mike Birch, Gary Millar, Caoimhe O'Neill
APL Annual Conference
November 2019

Introduction and Purpose of today's talk



- Introductions
- Purpose of today's talk:
 - Where we are taking the regulation of scheme funding – only got 45 mins!
 - Legal, operational and policy rationale
 - How it'll look in practice
 - Next steps and timings
- Part of our industry and APL dialogue.
- **Your Questions** (please use the App)
- **Health Warning:** contents in talk are reflections of current direction; may be subject to change; also subject to pre-election protocols.

Why are we changing our approach?



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TPR's remit, experience and operational changes

- Remit/Jurisdiction:
 - S90 PA04 – regulator of standards
 - Compliance with prudence TP and appropriate recovery plans
 - Maintain scheme specific flexibility
 - Throughout the funding cycle
- Experience:
 - Build on our experience of what works and what doesn't
 - Force of ideas: Rules → Principles/Risk-based → Hybrid
 - Supervision and enforcement
- Different regulatory model:
 - TPR Future: Clearer, quicker, tougher
 - More proactive (focus on the right schemes)
 - Use of resource (more efficient casework)

No Pensions
Bill!

TPR funding
powers
remained
unchanged

TPR's statutory
objectives
remained
unchanged

White Paper

- Changes taking place in the context of the government's review
- No funding crisis but improvements needed to ensure:
 - Trustees focus on long-term strategy and risk management
 - Greater accountability and transparency
 - More efficient and effective regulation of funding
- DB statement submitted with valuation:
 - Trustee diligence for their and TPR's benefit
 - Build on existing on good practice

Developments in the funding universe

Clearer strategy for DB maturing
⇒ target 'low dependency' funding and risk

DB Landscape

- **Maturing**
- **40% of schemes are closed to future accrual, up from 22% in 2010**
- **Active membership has fallen 49% since 2010**
- **Most schemes mature in 15 years**
- **1.2 million active members remaining**

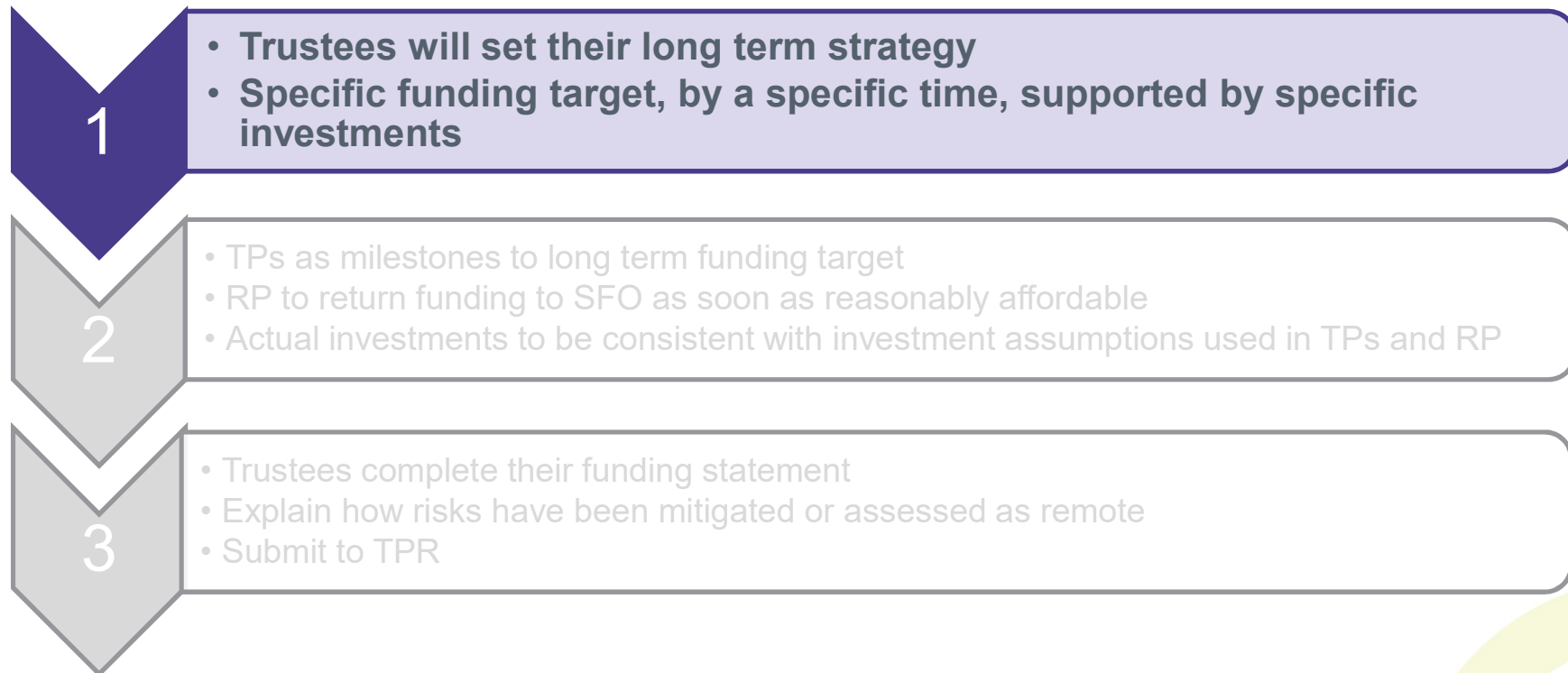
Needs of the industry: regulatory clarity

Where does regulatory evolution end up?

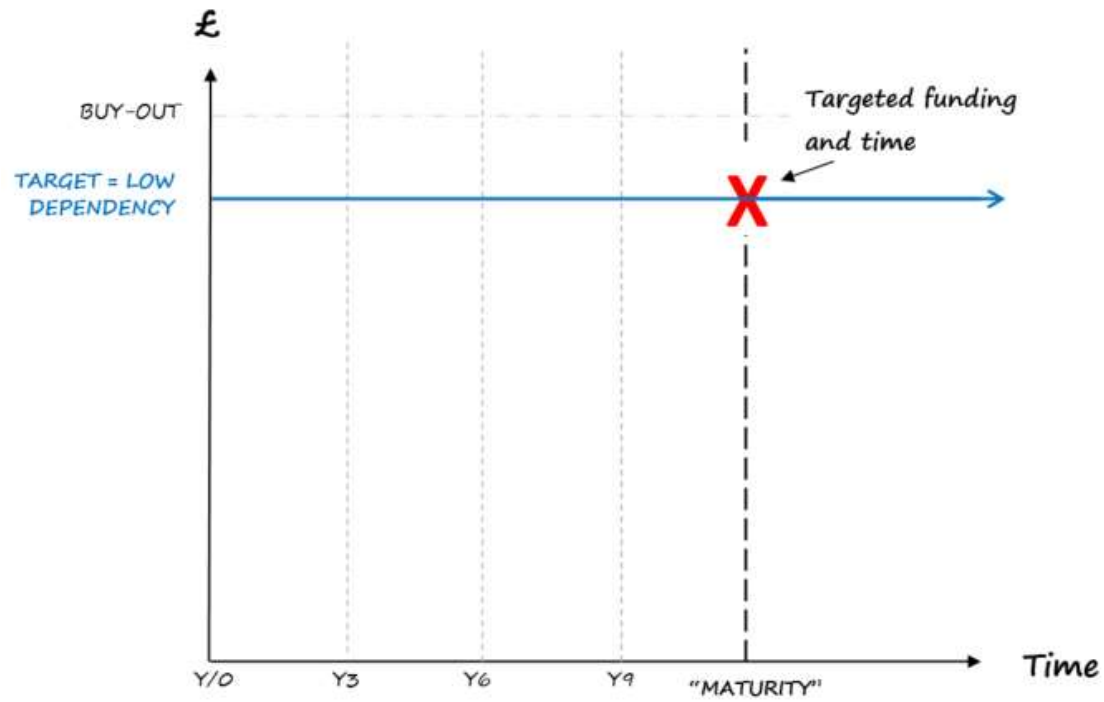


- DB strategy:
 - Our objectives and risks within the system
 - Industry needs
 - = moving the funding universe towards a low dependency risk
- The key product is the revised code of practice providing greater clarity on:
 - prudent technical provisions
 - appropriate recovery plan
 - setting SFO in the context of a long-term objective
- Timetable...?

What is being proposed?



Mapping the long term journey

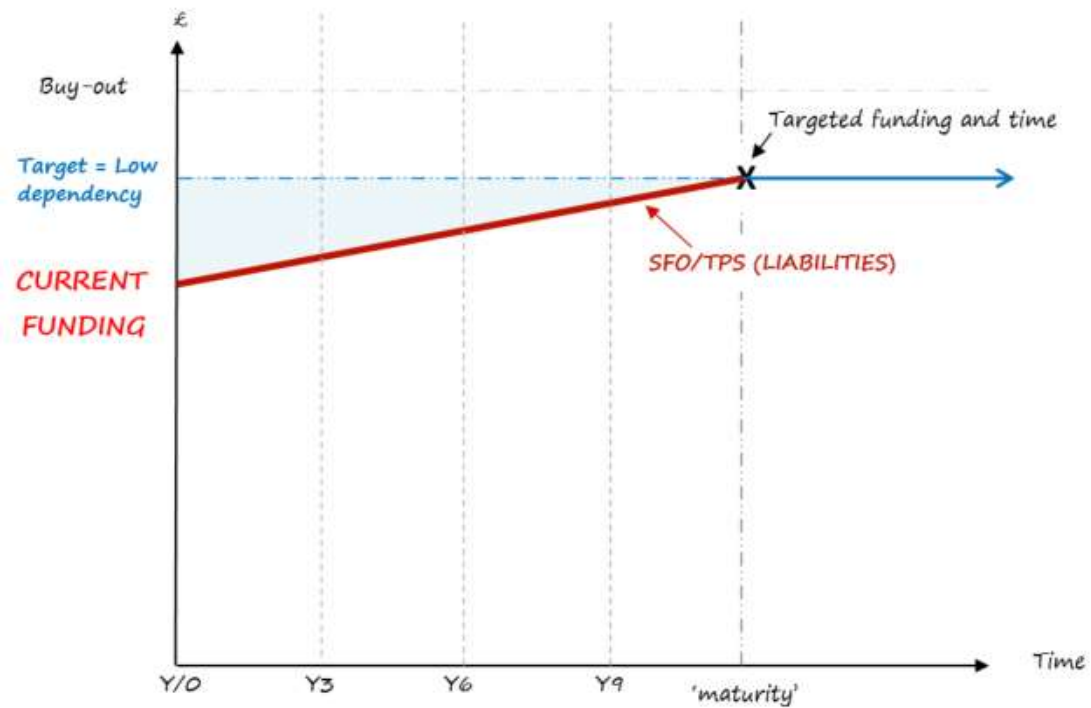


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What is being proposed?

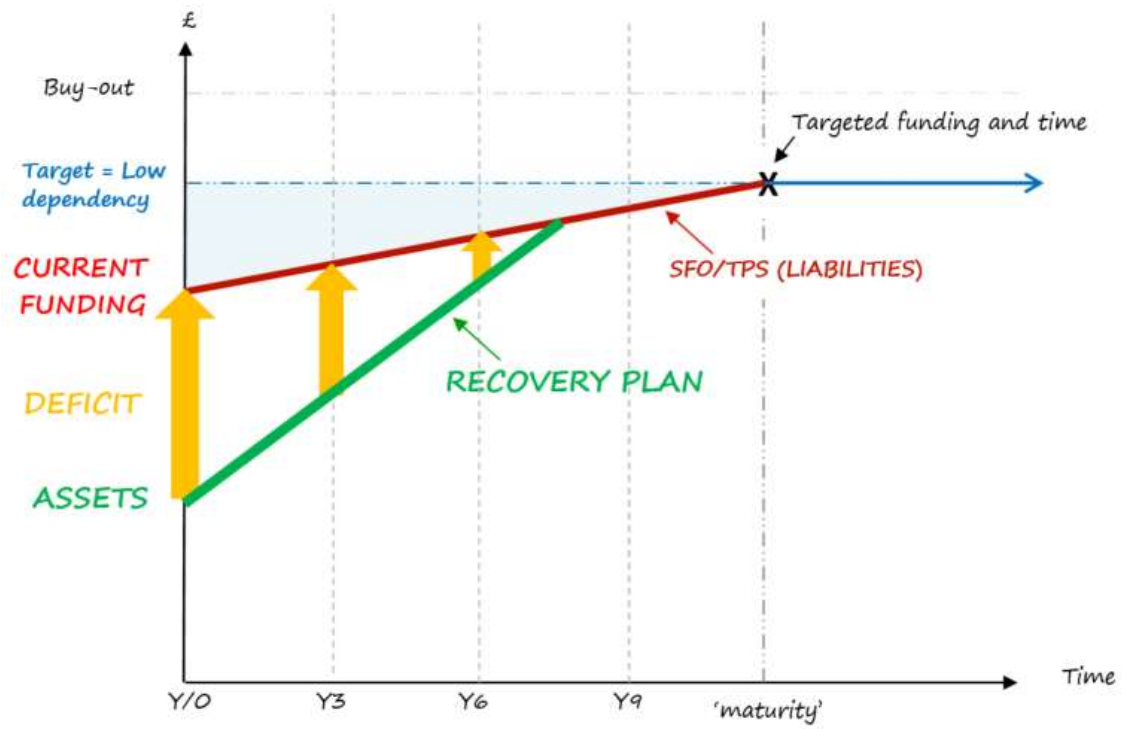


Mapping the long term journey



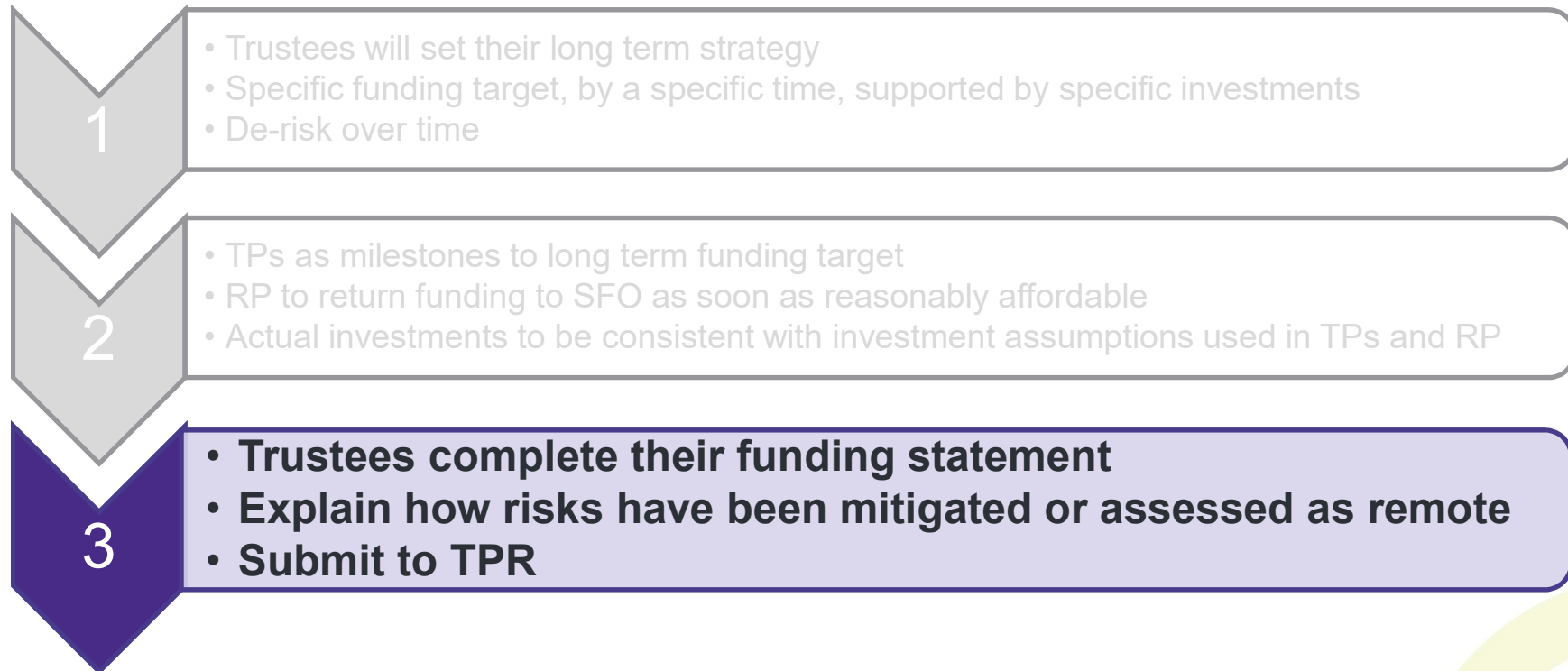
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Mapping the long term journey



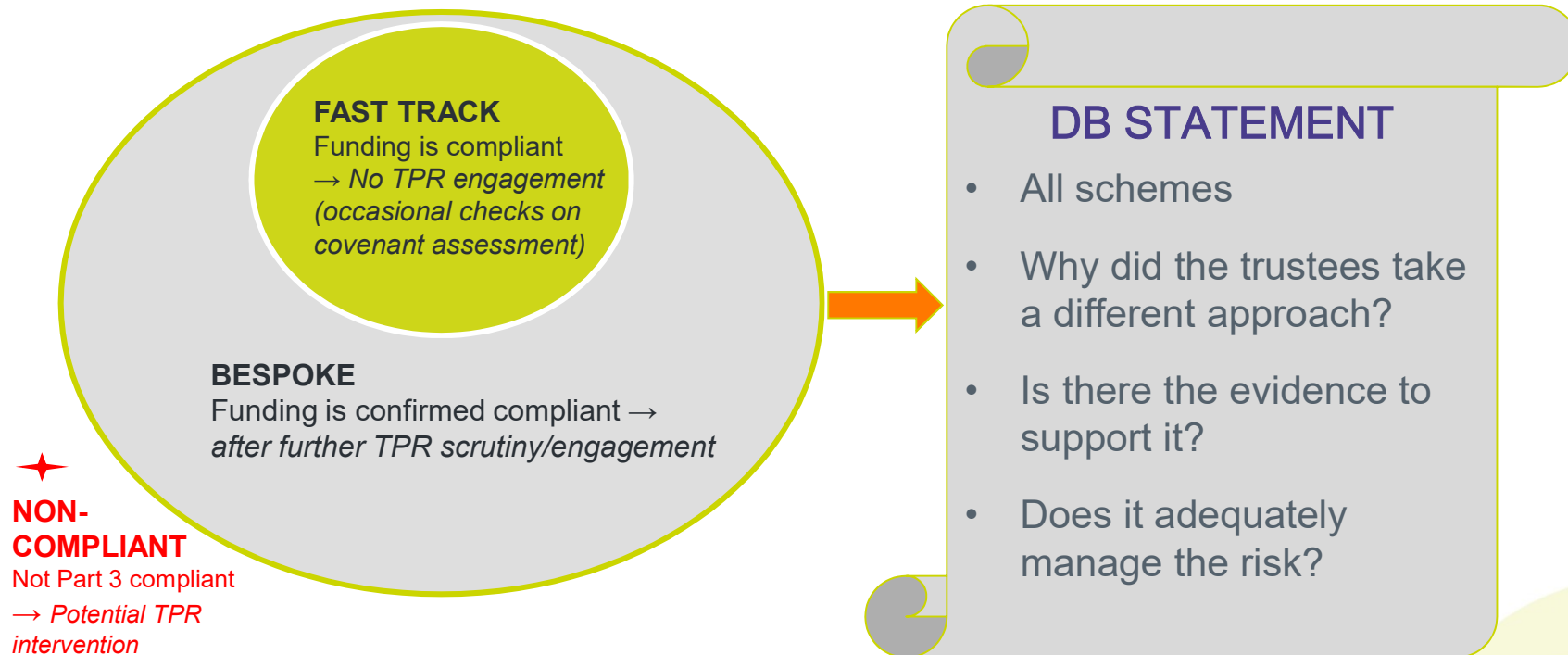
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What is being proposed?



TWIN-TRACK OPTION FOR COMPLIANCE

2004 PA PART 3



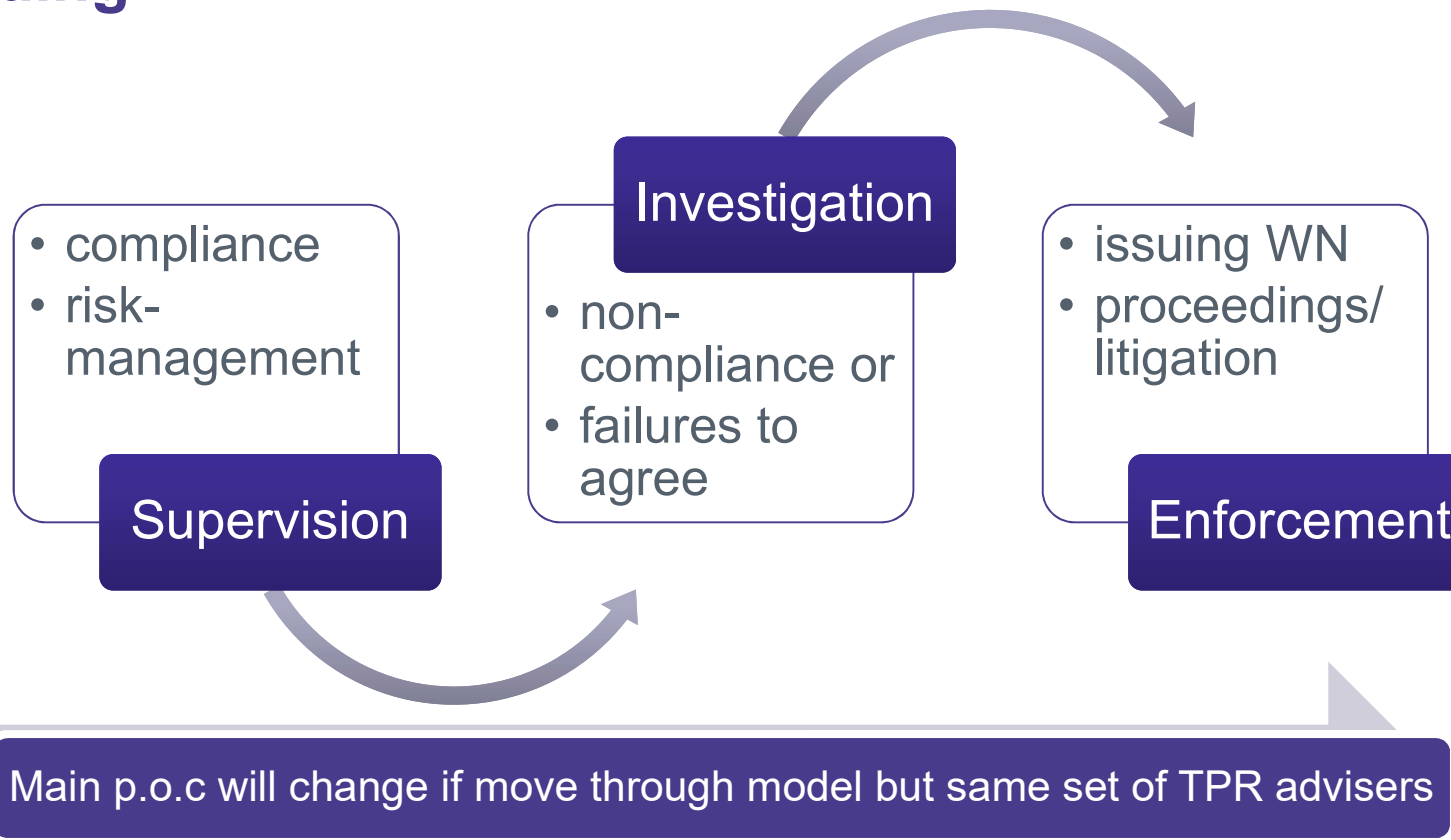
PURPOSE OF THE STATEMENT

- Demonstrates how the trustees have prudently managed risk
- We expect trustees who have followed the Bespoke route to describe how they have supported additional risk by reference to comparable Fast Track
- Trustees will follow the ‘principles’ laid out in the Code (we will be consulting on these)
- Helps TPR assess:
 - Scheme compliance with PA04
 - Which schemes to prioritise for engagement

How the new approach helps trustees with prudence and appropriateness

Prudence/ Appropriateness elements	Fast Track	Bespoke
<p>“RULES BASED” Objective prudence</p>	<ul style="list-style-type: none"> • details the processes the trustees should follow • outline the how the trustees can record reasons and mitigations for funding decisions Trustees and advisers can check against TPR’s view of what is prudent/appropriate for a similar scheme – corresponding with our guidance 	
<p>“PINCIPLES BASED” Subjective prudence</p>		<ul style="list-style-type: none"> • Recognises there could be a scheme specific answer to the prudence and appropriateness questions

A new TPR operational model for scheme funding



Supervision: relationship supervision / regulatory initiatives



Relationship supervision

- Extend reach and develop relationships with all types of strategically important schemes
- Focus on Funding **and** Governance **and** Administration
- Detailed review, then supervisory report
- Scheme to create an action plan to address weaknesses
- TPR learning from best practice

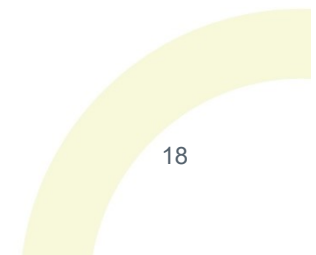
Regulatory Initiatives

- Proactive, high-volume activity
- Increased regulatory grip as we engage with more schemes
- Targeted and specific approach - linked to our regulatory strategy
- Clear on our expectations and hold entities to account
- Feedback loop to inform our strategy and focus of future interventions

Total liabilities* (£)	Market share liabilities*	Total deficit* (£)	Market share of deficit*
£683.5BN	32.7%	£213.5BN	42.2%

*Using TPR's Broadly Hedged basis

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Supervision: Rapid Response and Event Engagement



Risks

- Crystallising Risks
- Corporate distress and transactions

RR

- Ensure trustees recognise risks
- Trustees have capabilities and appropriate advisers
- Employers engaging appropriately

EE

- Direct engagement with employer
- Support trustee engagement
- Negotiate for appropriate mitigation
- Will accept corporate failure if inappropriate mitigation

Investigation and Enforcement

- Investigation and enforcement stages:
 - Gathering evidence (s72 PA04 Notices, expert evidence or possible Skilled Person Reports)
 - Issuing WN; and
 - Using regulatory powers (eg s231 PA04 powers)
- Use of new framework: start with rebuttable presumption the scheme should comply with our standards
- Open to settlement
- Use of s89 Regulatory Investigation Reports

And finally..



- Any questions?

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Solicitors' Negligence and Risk Management

Elaine Brailsford and Edwin Mustard
Shepherd and Wedderburn LLP



ASSOCIATION OF PENSION LAWYERS

P.I. Landscape

- Very hard market
- 1 in 5 of the last 10 years, loss ratios > 100%
- i.e. insurers are losing money
- Reduced insurers' capacity



Significant premium
increases

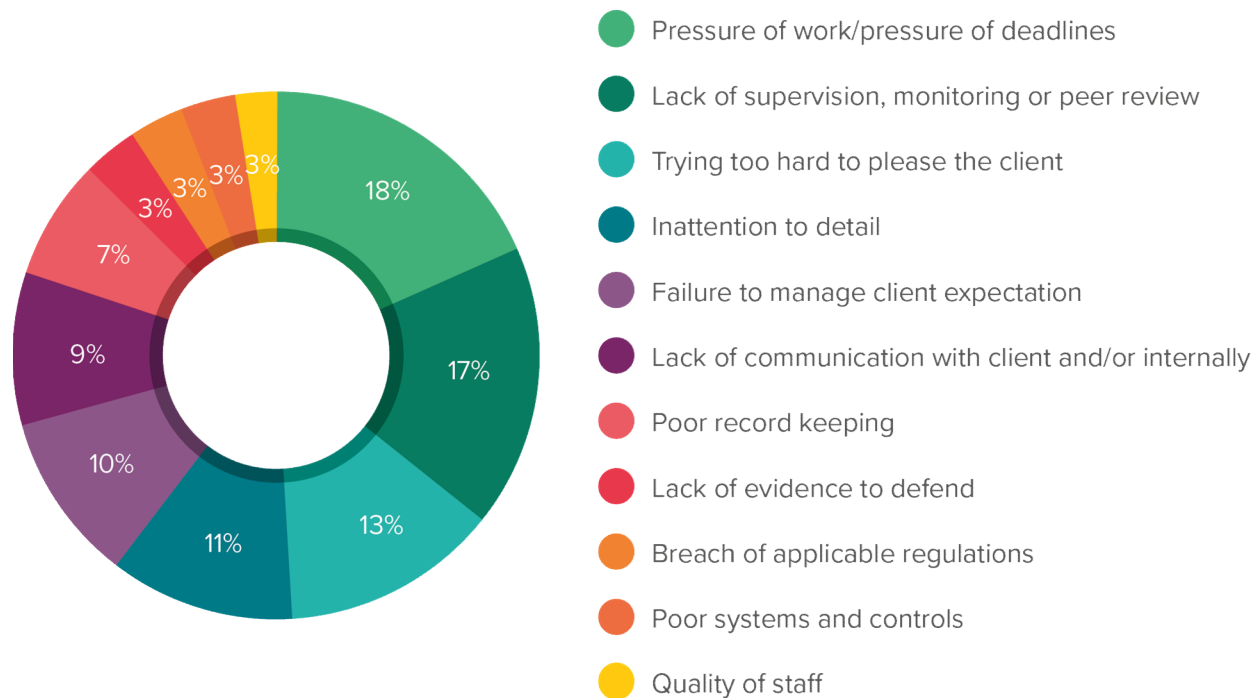
P.I. Landscape cont.

- Nature of pension liability means very large claims
- Historically equalisation claims
- New wave of equalisation claims –
 - Alleged failure to identify mistakes on part of the original lawyer - “Cannibal Claims”
- Conversion from final salary schemes to career average salary schemes
- Some errors may be rectified – but at a cost
- “Mission creep”

What causes claims?

Large law firms survey

(Legal Business 2019)



Urgency, lack of oversight/checking detail combined with 'pushy' clients are recurrent factors in claims

Legal Framework – A Quick Refresher

- Professional liability arises both in Contract and in Tort
- Contract to provide particular service
 - Implied (if no express terms) that you will act with the required standard of care in accordance with instructions given
- Concurrent duty of care in tort independent of contractual obligations

Legal Framework – A Quick Refresher cont.

The standard of care:

- The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession
Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp 1979 CL 384
- Slightly different formulation in Scotland:
 - Usual and normal practice
 - Failed to adopt that practice
 - The course adopted was one that no professional man of ordinary skill would have taken if he had been acting with ordinary care

Hunter v Hanley 1955 SC 200



Offer specialised advice – standard will be that of specialist in that field

Legal Framework – A Quick Refresher cont.

- To whom is the duty owed?
- With whom have you contracted?
 - Trustee, employer, both?
- What is the scope of the retainer?
 - Does it make clear who you owe a duty to and who you don't owe a duty?

Legal Framework – A Quick Refresher cont.

- Exemptions and exclusions and liability cap?
- Any exclusions etc. are subject to the reasonableness test under the Unfair Contract Terms Act 1977

Legal Framework – A Quick Refresher cont.

- Obligations owed to third parties – employers, members?
- Assumption of responsibility for the accuracy of a statement relied upon

Hedley Byrne v. Heller & Partners 1964
AC 465

- The Threefold Test:
 - foreseeability
 - proximity
 - fair, just and reasonable

Caparo Industries plc v Dickman 1990
UKHL 2

- No single test

Robinson v Chief Constable of West Yorkshire Police 2018 UKSC

Legal Framework – A Quick Refresher cont.

- White v Jones 1955 1AER 691 HL
- Disappointed legatee
- Assumed responsibility
- But no reliance
 - “practical justice”
- Restricted class i.e. legatee



Scottish courts have not been prepared to extend beyond disappointed legatees

Legal Framework – A Quick Refresher

Scope of Duty

- Starting point - Terms of the Retainer
- What have you undertaken to do?
- Disclaimer – liability cap - exclusions?
- Information or Advice

- Have you assumed responsibility for giving commercial advice?

BPE Solicitors v Hughes-Holland 2017 UKSC 21

- Solicitors did not assume responsibility for the decision to lend
- Losses arose from commercial misjudgement and not attributable to wrong information i.e. if correct information given, client would have lost his money anyway

Legal Framework – A Quick Refresher

- Duty to advise on risk
 - *Balogun v. Boyes Sutton & Perry* 2017 EWCA Civ 75
 - *Barker v Baxendale Walker* 2018 EWHC 1681(Ch)
- Where there is a significant risk of a contrary interpretation or opinion being correct you should warn of that risk.

Practical Issues and Risk Management

Particular aspects of pensions advice:

- scheme's lawyers may be retained by one party (e.g. the trustees)
 - but there are others closely connected to it (such as the scheme's principal employer)
- often on-going appointments rather than discrete one off instructions
- Trustees “running advice by more than one adviser”
- we advise in lots of grey areas of the law
- case law often confuses the position rather than clarifies it
- what we do is not an exact science: often involves matters of judgement

Practical Issues and Risk Management

Agenda

- examine solicitors negligence:
 - at a practical “coalface” level
 - focus on risk management
- some practical aspects of “who is the client?” and duties owed
- letters of engagement and going beyond the retainer
- advising on grey areas of the law
- other practical issues.

Who is the client?

- Starting point:
 - Section 47 PA95 requires appointment by Trustees alone, so clarifies contractual relationship
 - only a party to contract owed duties
- But financial impact of advice can be felt by others: e.g. employer(s) impacted by services provided to Trustees
- contractual duties might be owed solely to Trustees (client)
- BUT parallel duties under negligence law could be owed to:
 - Employer(s)
 - Members? (possible where advice specific to member given)



Legal adviser
engaged exclusively
by TRUSTEES

Who is the client?

- expect contractual relationship between legal adviser and Employer
- the absence of a Section 47 letter means that it is unlikely that Trustees will seek to establish that duties are owed by Employer's adviser



Legal adviser
engaged exclusively
by EMPLOYER

Nature of claims

1. Trustees: trust fund depleted
2. Employers: responsibility for all or proportion of scheme deficit – under/overpayment of contributions
3. In some circumstances, Trustees may not suffer loss following advice, but Employer does
4. Inevitably is fact specific

Who is the client?

Could duties in tort/delict be owed to the Employer? (relevant to “economic loss”)

01

“negligent misstatement” type claims (Hedley Byrne v Heller)

Example:

- Trustees’ legal advisers prepare updated trust deed and rules
- accompanying commentary, but headed up simply with the name of the Scheme - no indication of who advice for
- Principal Employer has no separate legal representation
- commentary passed to Principal Employer in full knowledge of Trustees’ legal adviser
- updated trust deed and rules not effective – rectification not possible
- Principal (and other non-principal) employers suffer loss
- no responsibility to third parties disclaimed

Who is the client?

02

“White v Jones” type claims:

- subsidiary employers ?
- could duty be established where no reliance on advice occurs in a Hedley Byrne sense ?

Example: rule re-write by Trustees' solicitors goes wrong and subsidiary employers impacted despite having no involvement in rules re-write and not receiving any ‘statement/misstatement’

- White v Jones: solicitors negligence in drafting will – solicitors’ failure caused disappointed beneficiaries to suffer loss

Wider responsibility?

misstatement

assumption of responsibility

“sufficient proximity”

reasonable foreseeable

fair and reasonable to
impose responsibility

Possible hurdles:
no conflict between T&PE
assumption of responsibility
may not be easy to establish
reliance by PE on advice

Letters of Engagement

“...On the question of retainer, I would observe that where there is a difference between a solicitor and his client upon it, the courts have said for the last 100 years or more that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight be given to it. The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned.

If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences...”

Denning LJ, Griffiths v Evans [1953] 1 WLR 1424

Letters of Engagement

- sets out express scope of contractual duty
- generally no duties arise until advice requested – at this point scope agreed and duties clarified
- BUT consider precise scope of retainer – too general?
 - “we will act as legal adviser for you as Trustees of the XYZ Pension Scheme”
- run risk of implied duty to proactively monitor, warn or volunteer advice
- consider the following alternative :
 - “we will provide legal advice to you as the Trustees of the XYZ Pension Scheme as requested by you from time to time”

Letter of Engagement

Limiting liability to third parties in engagement letter:

- consider restricting use and onward disclosure of advice:
 - “.....unless otherwise agreed our advice is provided solely to you and may not be used for any other purpose or disclosed to any person other than your other advisers (who may not rely on such advice)”
- may not completely remove arguments that no duties owed to third parties
- but helps inform circumstances that no responsibility is assumed by you to third parties
- disclaimer in advice itself?

Letter of engagement

- If no engagement letter:
 - scope of duties unclear
 - gives client opportunity to argue ambiguity
 - opportunity for liability caps is lost
 - solicitor regulatory requirement anyway
 - might increase chances of claims being made
 - lose control over who client may claim against (claims only against law firm and not individuals?)

Set out:

- what will and wont do
- if you expect or require the client to involve other advisers, say so

Letter of engagement

- Importance of clarifying instructions
 - advice could be correct, but not appropriate due to:
 - unclear instructions obtained
 - the right questions haven't been asked
- Mission creep:
 - update letter of engagement if changes or increases to the retainer
 - Example: client gives a vague request to “update the rules”

Letter of engagement

- Standard terms conflict with panel appointments and ITT terms
 - tender win in response to ITT
 - ITT contains t's and c's which apply if contract awarded – may not limit liability
 - risk that liability is uncapped
 - may still be scope to “haggle” on terms once contract won – but procurement risk for some clients if change sought
 - link pensions advice to overall services agreement

Invoicing

Take care when invoicing:

- fee note narratives: do they tie in with what has been done/the agreed level of responsibility assumed in the retainer?
- an opportunity to reconsider the retainer terms

Responsibilities on change of adviser

Trustees changes legal advisers:

- boxes of files appear
- duty on new advisers to start investigating? What does the standard of care suggest?
- “loss of chance”?
e.g. lurking historical equalisation problem?

- avoid arguments over responsibility being assumed by new solicitors: make clear in retainer what will do/not do with the contents of boxes received?
- for example: confirm that engagement shall not extend to conducting a review or due diligence on past documents or advice prepared unless specifically agreed

Advising in “grey areas” of the law

Grey areas a common feature of pensions law advice:

- just because area is grey does not preclude the legal adviser advising on a way forward
- as long as legal adviser caveats advice that legal position is not certain and that a contrary view could be taken by the courts
- key consideration: whatever course of action is it within a range of what a reasonable body of trustees would do?
- in some cases counsel’s opinion or directions from court may be appropriate
- always fact specific, but could be duty on solicitor to advise clients of significant risk that analysis could be wrong *Balgoun* and *Barker v Baxendale Walker*

Keeping up to date

- driven by the standard of care
- knowledge to be updated
- new developments incorporated into advice
- reasonableness test

the professional should not *“lag behind other ordinary assiduous and intelligent members of [their] profession in the knowledge of advances, discoveries and developments in their field”* Bingham LJ, *Eckersley v Binnie* (1988) 18 Con LR1

- an obvious plug for the APL!

Conclusions

- reported negligence cases rare: a function of complexity in the field and greyness of law?
- obvious practice management issues
- see the other side of the argument: avoid confirmation bias
- limiting liability does not equate to Teflon law!
- the existence of a liability cap may dissuade claims
- availability of rectification, contributory negligence and causation may impact on claims



Keeping a sense of perspective

A focus on liability and risk: Liability transfer on a buy-out

Julian Hobday
Adrian Somerfield
Chris Sharpe

November 2019

562749647



SLAUGHTER AND MAY

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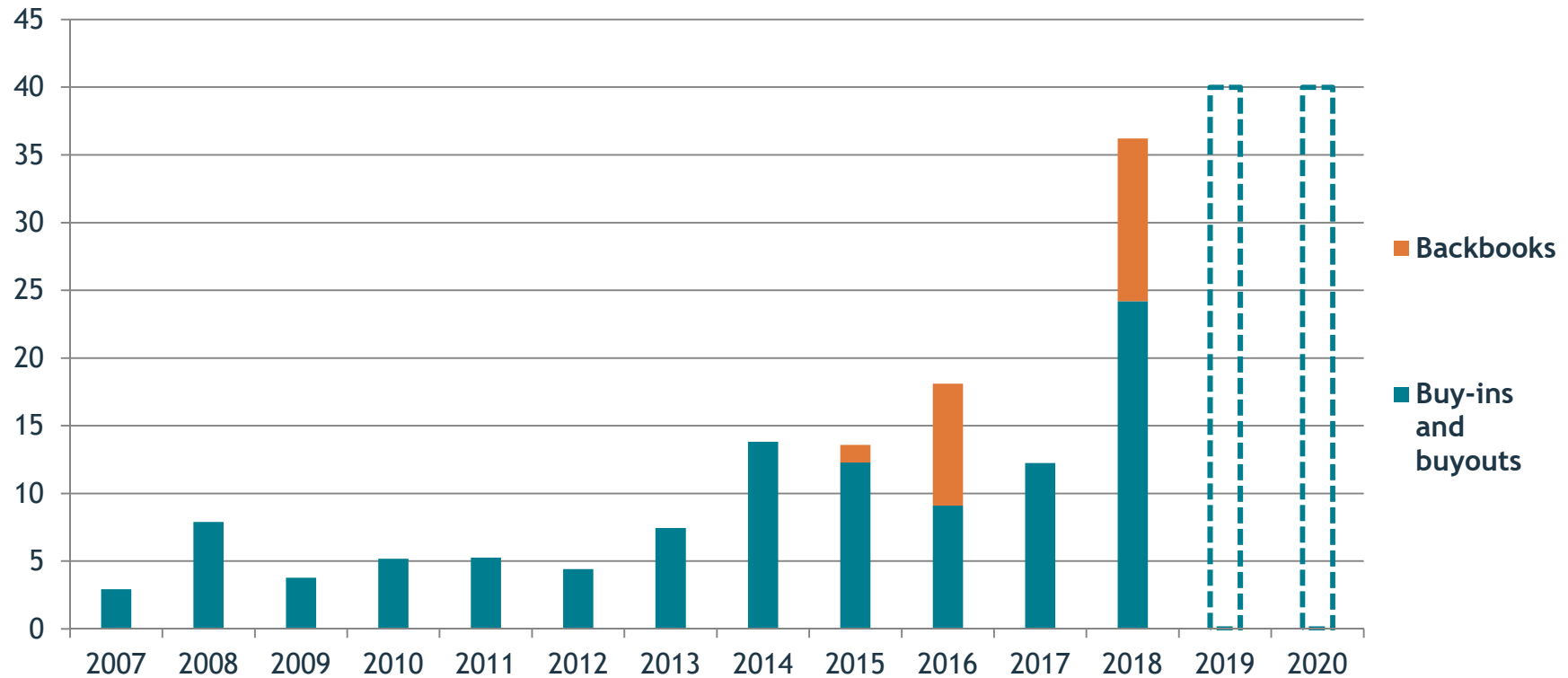
1. Introduction
2. Basic structure of buy-in and buy-out
3. Preparation - Data and benefits
4. Liability transfer
5. Residual risks
6. Some tricky areas
7. Questions?



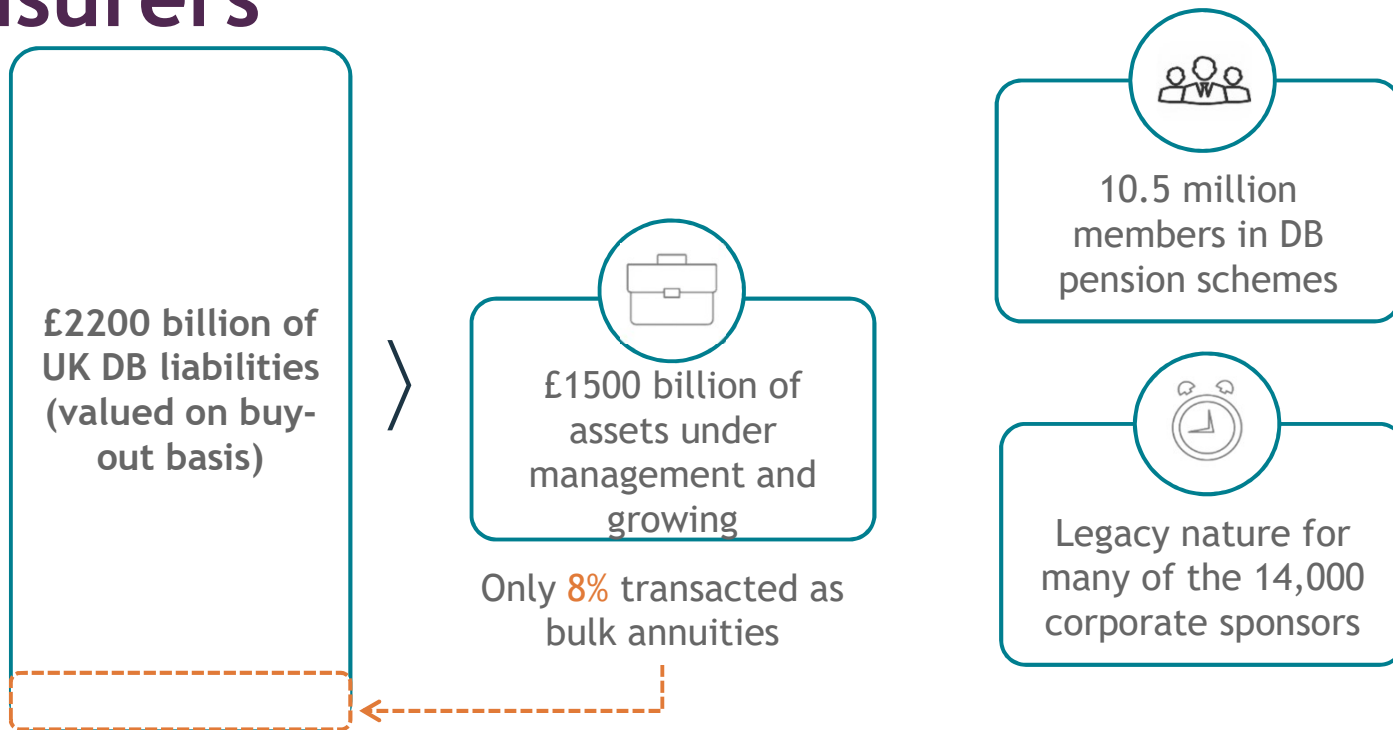
1. Introduction



Large expansion of the buy-in/out market...



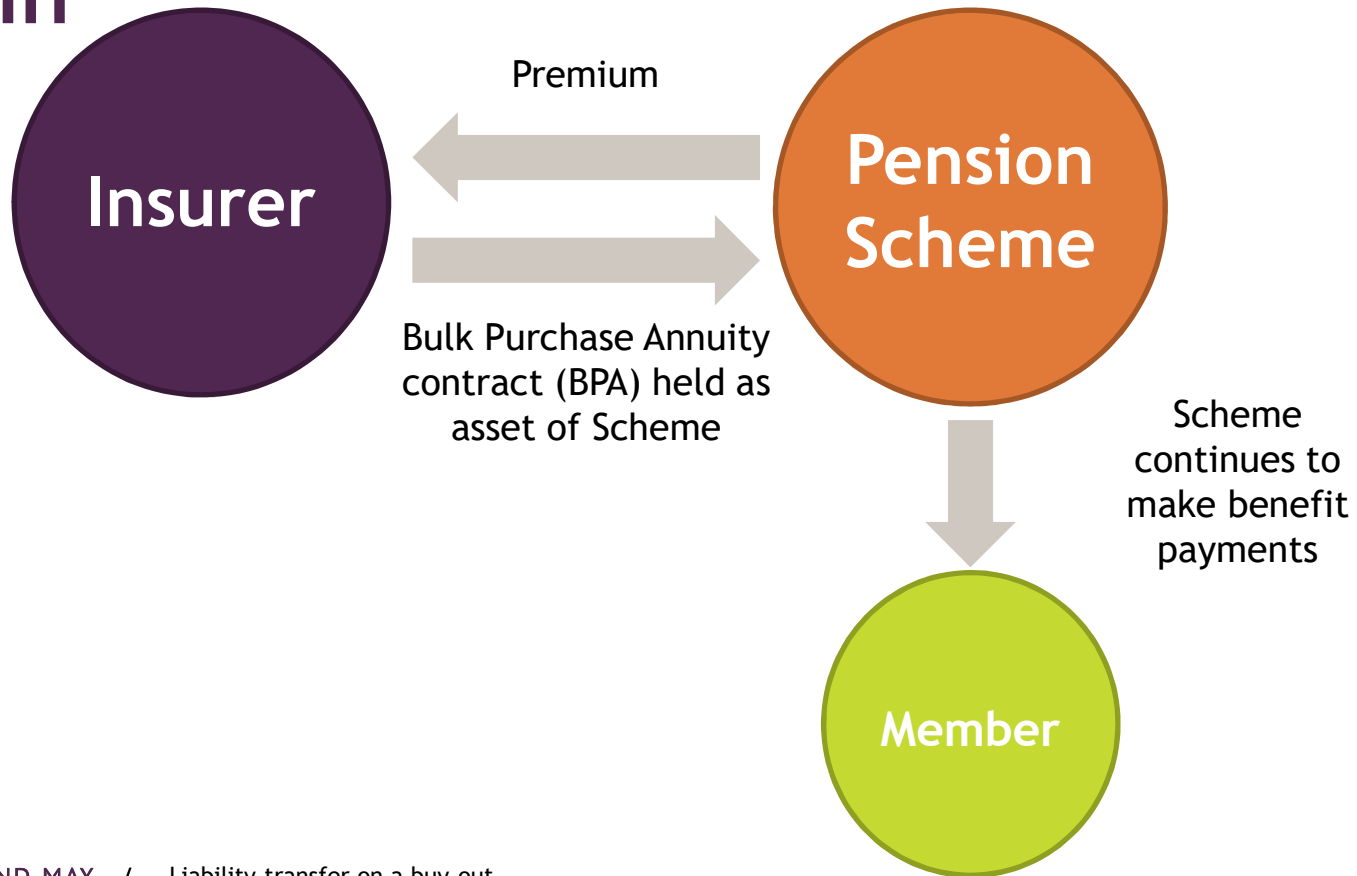
...but only 8% of liabilities have transferred to insurers



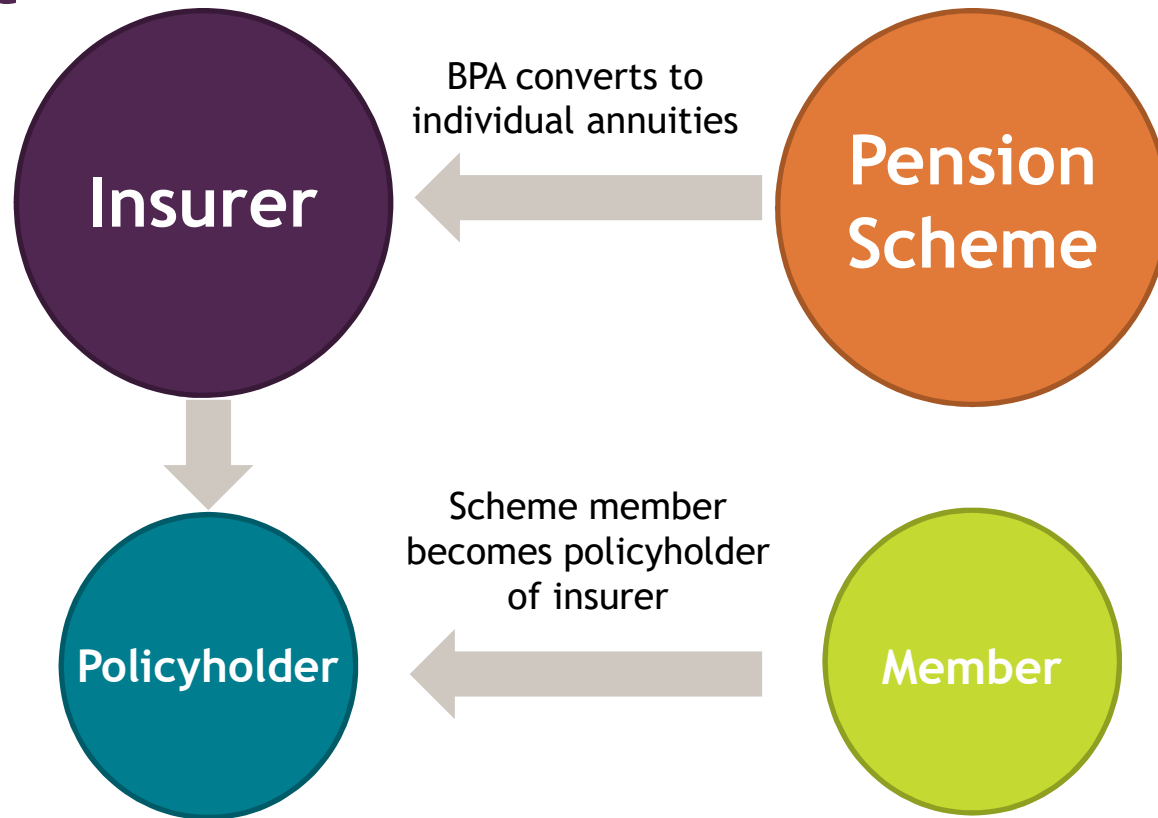
2. Basic structure of buy-in and buy-out



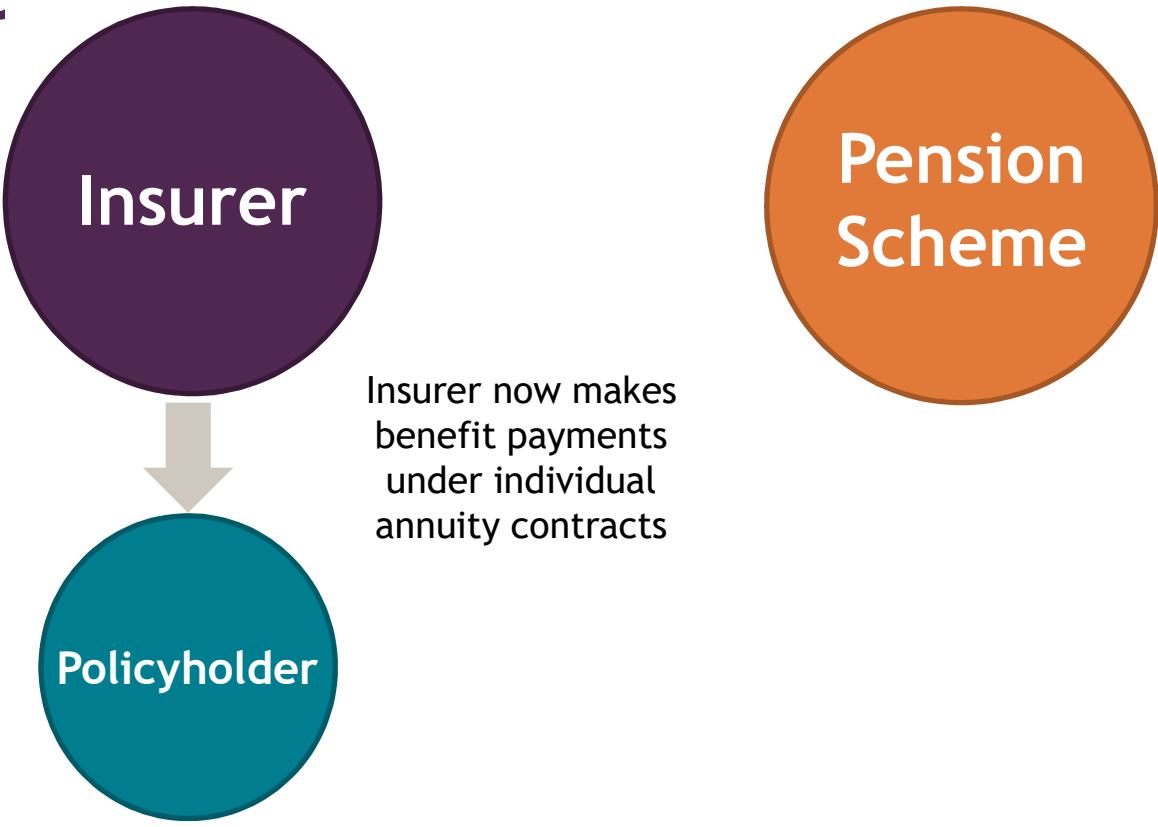
Buy-in



Buy-out



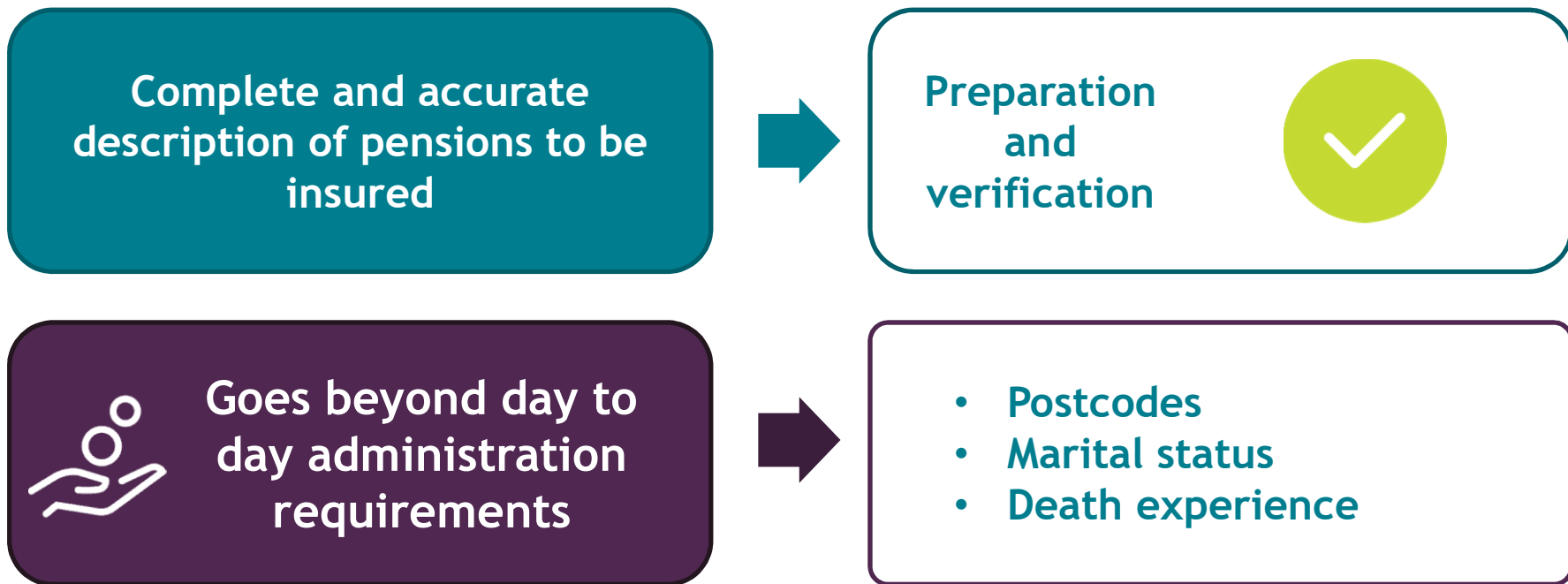
Buy-out



3. Preparation - Data and benefits

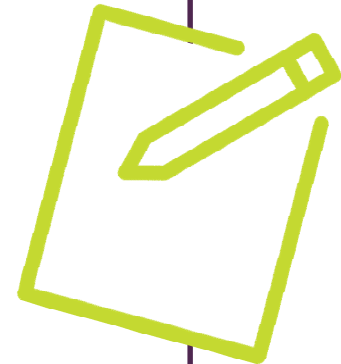


Importance of good data



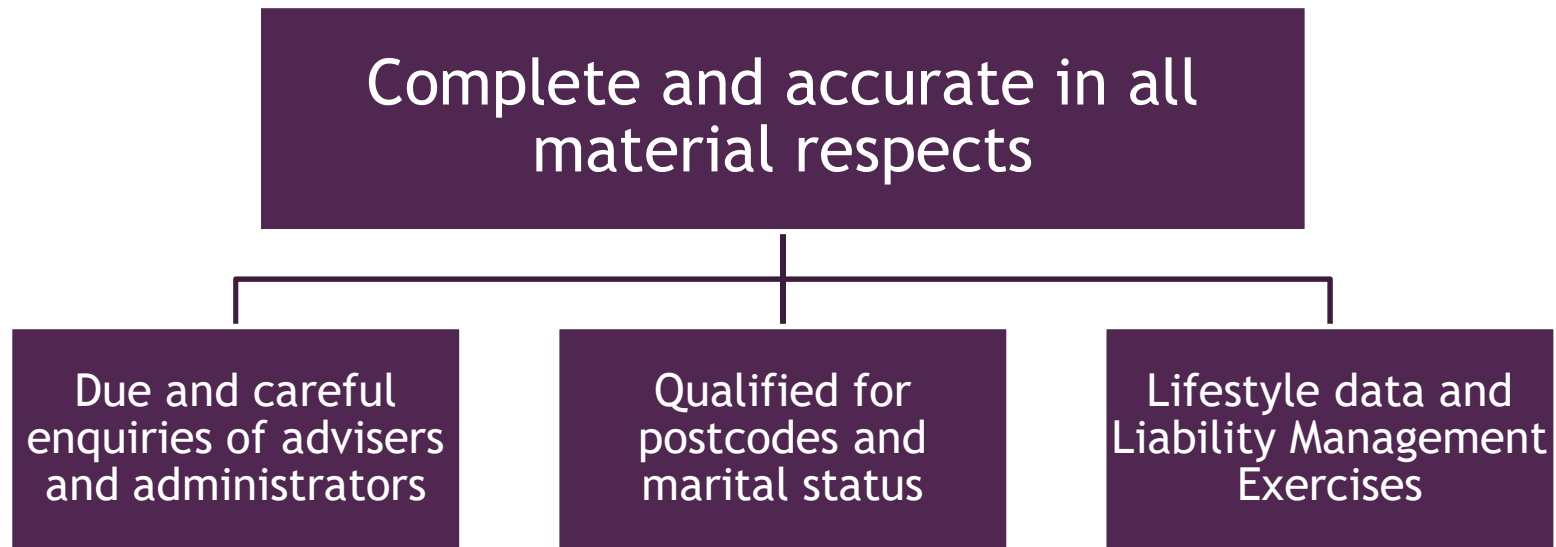
Importance of benefit specification

- Codify discretionary practices
- Beware of:
 - Unusual benefits which are difficult to price or asset match
 - Benefits payable on terms more generous than cost neutral
- Review governing documentation
 - Any special member letters / announcements?
 - Closure of “Barber” window / to future accrual effective?
 - Past administration practice consistent with governing documents?



An accurate benefit specification is a key component of any buy-in or buy-out transaction

Trustee warranties on data and benefits



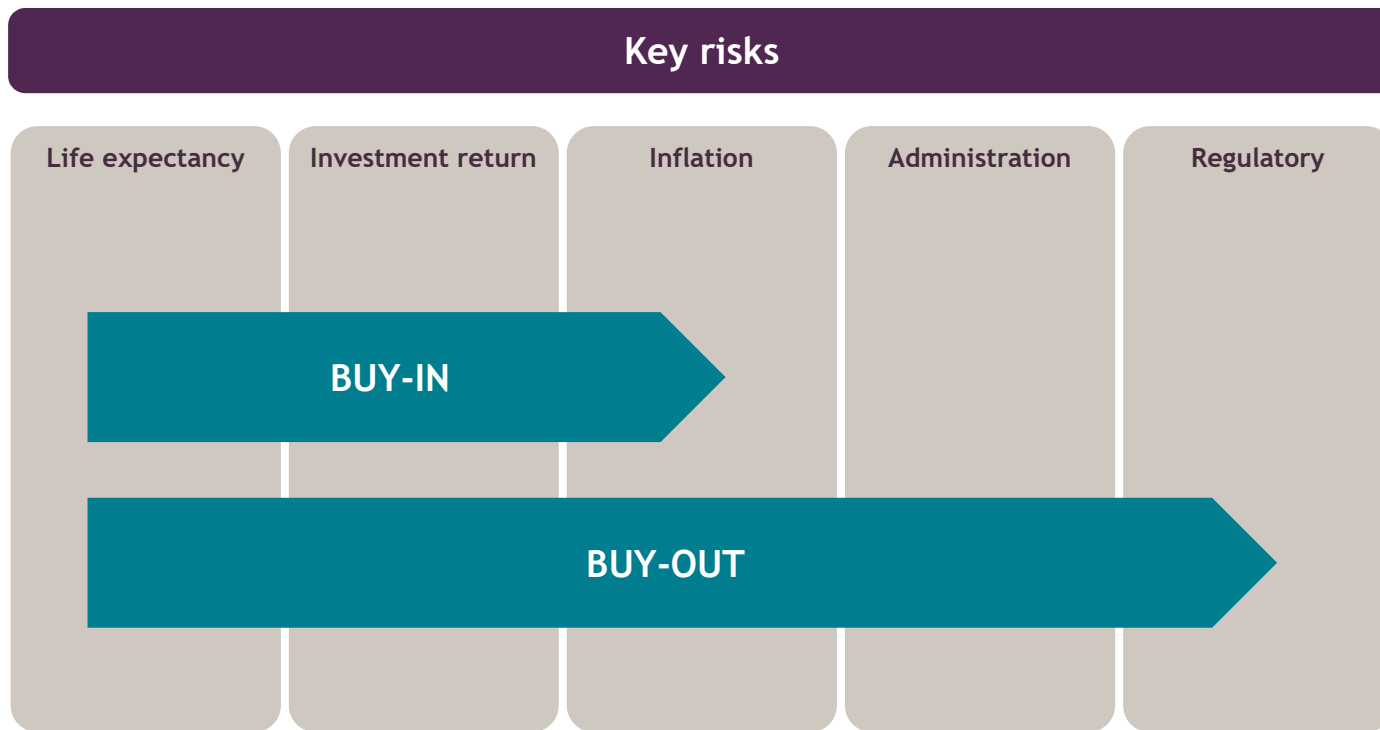
4. Liability transfer



When are liabilities transferred?

- Important to keep in mind which liabilities transfer and at what stage
- What do we mean by “liabilities”?
 - Certain key “economic” risks transfer at the buy-in stage...
 - ...but on one analysis all that has happened is that a basket of assets has been swapped for one asset, i.e. the trustees’ rights under the policy with the insurer
 - Insurer funds trustee benefit payments under buy-in policy
 - From a legal perspective, trustees are still liable to pay the benefits at the buy-in stage

“Economic” risk transfer



Discharge of trustees' legal liability

- Position pre-buy-out
 - Trustee remains liable
- Annuitisation (or commutation) and discharge
 - Scheme rules vs. statutory discharge
 - Ongoing scheme or winding-up?
 - Section 27 Trustee Act 1925
- Insurer only insures what you tell it to insure
 - Position after buy-out but before completion of winding up
 - Position after completion of winding up

Which liabilities are not transferred?

Why could the insurance policy be different to the scheme entitlement?	What are the mitigants?	Are there other options to transfer the risk?
Data errors	Data cleansing	?
Benefit discrepancies	Audit of scheme documents	?
Missing members	Data cleansing GMP reconciliation	?

5. Residual risks



Residual risks cover from insurer

What's typically covered

- Data errors
- Benefit errors
- Missing beneficiaries
- Without limit on monetary amount or time

What's not covered

- Fraud/negligent non-disclosure
- Possible carve outs for issues identified during due diligence
- Legislative changes

Residual risks case study - exclusions

Background

- £450m full scheme transaction
- Completed with Legal & General late 2016
- Residual risk cover was a key contractual requirement

What was the issue?

- Switch from RPI to CPI linked increases
- Change communicated to members, documented at a trustees meeting and consistent with administration practice
- Ambiguity in rules as to whether change effective
- QC opinion sought - change to CPI was probably effective, not definitive

What was the solution?

- Carve out from the residual risks cover
- Separate indemnity for trustees from sponsoring employer

What do you do with remaining uninsured risks?



Options for
dealing with
remaining
uninsured
risks

- General run-off insurance?
- Sponsor indemnity?
- Buy individual annuity (e.g. small number of missing beneficiaries)?

Which liabilities are not transferred?

Why could the insurance policy be different to the scheme entitlement?	What are the mitigants?	Are there other options to transfer the risk?
Data errors	Data cleansing	<ul style="list-style-type: none"> • Residual risks cover from insurer • Trustee indemnity insurance • Sponsor indemnity
Benefit discrepancies	Audit of scheme documents	
Missing members	<ul style="list-style-type: none"> • Data cleansing • GMP reconciliation 	

6. Some tricky areas



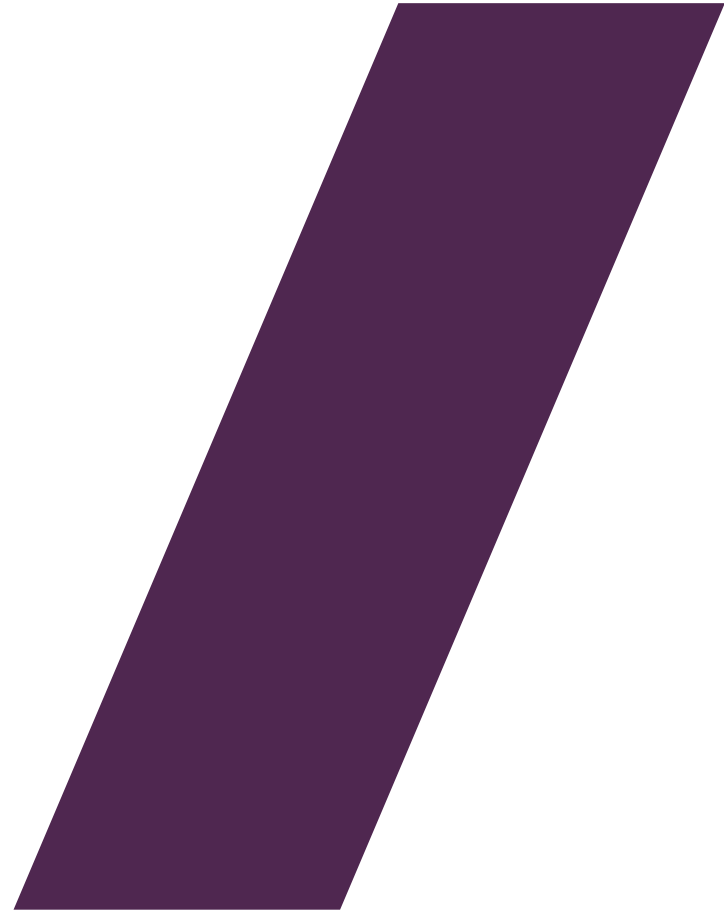
Some tricky areas



Fixed protection

GMP equalisation / conversion

7. Questions?



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PowerPoint Presentation 562749647



SLAUGHTER AND MAY

GMP equalisation: Panel Discussion

Our agenda

Part 1

- Snapshot – where are we?
- Unpicking the 2 key methodologies:
 - C2
 - D2

Part 2

- Other methods?
- Forfeiture
- Transfers
- De minimis tolerances

Illustration of crossovers: 60 year old female pensioner

NO CHANGE

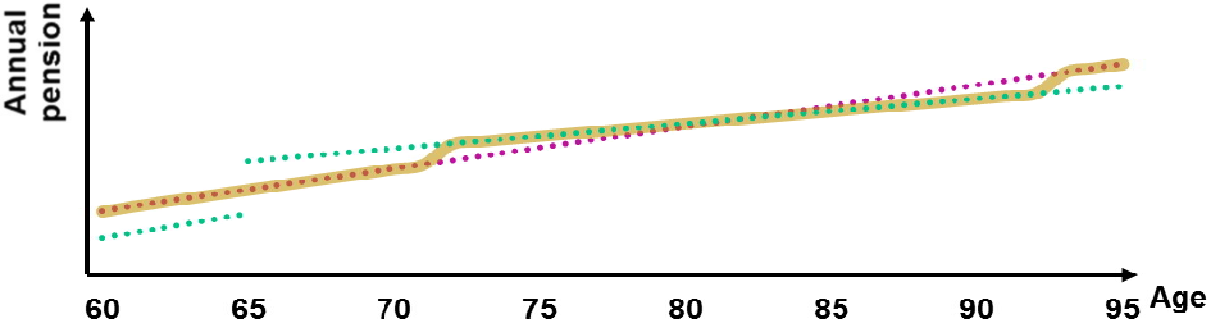
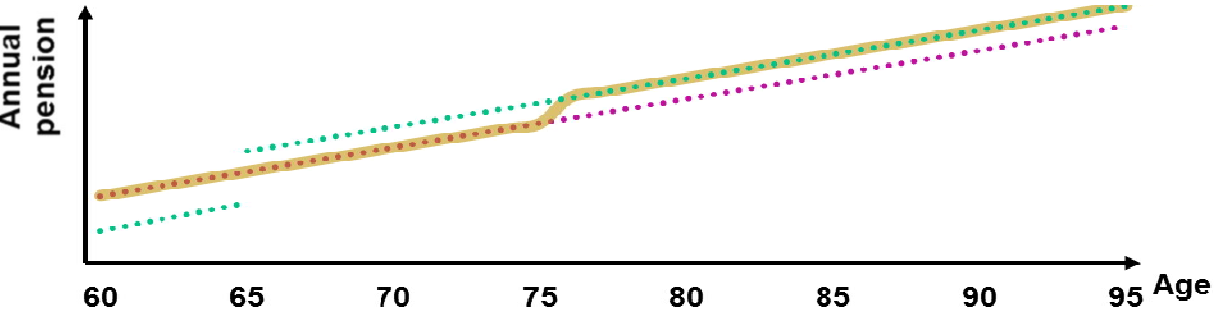
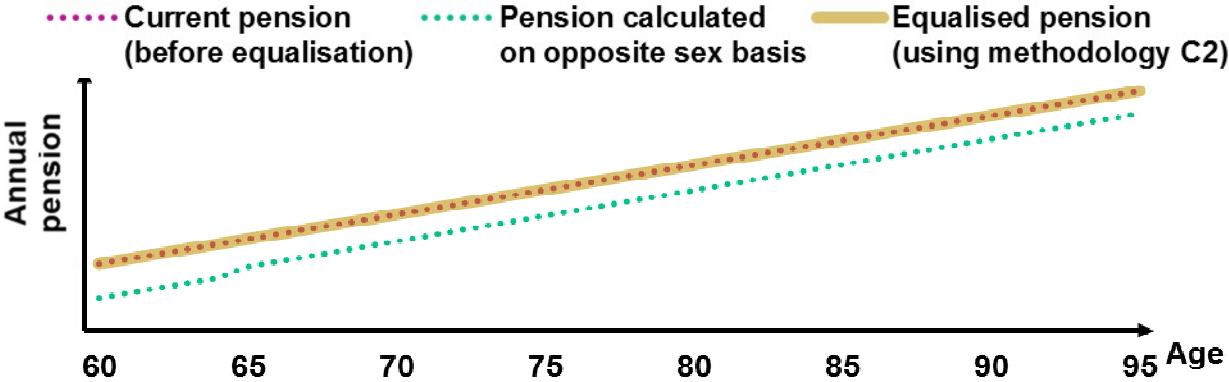
Pension currently payable is always going to be bigger than the opposite sex calculation

CROSS – OVER

Pension on opposite sex basis kicks in after a few years (at age 75)

DOUBLE CROSSOVER

Pension on opposite sex basis kicks in at some point, and then reverts to the current basis at a later date



What factors affect the size of the liability impact?

Factor	Typically higher impact	Typically lower impact
Average pension amount	Low pensions	High pensions
Normal Pension Age	65	60
Pre 97 pension increases	0%	RPI5
Sex	Male dominated NPA65 schemes <i>NPA60 schemes vary</i>	Female dominated NPA65 schemes <i>NPA60 schemes vary</i>
Back-payments	Full 28 years	Limited to 6 years
Revaluation of GMP at retirement pre GPA	Nil	Fixed rate
Scheme practice for “step up” at GMP pension age	High step ups in practice	Little or no step up usually.

Impact may be 3%+

Impact may be <0.5%

Range of possible outcomes – some strawmen

Scheme A:

- Normal retirement age 60
- At retirement date, excess and GMP revalued separately, with GMP revalued at fixed rate
- Pension increases on post 88 GMP are the same as pension increases on other pre-97 pension amounts
- Females: Likely to have no uplift
- Males: Uplift required to reflect higher female GMP, and hence higher pension at retirement
- But $B = C1 = C2$ and liability impact equal to D2

Scheme B:

- Normal retirement age 60
- At retirement at 60, females receive full revaluation on GMP and excess as required
- For males, whole pension is revalued at excess revaluation rate to 60
- At 65, all males get an uplift equal to differences between GMP revaluation and excess revaluation on GMP
- In almost every case, females start off higher, males are then higher from age 65, and a further crossover is also possible
- So almost every case is a crossover case
- And B is much more expensive than C2 which is also more expensive than D2, if benefits are not equalised through a C2 process prior to conversion

Context - What will equalisation mean for members in practice?

Analysis for a deferred pensioner population

Pension Valuer - Analytics Module
Help

Select method

C2 "Pay the male or female pension with the higher accumulated value in each given year, including interest on past payments."

Impact of different methods

Method	£ inc in liability	% inc in liability
B	£1,391,115	0.48%
C1	£927,410	0.32%
C2 (Selected)	£908,895	0.31%
D2 (opposite sex)	£907,859	0.31%

Membership summary - method C2

Pre 1990 only	90 - 97 service	Post 97 only
1 members	45 no change 209 opposite sex 187 crossover cases	434 members
876 total members		

Detailed analysis - charts

Compare
Male vs Female
Analyse
% impact
Plot by
Age (Years)

Male vs Female

DISCLAIMER - This tool is intended as an interactive aid to facilitate discussion and understanding. No action should be taken on the basis of this tool without obtaining advice specific to your circumstances from your usual Willis Towers Watson consultant. Copyright© 2019 Willis Towers Watson. All rights reserved.

Version 0.2

D2 - Conversion

-Legislation: s.24A-s.24H PSA 1993

-S24B: Conversion Conditions

- 1) Actuarial Equivalence (Reg 27, Schemes that were Contracting Out No2. Regs)
- 2) No reduction to pensions in payment
- 3) Can't convert into DC
- 4) Provision of survivor benefits
- 5) Procedural requirements, including
 - Employer consent
 - Consultation with members

-Basic principle: Place an actuarial value on benefits to be converted

-Take the higher of:

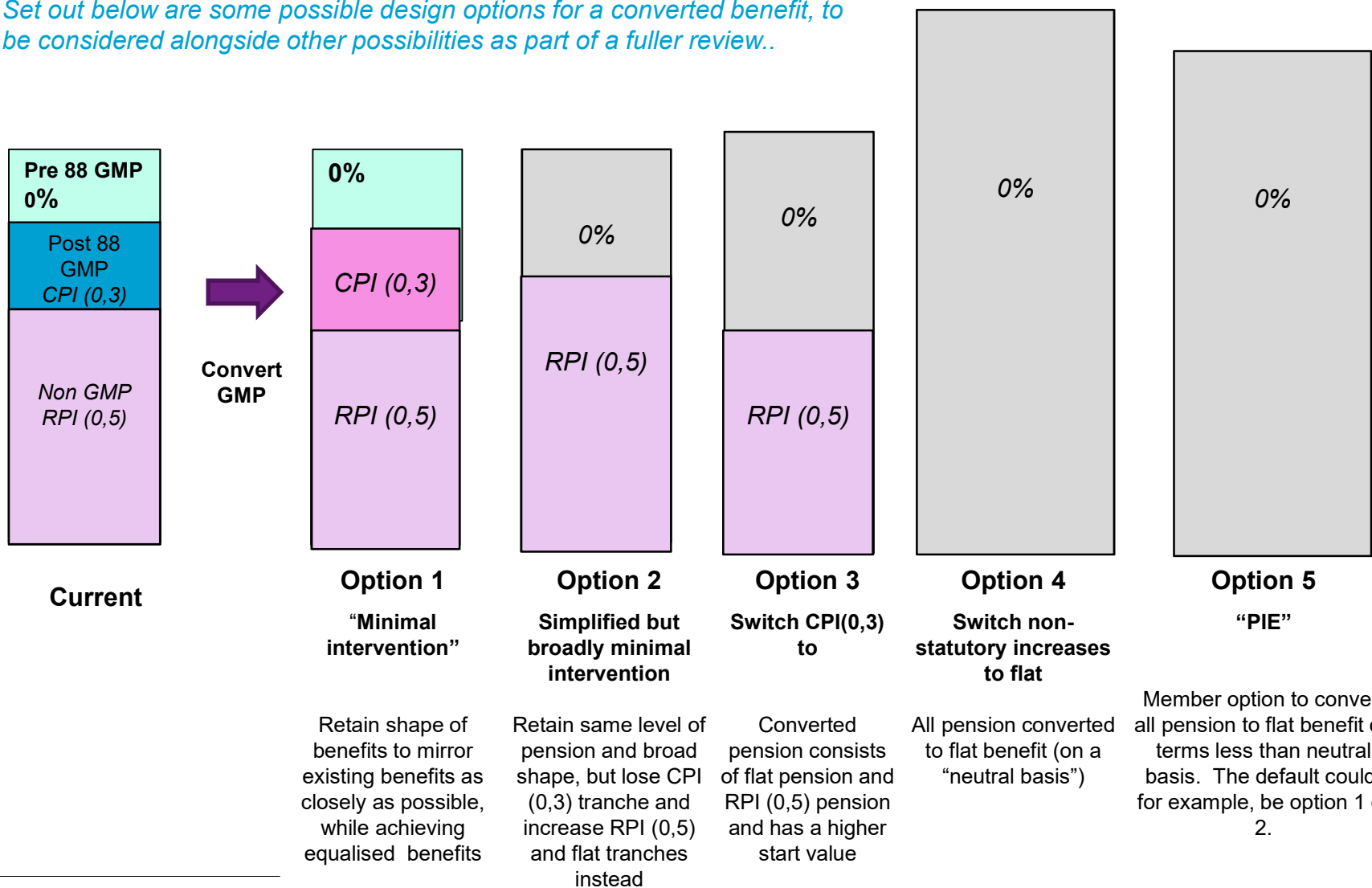
- the value of the member's actual benefits; and
- the value of those benefits had the member been of the opposite sex in relation to benefits accrued from 17 May 1990

-Convert this higher value into benefits that are not subject to GMP rules (and which provide equal value benefits as between a man and a woman)

High level overview of what conversion could look like

A typical male pensioner's pre1997 pension

Set out below are some possible design options for a converted benefit, to be considered alongside other possibilities as part of a fuller review..



S.24G(3): “necessary or desirable”

“(3) Where a scheme is amended to effect GMP conversion the trustees may include other amendments which they think are **necessary or desirable** as a consequence of, or to facilitate, the GMP conversion”

- “‘Necessary’ is a normal English word and no gloss of it is required but the court must keep in mind that the test is one of necessity and not, for example, one of convenience or desirability” (*Birdi v Price [2018] EWHC 2934 (Ch)*)
- “The test of necessity is more than simply ‘desirable’ or ‘convenient’ or ‘reasonable’. It is a high bar...” (*Commissioner of the Police of the Metropolis v MR [2019] EWHC 888 (QB)*)
- Also: *R (Lowe) v The Family Health Services Appeal Authority [2001] EWCA Civ 128* and *R (Assura Pharmacy Ltd) v National Health Service Litigation Authority (Family Health Services Appeal Unit) [2008] EWHC 289*
 - “‘Necessary or desirable’ considered; ‘desirable’ is not “otiose” and is “clearly distinct from and antithetical to ‘necessary’”

“Method E” – Nothing to see here.....

–Scheme pension and Additional Pension considered together

- Equality Act 2010: allows difference “*attributable only to differences between men and women in the [state benefits] to which the men and women are or would be entitled*”
- Equality Act 2010 (Sex Equality Rule)(Exceptions) Regulations 2010: within exemption where “*the amount by which the pension **increase** exceeds any increase that would have applied had the member been of the other sex, does not exceed the relevant amount*”

Public sector benefit structure

Those benefit structures in the 1990s didn't have the key differences

Normal Pension Age of 60

Simplified revaluation

- Fully revalued benefits for men as well as women at that age

Only increases in payment as issue

Roberts v Birds Eye Walls

‘New State Pension’ cases

Post April 2016 retirements

- Would no longer integrate

Treasury Direction

- s59 Pensions (Increase) Act 1971



Cabinet Office

LEGISLATING FOR PENSIONS

Elizabeth Gardiner, First Parliamentary Counsel
Cabinet Office



About OPC

- Established in 1869
- Central drafting resource
- 50 lawyers – barristers and solicitors
- specialists in drafting not subject-matter
- teams linked to government departments





What do we do?

- draft bills
 1. government bills
 - private members' bills
- advise Government on parliamentary procedure
- vet or draft some SIs (cf departmental lawyers and SI hub)
- advise on some constitutional matters



Cabinet Office

Complexity of the Statute Book

- Primary legislation – *average 33 UK Acts pa*
- Secondary legislation – *average 3000 UK SIs pa*
- “Soft law” – *directions, statutory codes of practice, statutory and non-statutory guidance*



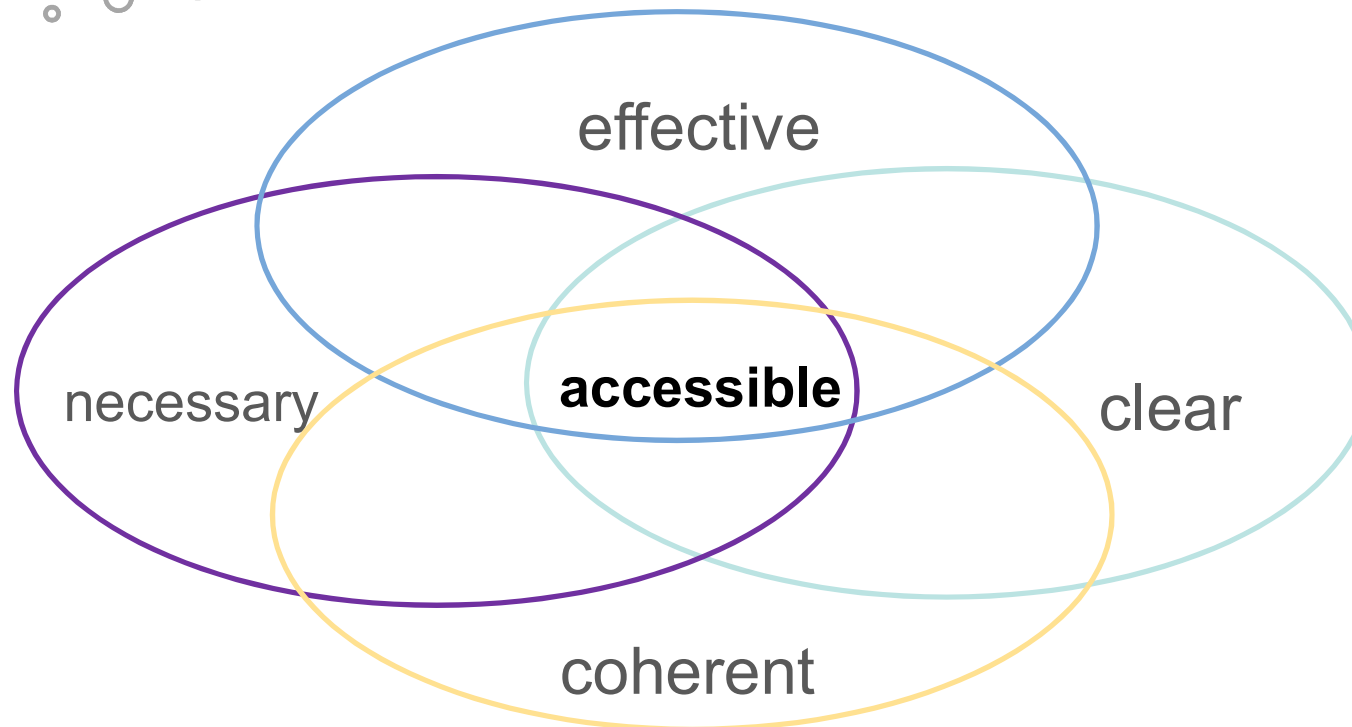
Cabinet Office

Complexity of the Statute Book

- EU law – *12,000 EU regulations alone*
- Devolution
- Extent
- Commencement



Vision for good law





“The Shame of Britain’s Law-Making” from Private Eye

Britain faces an epidemic of round-the-clock law-making which threatens to plunge the country into a new Dark Age.

Evidence is mounting to show that the government’s policy of 24-hour law-making is producing nothing but confusion and chaos in the streets of all our major cities.

Citizens no longer have any idea of what is or is not legal, and many, it is clear, are so bemused that they no longer even know which country they are living in.

We say this: It is time this shameful madness was stamped out once and for all. There ought to be a law against it.



Do you need primary legislation?

- pressures on legislative programme (eg Finance Bill)
- what do you want to achieve?
- what stands in your way?
- consider existing powers (statutory and other)
- consider risks of legislating
- will changing primary legislation be effective?



The drafting process

- policy – moving target?
- instructions
- analysis
- drafting – “four-eyes”, peer review
- amending – restructuring?

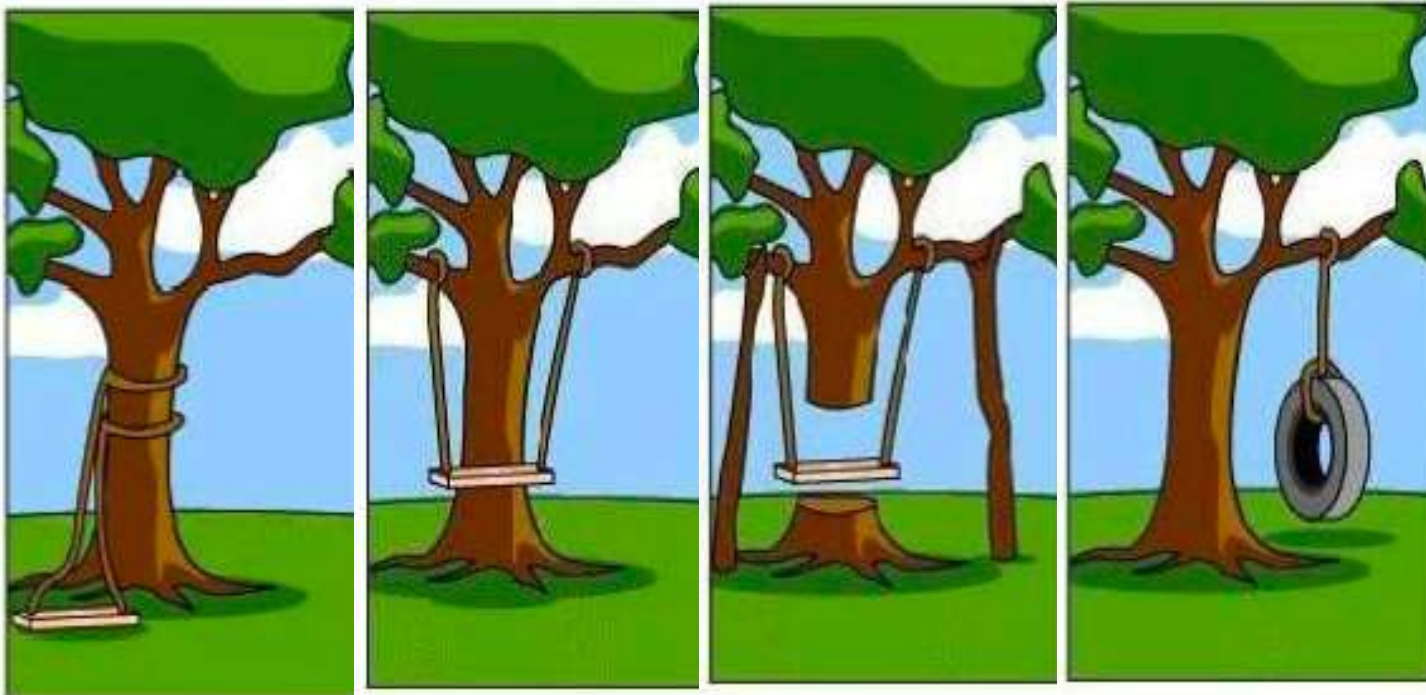




Cabinet Office

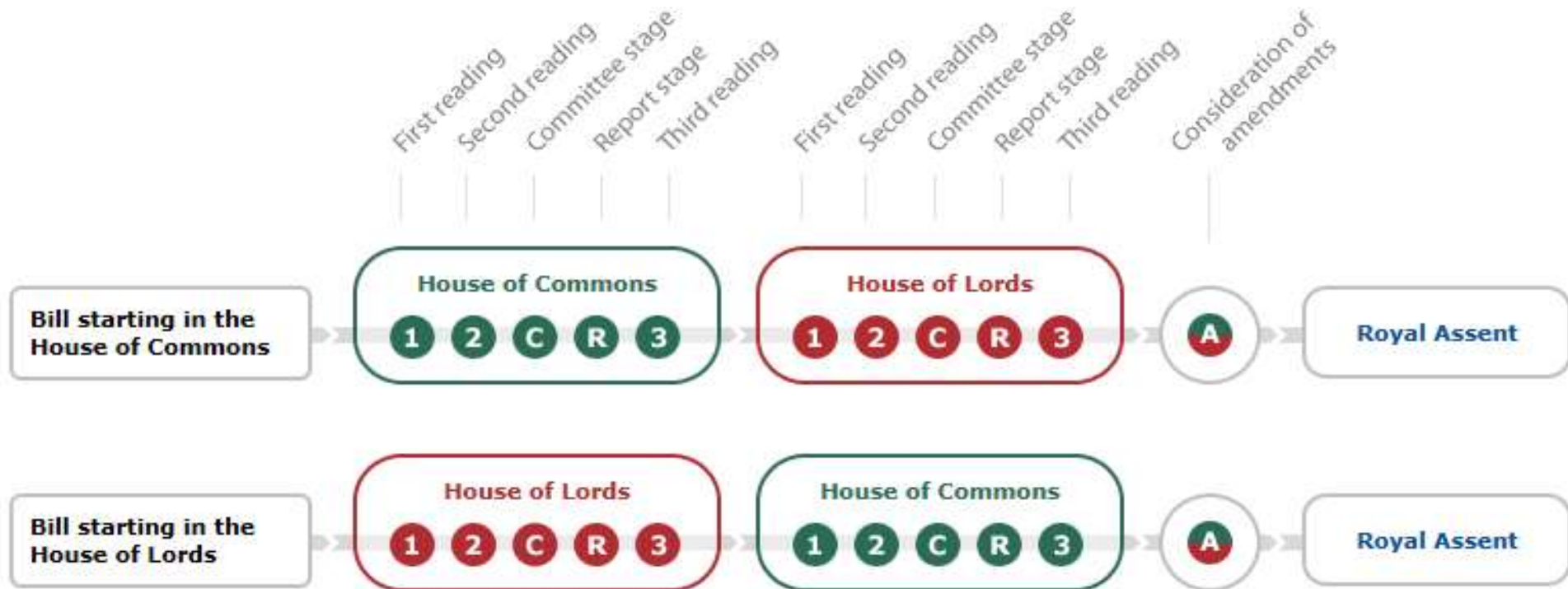
Drafting:

- effective
- choice of language (plain English, clear language, concise, consistency/modernisation, terms of art, jargon)
- textual amendment or free-standing provision?
- structure of Bill (clarity, clause length, use of Schedules)
- structure of provision (sentence length, paragraphs)
- delegation of powers
- quality control?
- inherent complexity in policy
- messiness of the existing legislative landscape





Passage through Parliament

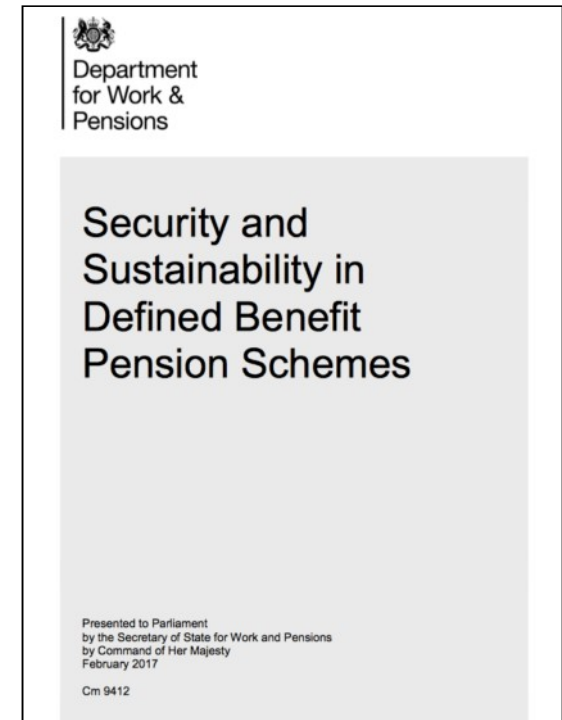




Cabinet Office

How can you improve legislation?

- How do you find out about proposed legislation?
- How do you spot legislation in Parliament that is relevant?
- Primary legislation
 - policy consultations; Green/White Papers
 - draft Bills
 - before/after introduction into Parliament
- Secondary legislation
 - policy consultations
 - published in draft?
 - unamendable – re-exercise the power
 - impact of triaging on volume of Sis – parliamentary numbers





Cabinet Office

How can you improve legislation?

- Are lawyers good at reading legislation?
 - drafting guidance
 - Interpretation Act 1978
 - reliance on guidance and secondary materials
- Are the comments about the drafting or the policy?
- When are comments most helpful?
- Important we hear the practitioner's perspective – please persevere!

OVERRIDING LEGISLATION

PHILIP STEAR



OVERRIDING LEGISLATION

- Overriding legislation
 - Pension Schemes Act 1993: s129
 - Pensions Act 1995, s117
 - Pensions Act 2004, s306

OVERRIDING LEGISLATION

- Part 1: General Principles
 - identifying conflict between overriding legislation and rules
 - a special case: preservation
 - some principles of construction
 - What happens when schemes script references to overriding legislation?

OVERRIDING LEGISLATION

- Part 2: Specific problems
 - LPI
 - scheme funding
 - amendments to contracted-out schemes (between 06/04/97 and 05/04/16): PSA93 s37
 - preservation and bulk transfers: some thoughts on *Halcrow*

OVERRIDING LEGISLATION

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PART 1: GENERAL PRINCIPLES

PSA93, s129(1):

“Subject to subsection (2), the provisions of [] override any provision of a scheme to which they apply to the extent that it conflicts with them.”

PART 1: GENERAL PRINCIPLES

PSA93, s129(1):

“Subject to subsection (2), the provisions of [SEE OPPOSITE →] override any provision of a scheme to which they apply to the extent that it conflicts with them.”

- Chapter 2 of Part 4*: (statutory revaluation)
- Chapter 3 of Part 4*: (anti-franking)
- Chapters 1 and 2 of Part IVA*: (CETVs)
- s110(1): (GMP increases)
- s113*: (disclosure of information)

* and associated secondary legislation

PART 1: GENERAL PRINCIPLES

PA95, s117(1):

“Where any provision of []
conflicts with the provisions of an
occupational pension scheme:

- (a) the provision..., to the extent that it
conflicts, overrides the provisions of
the scheme, and
- (b) the scheme has effect with such
modifications as may be required in
consequence ...”

PART 1: GENERAL PRINCIPLES

PA95, s117(1):

“Where any provision of [SEE OPPOSITE →] conflicts with the provisions of an occupational pension scheme:

(a) the provision..., to the extent that it conflicts, overrides the provisions of the scheme, and

(b) the scheme has effect with such modifications as may be required in consequence ...”

• Part 1* (ie ss1 – 125)
eg.:

- s51 LPI
- s67 amendments
- s73 (winding up priorities)
- s75 (employer debt)
- s91 (assignment etc)

*and associated secondary legislation

PART 1: GENERAL PRINCIPLES

PA04, s306(1):

“Where any provision of [] conflicts with the provisions of an occupational or personal pension scheme:

- (a) the provision..., to the extent that it conflicts, overrides the provisions of the scheme, and
- (b) the scheme has effect with such modifications as may be required in consequence ...”

PART 1: GENERAL PRINCIPLES

PA04, s306(1):

“Where any provision of [SEE OPPOSITE →] conflicts with the provisions of an occupational or personal pension scheme:
(a) the provision..., to the extent that it conflicts, overrides the provisions of the scheme, and
(b) the scheme has effect with such modifications as may be required in consequence ...”

- TPR anti-avoidance directions
- (most of) Part 2* (PPF)
- Part 3*
- (miscellaneous others)

*and associated secondary legislation

PART 1: GENERAL PRINCIPLES

PSA93, s131:

“It is hereby declared that nothing

in

[]:

...applies with direct effect to any
scheme, or to the rights of
liabilities of any person in, under
or by virtue of a scheme...”

PART 1: GENERAL PRINCIPLES

PSA93, s131:

“It is hereby declared that nothing in [SEE OPPOSITE →]: ...applies with direct effect to any scheme, or to the rights of liabilities of any person in, under or by virtue of a scheme...”

- Chapter 1 of Part IV:
 - PRESERVATION LEGISLATION*

*and associated secondary legislation

PART 1: GENERAL PRINCIPLES

UNBADGED PROVISIONS

- A provision may
override scheme rules
as a matter of
construction

PART 1: GENERAL PRINCIPLES

UNBADGED PROVISIONS

- A provision may override scheme rules as a matter of construction

eg PSA93 s160: “any term of a contract of service (whenever made) or any rule of a personal or occupational pension scheme to the effect that an employed earner must be a member.... shall be void.”

PART 1: GENERAL PRINCIPLES

UNBADGED PROVISIONS

- A provision may override scheme rules as a matter of construction

How do you decide?

- *Johnson v Moreton*

[1980] AC 37

- *Bradstock Group Pension Scheme*

[2002] EWHC 651

PART 1: GENERAL PRINCIPLES

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PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

Warren J in *British
Vita* [2007] EWHC 953
(Ch) and *Pilots* [2010]
EWHC 1573 (Ch)

“...it seems to me that the real question is whether there is a conflict, within the meaning of s306, between the provisions of Part 3 and the Scheme Funding Regulations on the one hand, and the rules of the schemes on the other.

“If there is such a conflict, the rules are overridden to the extent of the conflict. But if there is no conflict then I do not consider that the appeal...to the overall scheme of Part 3 as providing a complete code has any force....

PART 1: GENERAL PRINCIPLES

Warren J in *British Vita* [2007] EWHC 953 (Ch) and *Pilots* [2010] EWHC 1573 (Ch)

“If a person’s contractual or other rights are to be overridden or somehow qualified by legislation, that requires the use of clear words which, either expressly or by necessary implication, produce that result. Part 3 and the Regulations, in the absence of any conflict within section 306, do not, I consider, use such clear language. An examination of section 306 itself reinforces that conclusion. The section provides expressly that, in a case of conflict, the scheme rule is overridden: this strongly suggests to me that in the absence of conflict, the scheme rule should continue to apply.

PART 1: GENERAL PRINCIPLES

Warren J in *British Vita*
[2007] EWHC 953 (Ch)
and *Pilots* [2010] EWHC
1573 (Ch)

“For these reasons I reject any broad submission based on the proposition that Part 3 and the Scheme Funding Regulations provide a complete code for the making of contributions to a scheme.”
(*British Vita* at [81]-[82])

PART 1: GENERAL PRINCIPLES

The same “minimum interference” approach as is applied to EU legislation with direct effect:

BestTrustees v Stuart [2001] PLR 283

Warren J in *British Vita*
[2007] EWHC 953 (Ch)
and *Pilots* [2010] EWHC
1573 (Ch)

*Lloyds Banking Group Pension Trustees
v Lloyds Bank* [2018] EWHC 2839 (Ch)

PART 1: GENERAL PRINCIPLES

Purle J in *Alexander Forbes Trustees v. John Doe & Richard Roe* [2012] PLR 231

PA95 s73 and reg 13 OPS (Winding Up) Regs 1996 + PA95 s117

[reg 13] “says that section 73 applies *as if* (1) the liabilities of the scheme did not include liabilities in respect of [money purchase benefits], and (2) the assets of the scheme did not include the assets by reference to which the rate or amount of those benefits is calculated.”

PART 1: GENERAL PRINCIPLES

Purle J in *Alexander Forbes Trustees v. John Doe & Richard Roe* [2012] PLR 231

PA95 s73 and reg 13 OPS (Winding Up) Regs 1996 + PA95 s117

“Accordingly it seems to me that on that wording, section 73, as modified by regulation 13, applies so as to set out exhaustively the priorities to which defined benefit members are entitled...and that those provisions represent a complete code in relation to the rights to which those members are entitled in relation to any part of the funds.” (at [23]-[24])

So by necessary implication the exclusion of MP assets from the winding up priorities meant that they fell to be applied to secure the MP liabilities to which they related.

PART 1: GENERAL PRINCIPLES

BADGED NON-OVERRIDING PROVISIONS

PSA93:

s131: “... nothing in Chapter I of Part IV- (a) applies with direct effect to any scheme, or to the rights or liabilities of any person in, under or by virtue of a scheme...”

PART 1: GENERAL PRINCIPLES

BADGED NON-OVERRIDING PROVISIONS

PSA93:

s131: “... nothing in Chapter I of Part IV- (a) applies with direct effect to any scheme, or to the rights or liabilities of any person in, under or by virtue of a scheme...”

Preservation

PART 1: GENERAL PRINCIPLES

BADGED NON-OVERRIDING PROVISIONS

PSA93:

s132: “... where the rules of an occupational pension scheme to which the preservation requirements apply do not comply with those requirements it shall be the responsibility of...the trustees or managers of the scheme....to take such steps as are open to them for bringing the rules of the scheme into conformity with those requirements.”

Preservation

What if the employer does not consent to amendments?

There is no power under s68 PA95 to modify by trustee resolution

PART 1: GENERAL PRINCIPLES

BADGED NON-OVERRIDING PROVISIONS

PSA93: PROVISIONS REPEALED WITH EFFECT FROM 6 APRIL 1997

s133: power of OPB to advise on schemes' conformity with preservation requirements

s134: duty/power of OPB to “issue a determination on any such question...”

PART 1: GENERAL PRINCIPLES

BADGED NON-OVERRIDING PROVISIONS

s132: “... where the rules of an occupational pension scheme to which the preservation requirements apply do not comply with those requirements it shall be the responsibility of...the trustees or managers of the scheme...to take such steps as are open to them for bringing the rules of the scheme into conformity with those requirements.”

Warren J in *IBM UKPT v IBM UK Holdings* [2012] EWHC 2766 (Ch):

[44] “The position today... is that the trustees ... of a scheme that does not conform with the Preservation Requirements must exercise their powers, insofar as they are able, so that it does conform with those Requirements as they currently provide. But there is no power vested in tPR (or any other body) to exercise powers ...to bring about conformity, and no power for tPR or (or any other body) itself to execute any necessary modifications.”

PART 1: GENERAL PRINCIPLES

BADGED NON-OVERRIDING PROVISIONS

HOWEVER

Limited indirect
enforceability of the
preservation legislation
since 6 April 2005

PA04, s318(2): “*scheme rules*” are:

- “the rules of the scheme” except insofar as overridden by overriding law; PLUS
- overriding law, except insofar as reflected in the rules of the scheme; PLUS
- “any provision which the rules of the scheme do not contain but which the scheme must contain if it is to conform with the [preservation requirements]”

For PPF compensation purposes, the “admissible rules” are the “scheme rules” minus “recent rule changes”

PART 1: GENERAL PRINCIPLES

BADGED NON-OVERRIDING PROVISIONS

HOWEVER

Limited indirect
enforceability of the
preservation legislation
since 6 April 2005

PA95:

s73: “corresponding PPF liability” is
consistently worded

So there is limited direct enforceability
of preservation requirements, in the
benefits to be provided in a winding
up.

PART 1: GENERAL PRINCIPLES

BADGED NON-OVERRIDING PROVISIONS

HOWEVER

Limited indirect
enforceability of the
preservation legislation
since 6 April 2006

PA95:

s67 (from 6 April 2006):

“subsisting right” is defined in s67A by reference to the same (PA04) definition of “scheme rules” (s67A(8))

So is a post-5 April 2006 restatement of scheme rules which are non-compliant with preservation voidable under s67?

PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

scripted
references to
overriding
legislation

Interpretation of pension schemes

- *National Grid v Laws* (Robert Walker J [1997] PLR 157);
(Lord Hoffman [2001] UKHL 20)
- *Stevens v Bell* (Arden LJ) [2002] EWCA Civ 672
- *Safeway v Newton* (Lord Briggs) [2017] EWCA Civ 1482
- *Barnado's v Buckinghamshire* (Lord Hodge) [2018]
UKSC 55

PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

Interpretation of pension schemes

- admissible factual background is limited because not “readily accessible to members”

Safeway + Barnardo’s

scripted
references to
overriding
legislation

- taxation background is relevant

National Grid (Hoffman) + Barnardo’s

- statutory background must surely be relevant?

National Grid (Robert Walker J): “a patchwork put together partly by way of reaction to legislative change”

Stevens v Bell

PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

scripted
references to
overriding
legislation

Interpretation of pension schemes

- construction principle: presumption of legality – *ut magis valeat quam pereat*

“if the contract is capable of being read in two ways, one of which would involve a contravention of a statute and the other would not, that may be a powerful reason for reading the contract in the sense in which it is compliant with the statute, even if it is the less natural construction.”

(Toulson LJ in *Great Estates Group v Digby* [2011] EWCA 1120)

See also Lewison *Interpretation of Contracts* at 7.11

PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

Consider: how does statutory revaluation, (PSA93, Chapter 2 of Part IV) apply to a scheme which has *scripted* revaluation?

scripted
references to
overriding
legislation

PSA93, Sch 3, para 1: “(1) The final salary method is to add to *the amount that would be payable but for Chapter 2 of Part 4*... the additional amount specified [below]”

PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

scripted
references to
overriding
legislation

Consider: how does statutory revaluation, (PSA93, Chapter 2 of Part IV) apply to a scheme which has *scripted* revaluation?

- is the entitlement to the better of the scripted revaluation benefit and statutory revaluation?
- if the member is not entitled to both the scheme revaluation and statutory revaluation, why exactly is that so?

PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

presumption
against double
recovery

Consider: how does statutory revaluation, (PSA93, Chapter 2 of Part IV) apply to a scheme which has *scripted* revaluation?

- if the member is not entitled to both the scheme revaluation and statutory revaluation, why exactly is that so?
- maybe PSA93 s129 has effect to override the scheme provision to the extent that it would replicate the statutory revaluation, because PSA93 s84 and Schedule 3 para 1 represent a “comprehensive code” analogous to PA95 s73?

PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

express
inclusion of
term otherwise
present by
operation of
law

Consider: how does statutory revaluation, (PSA93, Chapter 2 of Part IV) apply to a scheme which has *scripted* revaluation?

- if the member is not entitled to both the scheme revaluation and statutory revaluation, why exactly is that so?
- alternatively perhaps the principle of construction that explicit statement of a requirement that would be implied by law has no greater effect – see Lewison *Interpretation of Contracts*, at 7.12

PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

multiple grounds
of invalidity?

Consider: what is the effect where an amendment power is limited to say:

“save that no amendment shall be made which would be a detrimental modification for the purposes of s67 of the PA95”

Does that make void what would only be voidable under s67 if it was simply allowed to override?

PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

multiple grounds of
invalidity?

probably a case of
expression of a provision
otherwise implied by law: no
additional limitation
imposed

Consider: what is the effect where an
amendment power is limited to say:

*“save that no amendment shall be
made which would be a detrimental
modification for the purposes of s67 of
the PA95”*

Does that make void what would only
be voidable under s67 if it was simply
allowed to override?

PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

multiple grounds of
invalidity?

Consider: what is the effect where an amendment power is limited to say:

(in a pre-2005 deed) *“save that no amendment shall be made unless the actuary has certified in accordance with section 67 PA95 that in his or her opinion no member would be adversely affected in respect of his or her accrued right or entitlement”*

PART 1: GENERAL PRINCIPLES

OVERRIDING PROVISIONS

multiple grounds of
invalidity?

Interpretation Act 1978,
s17(2)(a): “unless the
contrary intention
appears...any reference to...
[a repealed act] shall be
construed as a reference to
the provision re-enacted..”

Consider: what is the effect where an
amendment power is limited to say:

(in a pre-2005 deed) *“save that no
amendment shall be made unless the
actuary has certified in accordance
with section 67 PA95 that in his or her
opinion no member would be
adversely affected in respect of his or
her accrued right or entitlement”*

PART 2: SPECIFIC PROBLEMS

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OVERRIDING LEGISLATION

TOPIC 1: LPI (sections 51 – 54, Pensions Act 1995)

TOPIC 1: PENSION INCREASES

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TOPIC 1: PENSION INCREASES

PA95 s117

“to the extent that [s51] conflicts,[it] overrides the provisions of the scheme, and...the scheme has effect with such modifications as may be required in consequence ...”

The LPI legislation has a unique hybrid structure:

The legislation overrides unless the scheme includes provisions of a specified type.

So a scheme may comply in two different ways:

- (a) because the override applies and is implemented; or
- (b) because it contains a scheme rule which causes the override not to apply.

TOPIC 1: PENSION INCREASES

PA95 s117

“to the extent that [s51] conflicts,[it] overrides the provisions of the scheme, and...the scheme has effect with such modifications as may be required in consequence ...”

s51(2): [in relation to] “a pension to which this section applies....the annual rate of the pension...must be increased annually by at least the appropriate percentage.”

s51(3)*: “Subsection (2) does not apply to [a pension] if the rules of the scheme require [it] to be increased at intervals of no more than twelve months by at least the relevant percentage....”

*pre-3 January 2012 version

TOPIC 1: PENSION INCREASES

PA95 s117

“to the extent that [s51] conflicts,[it] overrides the provisions of the scheme, and...the scheme has effect with such modifications as may be required in consequence ...”

s51(4)*: “relevant percentage” is the percentage increase in the retail prices index for the reference period

(subject to 2.5%/5% caps)

s51ZA*: “appropriate percentage” means higher/lower revaluation percentage (under para 2, Schedule 3, PSA93) as applicable

*pre-3 January 2012 version

TOPIC 1: PENSION INCREASES

The *Qinetiq* RPI/CPI cases:

In *Qinetiq* [2012] EWHC 570 (Ch)* the increase rule required increases “*equal to the percentage increase in the Index over the period of 12 months ending on the preceding 30 September (or such other period as the Trustees may decide)*”

“*Index*” was defined as “*the Index of Retail Prices published by [ONS] or any other suitable cost-of-living index selected by the Trustees*”

*(followed in *Arcadia* [2014] EWHC 2683 and *Barnardo’s* [2015] EWHC 2200 (Ch) (itself upheld on appeal at [2016] EWCA Civ 1064 and [2018] UKSC 55

Was it true that:

“in advance of the next increase date...the member has no entitlement to an increase at any specific rate, since the Trustees always retain a power to change the Index by which the increases are to be calculated.”?

(Vos J at [55])

No accrued right/entitlement
⇒ PA95 s67 not engaged.

TOPIC 1: PENSION INCREASES

Statute: s51(3): “Subsection (2) does not apply to the annual rate of a pension...if under the rules of the scheme the rate is required to be increased at intervals of no more than twelve months by at least the **relevant percentage***.” *defined in s51(4)

Scheme: “*the Index of Retail Prices published by [ONS] or any other suitable cost-of-living index selected by the Trustees*”

Exactly how was the scheme complying with the LPI legislation?

Did it have a rule requiring (capped) RPI increases?

It seems not unlikely that the rule had been made with the objective of complying with s51(4). But the rule would only comply if construed as “*the Index of Retail Prices published by [ONS] until such time as another suitable cost-of-living index is selected by the Trustees*”.

TOPIC 1: PENSION INCREASES

The rule would only comply with s51(4) if construed as *“the Index of Retail Prices published by [ONS] until such time as another suitable cost-of-living index is selected by the Trustees”*.

If the factual matrix supported that objective, wouldn't the presumption of legality point to that construction?

If so, isn't the accrued right to RPI-based increases until such time as the trustees exercise the power to modify the basis upon which increases are made?

So isn't PA95 s67 engaged after all?

OVERRIDING LEGISLATION

TOPIC 2: SCHEME FUNDING (Part 3, Pensions Act 2004)

TOPIC 2: EMPLOYER CONTRIBUTION RULES

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TOPIC 2: EMPLOYER CONTRIBUTION RULES

PA04 s306

Does Part 3 completely override rules concerning valuations and employer contributions?

Why might it matter?

- if scheme rules balance power in a way that is not grandfathered in the scheme funding regime
- if there is a desire to complete a valuation on a faster timetable than applicable under Part 3
- if scheme rules impose constraints about assumptions, deficit repair timetable etc

TOPIC 2: EMPLOYER CONTRIBUTION RULES

PA04 s306

Does Part 3 completely override rules concerning valuations and employer contributions?

In two cases Warren J gave his view, obiter, that employer contribution rules remain exercisable where not in conflict with Part 3:

British Vita [2007] EWHC 953 (Ch)

Pilots [2010] 1573 (Ch)

TOPIC 2: EMPLOYER CONTRIBUTION RULES

Three reasons pointing towards the continued availability of scheme funding rules alongside Part 3:

PA04 s306

Does Part 3
completely override
rules concerning
valuations and
employer
contributions?

- “*the amount unpaid [under an SoC] if not a debt due from the employer to the trustees... apart from this subsection, shall be treated as such a debt.” s228(3) + *Pilots* [749]*
- ex hypothesi Part 3 will not override the obligations of those who are not statutory employers; anomalies would arise if it did override the comparable obligations of statutory employers *Pilots* [750]

TOPIC 2: EMPLOYER CONTRIBUTION RULES

PA04 s306

Does Part 3 completely override rules concerning valuations and employer contributions?

Three reasons pointing towards the continued availability of scheme funding rules alongside Part 3:

- there is no discernible policy against schemes being better funded than the SFO requires *Pilots* [752]

TOPIC 2: EMPLOYER CONTRIBUTION RULES

PA04 s306

Does Part 3
completely
override rules
concerning
valuations and
employer
contributions?

Two arguments the other way:

- under the grandfathering provisions of para 9 of Schedule 2 to the SF Regs, special SF regimes apply where rules provide for employer contributions to be set by the trustees or the actuary
- the SoC must [s227] show the contributions payable by both employers and active members: so if it is required to be agreed by the employer, how is there room for employer contributions to be decided without the employer's agreement under s229?

TOPIC 2: EMPLOYER CONTRIBUTION RULES

s306

but if Part 3 is only directed at ensuring that the SFO is met, this objection falls away

MAYBE:

- the SoC only relates to contributions required to meet the SFO;

OR

- in a case where employer contributions are determined without employer agreement, as far as the SoC is concerned they are a given (in the same way as member contributions)

Two arguments the other way:

- under the grandfathering provisions of para 9 of Schedule 2 to the SF Regs, special SF regimes apply where rules provide for employer contributions to be set by the trustees or the actuary
- the SoC must [s227] show contributions payable by both employers and active members: so if it is required to be agreed by the employer, how is there room for employer contributions to be decided without the employer's agreement under s229?

OVERRIDING LEGISLATION

TOPIC 3:
CONTRACTING-OUT: AMENDMENTS (s37, PSA93)

TOPIC 3: CONTRACTING-OUT (s37 PSA93)

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TOPIC 3: CONTRACTING-OUT (s37 PSA93)

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TOPIC 3: CONTRACTING-OUT (s37 PSA93)

PSA93, s129(1):

“Subject to subsection (2), the provisions of [SEE OPPOSITE →] override any provision of a scheme to which they apply to the extent that it conflicts with them.”

- Chapter 2 of Part 4*: (statutory revaluation)
- Chapter 3 of Part 4*: (anti-franking)
- Chapters 1 and 2 of Part IVA*: (CETVs)
- s110(1): (GMP increases)
- s113*: (disclosure of information)

*and associated secondary legislation

TOPIC 3: CONTRACTING-OUT (s37 PSA93)

PSA93, s129(1):

“Subject to subsection (2), the provisions of [SEE OPPOSITE →] override any provision of a scheme to which they apply to the extent that it conflicts with them.”

☆☆ PSA93 PART 3 IS MISSING FROM THE LIST ☆☆

- Chapter 2 of Part 4*: (statutory revaluation)
- Chapter 3 of Part 4*: (anti-franking)
- Chapters 1 and 2 of Part IVA*: (CETVs)
- s110(1): (GMP increases)
- s113*: (disclosure of information)

*and associated secondary legislation

TOPIC 3: CONTRACTING-OUT (s37 PSA93)

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TOPIC 3: CONTRACTING-OUT (s37 PSA93)

PSA93, s37: ☆(06/04/97 to 05/04/16)☆

“(1) Except in prescribed cases, the rules of a [COSR] scheme cannot be altered unless the alteration is of a prescribed description.

(2) Regulations made by virtue of subsection (1) may operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section.”

Does “cannot” mean:

- “cannot effectively”; or
- “cannot without being in breach of this legislation”?

Construing the section as a whole, doesn't (2) imply that a purported alteration of the rules in breach of subsection (1) will be of no effect?

NOT NECESSARILY....

TOPIC 3: CONTRACTING-OUT (s37 PSA93)

PSA93, s37: ☆(06/04/97 to 05/04/16)☆

“(1) Except in **prescribed** cases, the rules of a [COSR] scheme cannot be altered unless the alteration is of a **prescribed** description.

(2) Regulations made by virtue of subsection (1) may operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section.”

PSA93, s37: (@05/04/97)

“(1)... where a contracting-out certificate has been issued, no alteration of the rules of a relevant scheme shall be made so as to affect any of the matters dealt with in this Part....without the consent of the [OPB].

...

“(3) Subject to subsection (4), any alteration to which subsection (1) applies shall be void if it is made without the consent of the [OPB].

“(4) A consent given by the [OPB] for the purposes of this section shall, if and to the extent that the [OPB] so direct, operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section.”

TOPIC 3: CONTRACTING-OUT (s37 PSA93)

PSA93, s37: ☆(06/04/97 to 05/04/16)☆

“(1) Except in **prescribed** cases, the rules of a [COSR] scheme cannot be altered unless the alteration is of a **prescribed** description.

(2) Regulations made by virtue of subsection (1) may operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section.”

Three principles of statutory construction:

- (1) Presumption against redundancy: the court will (rebuttably) presume that every part of the enactment carries meaning. *Hill v William Hill (Park Lane)* [1949] AC 530;
- (2) Statutory language retains its original meaning (unless amended). *R (oao Quintavelle) v S of S for Health* [2003] UKHL 13; cf *Boss v Grosvenor Estates* [2006] EWCA Civ 594;
- (3) The amendment history is relevant: *R v GM Coroner ex parte Worch* 1987 WL 493461

TOPIC 3: CONTRACTING-OUT (s37 PSA93)

PSA93, s37: ☆(06/04/97 to 05/04/16)☆

“(1) Except in **prescribed** cases, the rules of a [COSR] scheme cannot be altered unless the alteration is of a **prescribed** description.

(2) Regulations made by virtue of subsection (1) may operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section.”

(1) the language in (old) ss(4) referred to alterations that were expressly void as a result of ss(3);

(2) the same language in (new) ss(2) must be (rebuttably) presumed to have referential meaning in the same way;

(3) the history of the amendment shows that Parliament intended (by repealing (old) ss(3)) to stop alterations being void for breach;

(4) interpreting (new) ss(2) as evidence of an continued intention that alterations be void would make the repeal of (old) ss(3) redundant;

(5) SO (new) ss(2) must be redundant instead.

TOPIC 3: CONTRACTING-OUT (s37 PSA93)

PSA93, s37: ☆(06/04/97 to 05/04/16)☆

“(1) Except in **prescribed** cases, the rules of a [COSR] scheme cannot be altered unless the alteration is of a **prescribed** description.

(2) Regulations made by virtue of subsection (1) may operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section.”

And the post-April 97 regime still made sense if “cannot” connoted only “may not” or “cannot without breach of the legislation”.

Periodic re-certification was required (OPS (Contracting-out) Regs (SI 1996/1172), reg. 16(2)).

Non-compliance with the statutory conditions was a ground for cancellation of the contracting-out certificate.

OVERRIDING LEGISLATION

TOPIC 4:
BULK TRANSFERS IN WINDING UP

TOPIC 4: BULK TRANSFERS IN WINDING UP

PSA93: s73:

(2) “... a scheme may, instead of providing SSB, provide ... for the member’s accrued rights.. to be transferred to another OPS with a view to acquiring transfer credits for the member...”

(4) [only with consent or as prescribed]

Preservation Regs, reg 12(3) and Schedule 3:
transfer without consent only if actuary certifies:

“the transfer credits to be acquired ...are, broadly,
no less favourable than the rights to be
transferred.”

TOPIC 4: BULK TRANSFERS IN WINDING UP

PSA93, s131:

“... nothing in Chapter I of Part IV- (a) applies with direct effect to any scheme, or to the rights or liabilities of any person in, under or by virtue of a scheme...”

PSA93: s73:

(2) “... a scheme may, instead of providing SSB, provide ... for the member’s accrued rights.. to be transferred to another OPS with a view to acquiring transfer credits for the member...”

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TOPIC 4: BULK TRANSFERS IN WINDING UP

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TOPIC 4: BULK TRANSFERS IN WINDING UP

Halcrow [2015] EWHC 3685 (Ch)

- unviable CG4 scheme
- proposal to wind up
- proposed bulk transfer (without consent) to new scheme providing reduced benefits (but > abated buyout benefits)

Held: (Asplin J) The required comparison under reg 12 is between RS transfer credits and TS headline benefits. The “rights to be transferred” does not mean the “abated benefits”.

PSA93: s73:

(2) “... a scheme may, instead of providing SSB, provide ... for the member’s accrued rights.. to be transferred to another OPS with a view to acquiring transfer credits for the member...”

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TOPIC 4: BULK TRANSFERS IN WINDING UP

Consequences of *Halcrow*:

“Haircut transfers” from distressed schemes happen on the *Kodak* model:

- with consent transfers
- rump scheme is subject to an RAA (to free important employers from liability)
- sacrificed employer becomes insolvent
- the PPF assumes responsibility

Kodak (March 2014)

Halcrow (May 2016)

British Steel (August 2017)

TOPIC 4: BULK TRANSFERS IN WINDING UP

Disadvantages of the *Kodak* model:

- RAA only available where “reasonable likelihood of assessment period commencing” within 12 months
- process of obtaining member consents is unsatisfactory

The problem of zombie employers in CG4

A process depending on member choice and conferring insolvency outcomes as the default is questionable in fiduciary terms

TOPIC 4: BULK TRANSFERS IN WINDING UP

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TOPIC 4: BULK TRANSFERS IN WINDING UP

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TOPIC 4: BULK TRANSFERS IN WINDING UP

Trustee Act 1925, s57

“Where in the administration or management of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instances, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit....”

TOPIC 4: BULK TRANSFERS IN WINDING UP

In a *Halcrow*-type situation, could the court grant under s57 power for trustees to secure benefits in winding up by means of a bulk transfer to secure “haircut benefits” at least equal to the abated benefits that would otherwise be secured in the winding up?

Trustee Act 1925, s57

“Where in the administration or management of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instances, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit....”

TOPIC 4: BULK TRANSFERS IN WINDING UP

Sutton v England [2011] EWCA Civ 637 - “other transaction” and “expedient” are “very broad” (Mummery LJ)

NBPFT v Warnock-Smith [2008] EWHC 454 (Ch)

- a pension scheme in winding up
- “what is proposed is merely a variation in the mechanism for getting [the] money to its intended recipients...”

Trustee Act 1925, s57

““Where in the administration or management of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instances, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit....”

TOPIC 4: BULK TRANSFERS IN WINDING UP

The proposal must not be an attempt to “rewrite the trust” and any effects on beneficial interests must be “incidental only”.

- *Sutton v England*
- *Gelber v Sunderland* [2018] EWHC 2344 (Ch)

Trustee Act 1925, s57

“Where in the administration or management of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instances, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit....”

TOPIC 4: BULK TRANSFERS IN WINDING UP

Would a power to secure benefits in a winding up by way of a “haircut transfer” affect beneficial interests more than incidentally?

Or would it be “*merely a variation in the mechanism for getting [the] money [otherwise due under the winding up priorities] to its intended recipients*”?

(cf *NBPT v Warnock-Smith*, above)

What beneficial interest does a member of a pension scheme have?

- what does it mean to have a beneficial interest in trust property?
- annuity interests in trusts generally
- doesn't winding up a pension trust recast the beneficial interests?

TOPIC 4: BULK TRANSFERS IN WINDING UP

What factors are relevant to the exercise of the court's discretion?

- the *Kodak* solution is imperfect:
 - RAA requires insolvency within 12 months
 - With-consent transfer process creates high risk of sub-optimal outcomes
- it is fairer (specifically to younger members) to restructure sooner rather than later (for liability drift reasons)
- as long as it is clear that the chances of the employer supporting the scheme indefinitely are low

TOPIC 4: BULK TRANSFERS IN WINDING UP

What public policy issues are in play?

- TPR would need to be involved because of material detriment
- a s57 application might be a process for dealing with distressed schemes' pension liabilities analogous to schemes of arrangement for creditor liabilities;

TOPIC 4: BULK TRANSFERS IN WINDING UP

What public policy issues are in play?

- the Rookes Review was highly sceptical about the merits of with-consent *Kodak*-type transfers and encouraged TPR to explore alternatives;
- s57 haircut transfers potentially allow unviable schemes with CG4 employers and excessive investment risk to be restored to IRM balance

© Philip Stear, Outer Temple Chambers, November 2019



Owing me, owing you

Legal issues arising from the overpayment and
underpayment of
occupational pension scheme benefits

Paul Newman QC
Wilberforce Chambers

OVERPAYMENTS

Is the trustee obliged to recover overpayments?

Not where the trustee reasonably believes that it would produce no useful result: *Hobday v Peters* (No.3) (1860) 28 Beav 603

- Consider the position of the member, the amount of the sum owed and the probability of the proceedings being successful: *Re Owens; Jones v Owens* (1882) 47 LT 61

OVERPAYMENTS

Is the trustee obliged to recover overpayments? (cont'd)

Ultimately a matter for the exercise of the trustee's discretion, having regard to all relevant considerations and no irrelevant considerations: *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank* [2019] Pens LR 246 at [420]

Mitigation of loss

OVERPAYMENTS

Methods of recovering overpayments

Restitution on the basis of mistake: e.g. *Derby v Scottish Equitable Plc* [2001] Pens LR 163

- Subject to change of position defence

OVERPAYMENTS

Methods of recovering overpayments (cont'd)

Recoupment from future payments

- Advantages for trustee:
 - No hostile claim
 - Flexibility
 - Probably no change of position defence
 - No statutory limitation period

OVERPAYMENTS

Methods of recovering overpayments (cont'd)

- Disadvantages for trustee:
 - Requires continued receipt of benefit by the member
 - Must recoup over at least no shorter period of time than the period for which the mistake had gone undetected:
Fitzgerald (PO-86179/1, 21 August 2012)

OVERPAYMENTS

Recoupment: involvement of the Court

Burgess v Bic UK Ltd [2018] Pens LR 13

S.91 PA 95: pension rights cannot be assigned, commuted, surrendered, charged or be subject to a lien or a set-off

OVERPAYMENTS

Recoupment: involvement of the Court (cont'd)

S.91(5)(f) (introduced by s.266(2) Pensions Act 2004): exception to the general prohibition for:

a charge or lien on, or set-off against, the person in question's entitlement, or right, for the purpose of discharging some monetary obligation due from the person in question to the scheme arising out of a payment made in error in respect of the pension

OVERPAYMENTS

Recoupment: involvement of the Court (cont'd)

S.91(5)(f) is made expressly subject to s.91(6):

Where a charge, lien or set-off is exercisable by virtue of subsection (5) ... (f) -

(a) Its amount must not exceed the amount of the monetary obligation in question, or (if less) the value (determined in the prescribed manner) of the person in question's entitlement or accrued right, and

(b) the person in question must be given a certificate showing the amount of the charge, lien or set-off and its effect on his benefits under the scheme,

and where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff

OVERPAYMENTS

Recoupment: involvement of the Court (cont'd)

Clift (PO-2066, 3 June 2014)

Burgess v BIC UK Ltd at [164]-[168]: PO determination is not *an order of a competent court*

OVERPAYMENTS

Recoupment: involvement of the Court (cont'd)

Burgess wrong on this point:

- statutory tribunals have been treated as courts for similar purposes: e.g., *Peach Grey & Co v Sommer* [1995] ICR 549
- s.151(3) PSA 93 makes PO determinations final and binding on the complainant
- confuses the recognition of a claim and its enforcement: no scope for judicial enforcement, as recoupment is a self-help remedy exercisable by the trustee
- s.91 is not intended to make the settlement of pensions disputes any more complicated than necessary: *HR Trustees Ltd v German* [2011] ICR 329

PO does not follow *Burgess* in this respect: *Mr N* (PO-16358, 9 November 2018)

OVERPAYMENTS

The application of limitation periods to restrict the recovery of overpayments

Restitution

- 6 years, by analogy with s.5 LA 80: *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] 1 WLR 2961
 - cause of action accrues on the making of each overpayment: *Webber v Department for Education* [2017] ICR 198

OVERPAYMENTS

The application of limitation periods to restrict the recovery of overpayments (cont'd)

- Subject to s.32(1)(c) LA 80, which postpones the running of the limitation period for actions for relief from the consequences of a mistake *until the plaintiff has discovered the ... mistake ... or could with reasonable diligence have discovered it*
 - imposes an obligation on the trustee to exercise reasonable diligence in monitoring payments made from the scheme
 - *Clift* (PO-2066, 3 June 2014)
 - *Webber v Department for Education* [2015] ICR 544

OVERPAYMENTS

The application of limitation periods to restrict the recovery of overpayments (cont'd)

- What is the cut-off date for the 6 year limit where the issue is referred to PO?
 - The first act of the trustee asserting its entitlement to repayment: *Webber v Department for Education* [2017] ICR 198
 - Causes potential prejudice where there is delay by PO in sending the complaint to the trustee

OVERPAYMENTS

The application of limitation periods to restrict the recovery of overpayments (cont'd)

Recoupment

- PO used to apply 6 year limitation period: *Mr D* (PO-1918, 1 September 2017)
- *Burgess v Bic UK Ltd* - no limitation period at all:
 - Self-help remedy
 - S.36(1)(b) LA 80 excludes statutory limitation periods in respect of *any claim for specific enforcement of a contract or an injunction or for any other equitable relief*

OVERPAYMENTS

Taxation of overpayments

Unauthorised member payments: s.160 FA 04

- Not treated as unauthorised where overpayment was made in error and is spotted and repaid as soon as reasonably possible: PTM 146100
- Other overpayments will be exempt even where they are not repaid: Parts 3 and 4 of The Registered Pension Schemes (Authorised Payments) Regulations 2009 (SI 2009/1171)
- Even where those Regulations do not apply, and the trustee was unwilling or unable to recover the mistaken overpayment, a *de minimis* threshold of £250 is applied: PTM146300

UNDERPAYMENTS

Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank [2019]
Pens LR 246

Forfeiture clauses

- Ham QC, Atkinson & Scott: *Time limits for underpaid DB benefits* (2019 Nugee Lecture series)

UNDERPAYMENTS

The application of limitation periods to restrict back payments

The nature of the compensation obligation

- breach of trust
- proprietary claim by the member against the assets of the scheme which are required to be realised in order to pay the correct benefit: *Granada Group Ltd v Law Debenture Trust Corporation plc* [2015] 2 BCLC 604

UNDERPAYMENTS

The application of limitation periods to restrict back payments (cont'd)

The applicable limitation periods

- Default position is s.21(3) LA 80:

an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.

UNDERPAYMENTS

The application of limitation periods to restrict back payments (cont'd)

- 3 exceptions:
 - Fraud: s.21(1)(a)
 - *an action ... to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use:*
s.21(1)(b)
 - interests which have not fallen into possession: s.21(3)

UNDERPAYMENTS

The application of limitation periods to restrict back payments (cont'd)

The application of s.21(1) to underpayments

S.21(1)(b) applies, so that there is no limitation period applicable to the requirement to compensate the member for past underpayments: *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank* [2019] Pens LR 246

UNDERPAYMENTS

The application of limitation periods to restrict back payments (cont'd)

Laches

- Even if no limitation period applies to a claim for underpaid benefits, the equitable doctrine of laches can still apply to bar the claim: *Nelson v Rye* [1996] 1 WLR 1378
- Requires a lapse of time and conduct by the members such as to make it unconscionable for them to be permitted to assert their claim

UNDERPAYMENTS

The application of limitation periods to restrict back payments (cont'd)

- Unlikely to be relevant to mistaken underpayments, as time does not begin for this purpose to run until the trustee became aware of the relevant facts: *Betterment Properties (Weymouth) Ltd v Dorset County Council (No 2)* [2014] AC 1072

UNDERPAYMENTS

Interest on back payments

Is the trustee obliged to pay interest? *Mrs S* (PO-22618, 5 February 2019)

Rate of interest

- *Lloyds Bank, supra*: simple interest at 1% above base

UNDERPAYMENTS

Who is to be compensated?

Deferred members and lack of data

Transferred-out members:

- Statutory discharge: s.99(1) PSA 93
- Express provision in the scheme rules
- Discharge agreements:
 - *BCCI v Ali* [2002] 1 AC 251

UNDERPAYMENTS

Taxation of back payments

Authorised member payments

Application of the Gourley principle: *British Transport Commission v Gourley* [1956] AC 185

- Compensation will be reduced if the monies represented by the compensation would have been diminished in the hands of the claimant by the incidence of taxation
- If the compensation award is subject to tax, the compensation will not be reduced, leaving it to be taxed following its receipt by the claimant

UNDERPAYMENTS

Taxation of back payments (cont'd)

As to pension underpayments:

- Taxed as pension income under s.567 ITEPA
- If assessed on the cash basis, may put the member's income into the higher or additional rate bands for that tax year
- However, probably more appropriate for the trustee to assess the payment on the accruals basis:
 - s.571 ITEPA
 - *Re Houghton Main Colliery Co Ltd* [1956] 1 WLR 1219
 - Possible interest and penalties for late payment of tax



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Association of Pension Lawyers
Conference 2019: Panel Session on Consolidation

Consolidation in the Defined Contribution Market and Lessons for Defined
Benefit Consolidation

Michael Jones
Pinsent Masons LLP

Scope of this paper

Over the past decade, the defined contribution ("DC") landscape in the UK has evolved dramatically from a small and relatively unsophisticated market supplementing defined benefit pensions ("DB") to a large, rapidly expanding and innovative market responsible for providing savers with their entire pension benefits at retirement. The market is set to expand even more rapidly in membership and assets under management over the next decade as it consolidates further, the pension dashboard becomes a reality¹, there is more effective member engagement, new investment products offer cost efficient access to illiquid assets and private markets² and the effects of minimum auto-enrolment contributions of 8% crystallise.

There are two types of DC workplace pension schemes: trust-based occupational pension schemes, which are governed by trust deed and rules, managed by trustees and regulated by the Pensions Regulator ("TPR"); and contract-based personal pension schemes, which are regulated by the Financial Conduct Authority ("FCA"), managed by insurance providers and have a contractual relationship with members. In this paper, I will focus on the occupational DC market in the UK, which has experienced greater change than the contract-based market recently and in general, is more relevant to the APL membership (although note that there have been similar legal and regulatory developments across all DC workplace pension schemes).

I will examine how the DC market has evolved and consolidated and address the issues facing trustees of occupational pension schemes proposing to transfer to a DC master trust and how these issues may apply to all bulk transfers without consent regardless of whether the receiving scheme is a DC master trust, DB master trust or DB commercial consolidator³. For ease of reference, I refer to the occupational DC market as the "DC market" unless otherwise stated.

The evolution of the DC market and authorisation of DC Master Trusts

The reasons for the DC market changing and evolving can be attributed to five key developments: (i) the spiralling costs of DB pension provision and closure of DB pension schemes; (ii) the introduction of auto-enrolment in 2012 and subsequent increases in minimum contribution levels; (iii) "freedom and choice" and the introduction of DC flexibilities from 6 April 2015; (iv) the implementation of minimum charges and governance requirements for DC workplace pension schemes from 6 April 2015; and (v) the authorisation regime for DC master trusts from 1 October 2018.

The financial crisis in 2008 brought into focus the spiralling costs of DB pension provision, gave renewed impetus to the closure to future accrual of DB pension schemes and accelerated the move towards employers providing DC benefits to their workforce. But the financial crisis also prompted a significant fall in the values of DC funds for many DC scheme members, which highlighted the risks inherent in DC pension provision and uncertainty and inadequacy of retirement outcomes for members.

¹ See Pension Schemes Bill as introduced in the House of Lords on 15 October 2019 (HL Bill 5).

² See DWP's recent consultation on "Investment innovation and future consolidation: a consultation on the consideration of illiquid assets and the development of scale in occupational defined contribution schemes", which closed on 1 April 2019.

³ See page 10 of the DWP's consultation on "Consolidation of defined benefit pension schemes", published in December 2018 for the main characteristics of a superfund (I refer to superfunds as DB commercial consolidators in this paper).

The onset of auto-enrolment was a seminal moment for the DC market⁴ and introduced in stages, with the largest employers required to comply first from 1 October 2012. Minimum contributions started at 2%, rose to 5% in April 2018 (2% employer and 3% employee contributions) and rose again to 8 per cent in April 2019 (3% employer and 5% employee contributions).

The Office of Fair Trading ("OFT") launched a study into the DC workplace market to examine how the DC market was likely to develop given the "major structural shift" caused by auto-enrolment and the increasing number of savers and assets under management in DC occupational pension schemes. The OFT found poor levels of governance in the DC sector which had a negative impact on investment outcomes and a lack of regulation of member-borne charges. The DWP also launched a call for evidence and TPR and the FCA sought to align their approach to achieve consistent quality standards and similar levels of member protection between DC occupational pension schemes and workplace personal pension schemes. These initiatives led directly to the Department of Work and Pensions (the "DWP") implementing minimum charges and governance measures designed to improve the quality of DC occupational pension schemes with effect from 6 April 2015.

Amongst other things, the minimum governance standards imposed the charges cap on default arrangements in relation to qualifying schemes⁵ and stringent compliance obligations on trustees of relevant DC schemes⁶ primarily through the Chair's statement, which increased the cost of running DC schemes for employers. When combined with the DC flexibilities which came into effect from 6 April 2015 and gave members far greater choice and flexibility in their pension benefits at retirement, the costs, governance and administrative burden of running a DC scheme soared. Employers sought to offload their "own trust" schemes to consolidators in the form of DC master trusts, in order to benefit from economies of scale by pooling administrative, governance and investment functions, and also to give members access to the full range of DC flexibility (employers are not obliged to offer the DC flexibilities within their scheme and most employers still do not offer a drawdown facility).

"Master Trust schemes" are private occupational pension schemes which provide money purchase benefits (either alone or in conjunction with other (DB) benefits) and are used by two or more employers which are not connected to each other⁷. This definition is broad and captures a wide-range of commercial and "not-for-profit" occupational pension schemes, including hybrid industry-wide non-associated multi-employer schemes, NEST set up by the government especially for auto-enrolment, other schemes established specifically to cater for the auto-enrolment market, and insurer and consultant-backed schemes.

The onset of auto-enrolment, DC flexibilities and minimum governance standards saw the master trust market grow from 0.2 million members in 2010 to over 7.1 million members and

⁴ The statutory duty on employers to: automatically enrol their workers into a pension scheme meeting minimum standards (a "qualifying scheme"); and to pay a minimum level of contributions to that scheme on behalf of workers.

⁵ See Regulation 4 of The Occupational Pension Schemes (Charges and Governance) Regulations 2015. Under Regulation 3, a "default arrangement" in relation to an employer, means an arrangement under which the contributions of one or more workers are allocated to a fund or funds where those workers have not expressed a choice as to where those contributions are allocated. There are other qualifying conditions of a default arrangement under Regulation 3(2), but this condition is the most relevant.

⁶ See Regulation 1(2) of The Occupational Pension Schemes (Scheme Administration) Regulations 1996 for the definition of "relevant scheme", which includes (broadly) an occupational pension scheme which provides money purchase benefits other than a scheme where the only money purchase benefits are attributable to additional voluntary contributions.

⁷ See Section 1(1) of the Pension Schemes Act 2017.

£10 billion assets in 87 Master Trusts in the UK in January 2017⁸. As at 5 November 2019, the master trust market supports 16 million members and more than £36 billion in assets⁹.

Given this burgeoning market, the DWP became concerned that individuals' savings would not be adequately protected if a master trust were to fail and there was broad industry consensus that the existing regulatory controls were insufficient to provide appropriate levels of assurance to master trust scheme members¹⁰. This led to the authorisation and supervision regime for master trusts (enacted through the Pension Schemes Act 2017 which received royal assent on 7 April 2017). In launching the consultation on the draft regulations to support the authorisation regime, Guy Opperman, Minister for Pensions and Financial Inclusion, said "the majority of master trust pension schemes are operating well, but for too long these schemes have been subject to far less regulatory scrutiny than new contract-based providers". The new regime was designed to ensure that the legal and regulatory framework adequately reflects the increasingly commercial nature of the market (and shift from the traditional not-for-profit nature of occupational pension schemes), which holds significant parallels with the nascent market for DB commercial consolidators. I will address these parallels in more detail later in the paper.

The objectives of the new regime were to: (i) protect master trust members' pension savings (and confidence in savings), in particular addressing gaps in the regulatory regimes which had arisen because of the way in which master trusts had evolved; and (ii) ensure TPR has the necessary powers to regulate and enforce new minimum standards for such schemes¹¹.

The requirement for existing master trusts to apply for authorisation from 1 October 2018 and the consequential increase in costs, resources and governance burden was a factor in promoting consolidation activity within the master trust market itself during the course of 2018. Amongst other "consolidating" transactions, Aegon acquired the Blackrock master trust; Friends Life merged with Aviva; Scottish Widows acquired Zurich's corporate pension platform via Part VII transfer; the People's Pension acquired Your Workplace Pension; the Salvus Master Trust bought the Complete Master Trust; and Smart Pension acquired the Corporate Pensions Trust, with effect from authorisation. Further, over 30 master trusts elected to withdraw from the market and not apply for authorisation, including well-known master trusts such as Welplan, citing prohibitive costs and a regulatory environment favouring much larger scale.

The DWP and TPR have encouraged consolidation through a series of consultations to improve governance standards, take advantage of economies of scale, and improve member outcomes¹². We are awaiting response to consultation, but importantly, the DWP has proposed that smaller schemes assess every 3 years whether they should consolidate into a larger scheme. TPR said in its consultation document that "[it] will seek to facilitate and encourage scheme consolidation as a way of supporting efficiency and closing the quality gap for schemes that don't meet the standards [it] expect[s]. Trustees of underperforming schemes will need to consider whether they are able to offer value for members or whether savers are better provided for in larger schemes". So consolidation is here to stay, and TPR will be taking a more

⁸ The Pensions Regulator: 'DC Schemes Returns 2016/17', Summary, Table 2.

⁹ TPR's analysis on the master trust market post authorisation: final facts and figures, published 5 November 2019.

¹⁰ DWP's public consultation on the draft Occupational Pension Schemes (Master Trusts) Regulations 2018 to support the Pension Schemes Act 2017, dated 30 November 2017.

¹¹ DWP's Impact Assessment: Occupational Pension Schemes (Master Trusts) Regulations 2018 consultation.

¹² DWP's consultation on "Investment Innovation and Future Consolidation: A Consultation on the Consideration of Illiquid Assets and the Development of Scale in Occupational Defined Contribution schemes" (February 2019) and TPR's industry consultation, "Future of trusteeship and governance" (July 2019).

proactive approach in encouraging schemes to consolidate where they do not meet the standards that it expects.

As at 5 November 2019, TPR completed the authorisation process for existing master trusts and confirmed thirty-seven (37) authorised master trusts with one new master trust currently going through the application process. At the start of the authorisation process, there were 90 master trusts in the market. Eleven (11) schemes have exited the master trust market so far, and a further thirty-six (36) have notified TPR of a triggering event to exit the market and will transfer their members to an alternative master trust scheme or other appropriate vehicle. This is a reduction in the overall size of the market by 58.8%¹³, which represents significant consolidation, reflects regulatory intentions for the market and also the complexity and robustness of the authorisation process.

Transfers to a DC master trust

Having established the direction of travel towards a consolidated DC market of large DC master trusts, I will now look at the ways in which trustees can bulk transfer money purchase benefits into an authorised master trust and how these differ to transfers to a DB master trust or DB commercial consolidator. Note that there are prescribed ways set out in the Pension Schemes Act 2017 for existing authorised master trusts to consolidate through transfer of members' accrued rights and winding-up under "continuity option one". I do not intend to set out the prescribed requirements for this type of transfer in this paper, but I am aware of forthcoming master trust transition guidance from PASA that refers to this type of transfer as a "regulated transfer" and the transfer of an "own trust" occupational pension scheme to an authorised master trust as a "non-regulated transfer".

Can trustees agree to the transfer?

Where a member has "relevant money purchase rights" and their pensionable service is terminated before normal pension age with at least 30 days' qualifying service, the preservation laws allow a scheme to transfer members' accrued money purchase rights without their consent to another occupational pension scheme as complete or partial substitute for "short service benefit" – in other words, a scheme can make full or partial transfers instead of providing members with deferred pension benefits. A member will have "relevant money purchase rights" where, broadly, the assets held to provide the benefits do not include any guarantee or promise in relation to benefits (i.e. there is no DB element to the benefits being transferred).

Regulation 12 of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 (the "Preservation Regulations") allows trustees¹⁴ to make partial or full transfers of money purchase rights to another occupational pension scheme if one of the following conditions is satisfied:

- 1) the receiving scheme is authorised by the Pensions Regulator under the Pension Schemes Act 2017;

¹³ TPR's analysis on the master trust market post authorisation: final facts and figures, published 5 November 2019.

¹⁴ The Preservation Regulations recognise that the employer may have a unilateral power to make the transfer under the transferring scheme's trust deed and rules and make specific provision for this balance of powers.

- 2) the transferring scheme's principal (or controlling) employer and the receiving scheme's principal (or controlling) employer are undertakings of the same corporate group and the transferring members are current or former employees of an undertaking within that corporate group - i.e. there is an intra-group transfer; or
- 3) within a year of the transfer, the transferring trustees have taken independent "appropriate advice" in relation to the transfer from a person who they reasonably believe to be qualified to give that advice by reason of that person's ability in, and practical experience and knowledge of, pension scheme management.

The specific conditions to transfer money purchase rights without consent were introduced by the Occupational Pension Schemes (Preservation of Benefit and Charges and Governance) (Amendment) Regulations 2018 with effect from 6 April 2018. In its response to consultation on the draft regulations, the DWP noted that "the current process for scheme consolidation is very burdensome. Schemes can seek consent from every individual member – but this is time-consuming and difficult, with low response rates, even after concerted efforts. A "without consent" approach is available, but the tests to be met are either difficult to apply or serve no useful purpose when used for Defined Contribution schemes"¹⁵. The purpose of the amendment to regulations, therefore, was to enable a more streamlined and suitable approach to DC transfers whilst allowing trustees to take a more holistic view of whether the transfer would be in members' interests.

There was a transitional period between 6 April 2018 and 1 October 2019 when trustees could use either the specific conditions for transfer of money purchase rights or the following conditions for transfer of accrued rights without consent (at that time, there are no carve-out for relevant money purchase rights):

- an actuary must certify that each member's rights in the receiving scheme will be "broadly, no less favourable" than the rights to be transferred; and
- the transferring and receiving schemes both relate to persons who are or have been in employment with the same employers, or the transferring and receiving schemes relate to persons in employment with different employers and the transfer is either a consequence of a financial transaction between the employers or the employers are related for the purposes of the legislation.

Employers for this purpose are related, for example, where they are in the same corporate group.

Since 1 October 2019, however, trustees seeking to transfer relevant money purchase rights without consent must use one of the three conditions relating to money purchase rights (the "DC Bulk Transfer Conditions").

The first point to highlight is that there is legislation to enable transfer to an authorised DC master trust without members' consent. So long as trustees have satisfied their fiduciary duties to transfer to an authorised master trust, there are no additional preservation requirements that need to be satisfied. Conversely, to transfer to a DB master trust or DB commercial

¹⁵ See the executive summary to the DWP's response to consultation on the draft Occupational Pension Schemes (Preservation of Benefits and Charges and Governance) (Amendment) Regulations 2018.

consolidator, trustees need to comply with their fiduciary duties and statutory requirements which are far more complex and historic than existing law for DC consolidation.

In theory, therefore, trustees seeking to transfer money purchase rights to an authorised master trust should experience a far more straightforward transfer process from a legal perspective. Trustees can choose from a list of authorised master trusts, all of which have been through a stringent and extensive due diligence process. For each scheme, TPR has confirmed its approval of the scheme's financial security, financial reserves, business plan and ability to protect members' benefits (even in a high risk scenario such as the insolvency of the scheme funder¹⁶); the persons who run the scheme are "fit and proper" with the requisite competence, financial soundness, conduct and collective skills, knowledge and experience; and the scheme's systems and processes are sufficient to ensure the scheme is run effectively. Certainly, trustees can take significant assurance from a receiving scheme being authorised and they do not need to carry out the same level of due diligence into the financial soundness and sustainability of the receiving scheme as they would before authorisation - this has already been done for them by TPR, and these schemes will be subject to ongoing regulatory supervision and assessment against the authorisation criteria.

However, I do not consider the transfer process is as straightforward as trustees simply identifying an authorised master trust from a shopping list and in many ways, the steps that trustees must satisfy are much the same as before master trust authorisation (not least because trustees potentially expose themselves to future challenges if savers' expectations in terms of their retirement outcomes are not met). In its guidance on DC bulk transfers without consent, the DWP expressly states that although trustees are not required by regulation to seek additional advice on the suitability of an authorised master trust and authorisation can act as reassurance that the scheme meets minimum quality standards¹⁷, trustees should not assume that their fiduciary duty to act in member' interests is satisfied automatically by transferring members without consent to an authorised master trust. Indeed, there are several key points that trustees need to consider regardless of whether the proposed receiving arrangement is a DC master trust, DB master trust, or a DB commercial consolidator.

First, trustees need to ask themselves whether they have the power to make the transfer under the scheme rules and legislation, and if so, whether this is an appropriate exercise of their power. In doing so, they will also need to assess whether they require the consent of the sponsoring employer, particularly if there is a partial transfer of members' benefits, for example, where trustees propose to partially transfer money purchase rights in a hybrid scheme which is not segregated. It is likely that the employer would be driving the transfer and therefore willing to provide its consent.

Typically, scheme rules contain a broad power to transfer members' rights and benefits without consent, so long as the transfer complies with applicable tax, preservation and contracting-out laws. I set out above the DC Bulk Transfer Conditions, but it is worth noting that for DB transfers to a DB master trust or DB commercial consolidator, there are additional statutory requirements other than the Preservation Regulations. For example, if the transferring scheme

¹⁶ "Scheme Funder" is defined in section 39 of the Pension Schemes Act 2017 as (broadly) a person (i.e. a body corporate or partnership) who is a liable to fund the scheme where the costs of running the scheme are in excess of member-borne administration charges or is entitled to receive profits of the scheme where member-borne administration charges exceed running costs.

¹⁷ See page 9 of the DWP's guidance for trustees on "Bulk transfers without consent: money purchase benefits without guarantees", published April 2018.

has guarantee minimum pensions (GMPs) (i.e. contracted-out rights accrued before 6 April 1997) and/or section 9(2B) rights (i.e. contracted-out rights accrued between 6 April 1997 and 5 April 2016), the trustees will need to ensure that they meet the requirements for a "connected employer transfer" to enable a bulk transfer without consent¹⁸.

Should trustees agree to the transfer?

Once trustees have established that they *could* agree to the transfer, they need to ask themselves whether they *should* agree to transfer. This is a far wider ranging and complex question and trustees will need to consider general issues as well as specific issues bespoke to the type and nature of the receiving scheme.

Fiduciary duties

The starting point is for trustees to consider their fiduciary duties under trust law. It is of paramount importance for trustees to be aware of these when considering any bulk transfer without consent. Trustees have a duty to act in accordance with their scheme's trust deed and rules, act for the proper purpose of the trust (which includes considering what beneficiaries have been promised); and to act impartially, prudently, responsibly and honestly. The common presumption is that trustees are also obliged to act in the "best interests of beneficiaries" and this term is often used when referring to trustees' fiduciary duties. However, there is no freestanding duty to act in the best interests of beneficiaries¹⁹ and in general, trustees will satisfy their fiduciary duties if they consider all relevant factors to reach a decision that members would not be disadvantaged by the transfer.

This is often a complex process and it is commonplace for trustees proposing to transfer DC benefits to an authorised master trust to seek advice on the transfer despite the bulk transfer condition not requiring it. The authorised market is diverse and there is a wide range of different types of schemes, with different governance and charging structures, investment strategies and funds and different levels of benefit flexibility. Many of the authorised master trusts may not be suitable for the transferring members. There is no "one size fits all" and trustees will need to carry out sufficient due diligence of the market to assess which is the most appropriate receiving scheme for their membership. They will also need to ensure that the receiving scheme can replicate the scheme's benefit structure, any transition or "out of market" investment costs are adequately mitigated and that the receiving scheme offers a suitable range, flexibility and type of investment strategy and funds with costs and charges that are similar or lower than the transferring scheme. To the extent that the member borne charges in the receiving scheme are higher, trustees must be satisfied that these higher costs and charges can be justified by a higher standard of service provided by the receiving scheme and that, in effect, members receive similar or enhanced value for money.

In its guidance on DC bulk transfers without consent, the DWP supports this approach and notes that as a general principle, the receiving scheme should be compared to the transferring

¹⁸ The Contracting-out (Transfer and Transfer Payment) (Amendment) Regulations 2018 amended the Contracting-out (Transfer and Transfer Payment) Regulations 1996 to enable bulk transfers of "contracted-out salary-related rights" (whether accrued or in payment) without member consent to "salary-related schemes" that have never been contracted out with effect from 6 April 2018.

¹⁹ The "best interests of beneficiaries" principle can be found under legislation in an investment context only where trustees are under a duty to invest scheme assets in the "best interests of members and beneficiaries and in the case of a potential conflict of interest, in the sole interest of members and beneficiaries". In this context, "beneficiary" means a person, other than a member of the scheme, who is entitled to the payment of benefits under the scheme.

scheme in terms of value for members and "trustees need to be satisfied that overall the transfer to the new scheme is in *members' interests*" (emphasis added)²⁰.

However, in the context of bulk transfers without consent to a DB commercial consolidator, there is a risk that the DWP's proposals (as set out in its consultation on DB consolidation) go above and beyond trustees' existing fiduciary duties under trust law and place a higher bar on transfers to a DB commercial consolidator than currently exists in relation to transfers to DC and DB master trusts²¹.

In its consultation, the DWP says that in considering a transfer to a DB commercial consolidator, "trustees must act in the *best interest of beneficiaries* (emphasis added); they will need to be convinced that members' benefits will be *more secure* in a superfund [DB commercial consolidator] than remaining with the sponsoring employer and the current funding arrangements". The DWP proposes strengthening the current pension transfer process by introducing a regulatory gateway to ensure that the decision to enter into a DB commercial consolidator is in the best interests of scheme members²². Further, in its guidance on transfers to a DB commercial consolidator, TPR expects trustees to evidence that the transfer will enhance member security; it is in the best interests of members; and that the scheme could not have achieved a better outcome through other means.

Whilst I appreciate that bulk transfers to a DB commercial consolidator are prone to greater risk²³ and in general, parties are more exposed to public criticism and scrutiny of this type of transfer than DC bulk transfers, there is no discernible legal reason for trustees considering a DB bulk transfer to be under a higher fiduciary duty than trustees considering a DC bulk transfer, particularly when consolidation for many DB schemes (particularly smaller schemes) may be to the benefit of all stakeholders. There is no freestanding duty to act in the best interests of beneficiaries (as the court found in *Merchant Navy Ratings Pension Fund Trustees v Stena Line ("MNRPF")*). The "best interests of beneficiaries" principle originated from case law, and most prominently, from the renowned case of *Cowan v Scargill*. Sir Robert Megarry V-C said "when the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests".

However, the "best interests of beneficiaries" principle has evolved in case law since *Cowan v Scargill*. In *MNRPF*, Asplin J found that the "best interests of beneficiaries" principle should not be viewed as a paramount stand-alone duty and should not be treated as if it were separate from the "proper purpose" principle. Asplin J also noted that "to decide whether a proposed course is for the benefit of the beneficiaries or is in their best interests, it is necessary to decide first what is the purpose of the trust and what benefits were intended to be received by the beneficiaries. Thus, to define the trustee's obligation in terms of acting in the best interests of the beneficiaries is to do nothing more than formulate in different words a trustee's obligation to promote the purpose for which the trust was created²⁴.

²⁰ See paragraph 43 (page 14) of the DWP's guidance on "Bulk transfers without consent: money purchase benefits without guarantees", published April 2019.

²¹ I note that this view is also held by the Pension Superfund and Clara Pensions in their responses to consultation.

²² Paragraphs 197 and 200 of DWP's consultation on "Consolidation of defined benefit pension schemes", published December 2018.

²³ This is a "one off" transaction that will replace the existing employer covenant with the "covenant" of a capital buffer within the consolidator structure.

²⁴ *Merchant Navy Ratings Pension Fund Trustees v Stena Line Ltd* [2015] EWHC 448 (Ch) at paragraphs 211-212.

In the context of exercising a power to bulk transfer, I expect the purpose of this power would be to ensure that members are not disadvantaged as a result of the transfer (i.e. they receive the same or greater level of security of benefits); and to ensure they receive benefits in the receiving scheme which are not less favourable. In this regard, I agree with both Clara Pensions and the Pension Superfund in their responses to consultation²⁵ that setting an objective of improving the security of members' benefits does not reflect the trust law position or enable trustees to effectively exercise their fiduciary duties to consider the transfer as a whole.

It is worth noting also that trustees may take into account the principal employer's interests as a beneficiary of a scheme. In MNRPF, the court found that it was reasonable for the trustees to take into account the principal employer's interests and in the recent British Airways case²⁶, the court found that the trustees had a "duty" to take account of all relevant factors, including the interests of the employer. Although the recent case of Keymed²⁷ found that trustees did not owe fiduciary or equitable duties to the sponsoring employer, trustees may still have regard to the interest of sponsoring employers, provided there is no conflict with their primary duty to other beneficiaries. This suggests that trustees can consider the employer's business and commercial drivers for transfer as a relevant factor in their decision-making, provided that members would not be disadvantaged by the transfer.

Tax considerations

The tax considerations for bulk transfers without consent to all consolidators are also very similar. The transfer must be a "recognised transfer" from one registered pension scheme to another (as set out in section 169 of the Finance Act 2004) and trustees will also need to ensure that transferring members retain any tax protection, such as primary, individual, enhanced and fixed protection. In most circumstances, members will retain these protections on transfer, but trustees will need to ensure that members do not accrue further benefits in the receiving scheme in respect of enhanced and fixed protection and as an additional safeguard, seek to ensure that the transfer is in connection with the winding-up of the transferring scheme.

The trustees would also need to ensure that the transfer satisfies the requirements of a "block transfer" under the tax rules and members retain any right to a protected pension age from age 50 and/or protected pension commencement lump sum. To be a block transfer under the tax rules, there must be a transfer in a single transaction of *all* the sums and assets of a member and at least one other member in the transferring scheme and so this is a key point to address in the context of a partial transfer from a hybrid scheme to ensure that members are not disadvantaged by the transfer. Trustees will need to ensure that members of a hybrid transferring scheme do not lose the ability to use any DC benefits as part of their DB PCLS at retirement.

Trustees would also want to ensure that they continue to be protected from liability after transfer and during winding-up of the transferring scheme or section. Trustees would typically want to ensure the employer meets the expenses of winding-up and they should review their existing insurance policy to ensure it provides sufficient coverage and includes any claims and liability arising from winding-up in respect of missing beneficiaries.

²⁵ See page 53 of Clara Pensions' response and pages 30-31 of the Pension Superfund's response to DWP's consultation on "Consolidation of defined benefit pension schemes", published December 2018.

²⁶ See *British Airways v Airways Pension Scheme Trustee* [2018] EWCA Civ 1533.

²⁷ *Keymed Medical & Industrial Equipment) Ltd v Hillman* [2019] EWHC 485 (Ch).

Transfer Deed

All bulk transfers will require a transfer deed to document the transfer of assets and liabilities from the transferring scheme to the receiving scheme. The transfer deed will vary in length and complexity depending on the type of transfer, but in general, the deed will include provision for transfer of scheme assets in specie or cash, and how assets will be disinvested to facilitate transfer of cash. The deed will also include a suite of warranty and indemnity protection to cover the accuracy and completeness of information provided by the transferring trustees; the scope and extent of benefits provided in the receiving scheme; how risk will be apportioned before and after transfer in respect of the transferring members; how benefits will be replicated in the receiving scheme; and how and to what extent discretionary benefits will be provided after the transfer. The transfer deed will also include warranties covering segregation and registration of the receiving scheme, treatment of any section 75 debts, winding-up of the transferring scheme and compliance with all applicable laws and regulatory requirements.

Transfers to DB commercial consolidators

Whilst there are common factors trustees need to consider in respect of all bulk transfers without consent, there are also key considerations that will depend on the nature of the receiving scheme.

The authorisation regime for DC master trusts provides a significant level of assurance for transferring trustees. Similarly, transfers to DB master trusts are a well trodden path which retain a link to the sponsoring employer and provide trustees with assurance that the employer covenant will continue to support the scheme's liabilities and protect the security of members' rights and benefits. In contrast, a transfer to a DB consolidator breaks the link to the employer covenant in exchange for a top-up payment and a "covenant" that consists of a capital buffer within the consolidator structure. The replacement of covenant will need to adequately mitigate any detriment and protect against an increased risk to members receiving their benefits in full.

Unless and until there is an authorisation regime for DB consolidators, the decision to transfer will be much tougher for trustees because they will need to do extensive due diligence on the receiving scheme, which will be an expensive and time-consuming process. The transaction will also be considerably more complex, given the requirements for regulatory clearance, the payment of an employer fee as part of the transfer²⁸, and the need for a benefit specification setting out the rights and benefits to be transferred (and the scope and extent of liability taken on by the DB commercial consolidator).

The DWP has also proposed a regulatory gateway that would exclude schemes from transfer which are able to afford buy-out in the "foreseeable future". The DWP defines "foreseeable future" as a period of up to five years, and this adds an additional layer of complexity, given fluctuations in buy-out pricing, TPR's expectations for trustees of DB schemes to set long term funding targets²⁹ and the requirements of the Pension Schemes Bill 2019-2020 for trustees to produce a funding and investment strategy specifying the funding level which the trustees "intend the scheme to have achieved". In the DWP's proposals, trustees will need to evidence

²⁸ The employer payment is being viewed as a "financial transaction" by Clara to satisfy the Preservation Regulations, which require the transfer to be the consequence of a financial transaction between the transferring and receiving employers.

²⁹ TPR's annual funding statement 2019 for defined benefit pension schemes, published March 2019.

to TPR their rationale and assumptions as to why there is no reasonable probability of achieving buy-out within the foreseeable future, including any reviews or stress-testing carried out on employer trading forecasts, which is a harder prospect with the new funding and investment requirements.

As a minimum, trustees will need to take actuarial and covenant advice to compare the projected outcomes for members if the scheme transfers to a DB commercial consolidator as opposed to remaining with the employer and analysis of the support provided to the scheme before and after the transaction. Trustees will also need to be satisfied with the DB commercial consolidator's policy for: protecting members if funding worsens (and for there to be sufficient funding triggers for transfer and winding-up); protecting existing members on the consolidator acquiring new business; ensuring the trustees have access to the buffer fund in certain scenarios; extraction of profit and the trustees' involvement in this process; eligibility for the PPF; governance of the scheme and the way in which conflicts are managed between the directors of the employer (i.e. the corporate entity) and the trustees of the scheme; ensuring the trustee board and corporate board have the collective knowledge, experience, expertise and financial soundness and understand the scheme's systems and processes and how the consolidator is run; and the balance of powers between the trustee and the employer in respect of key powers such as employer contributions, winding-up, rule amendments and surplus.

So there is a lot for trustees to consider in respect of transfers to a DB commercial consolidator over and above the common features for bulk transfers without consent. But first and foremost, in my view, the key question for trustees should be "why should we not make the transfer" rather than "why should we make the transfer". Only then will trustees ensure they are properly considering the merits of DB commercial consolidators and exercising their fiduciary duties by assessing all the options available to them.

APL CONFERENCE 2019

Panel Session On Consolidation

This paper accompanies the panel session on consolidation at the APL Conference in 2019. It considers whether the existing legislation, as at 24 October 2019, is sufficient to permit a transfer without the consent of members from a defined benefit occupational pension scheme to a "commercial consolidator"¹.

By "commercial consolidator", I mean² an occupational pension scheme that is operated for the purposes of effecting consolidation of other defined benefit pension schemes' liabilities where:

- the transferring scheme employer's link to the liabilities is severed on transfer;
- under the receiving scheme, the employer covenant is replaced by a capital buffer provided by investors; and
- there is a mechanism to enable returns to be payable to the investors³.

The Pensions Bill of October 2019 did not include any provisions in relation to commercial consolidators. Pending any legislation specifically in relation to them, commercial consolidators have to operate within the framework of the existing law, just like any other occupational pension scheme. Based on its December 2018 consultation paper, the government seems to consider the existing law to be sufficiently flexible to enable without consent transfers to be made to commercial consolidators⁴. I agree, but there would be a benefit in new, tailored legislation, including a dedicated gateway permission for without consent transfers to a commercial consolidator, to remove any doubts and make the appropriate process or processes clear.

Overview

In order for an occupational pension scheme to transfer the accrued defined benefit rights⁵ of a member to a commercial consolidator without the consent of the member:

- the transferring scheme will need to comply with regulation 12 of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991⁶ ("**the Preservation Regulations**"); and

¹ Pending these arrangements being defined in legislation, I use that term rather than "superfund" as a generic name for them, to avoid any confusion with the particular arrangement of that type that is called "The Pension SuperFund". This is notwithstanding the use of "superfund" as the generic name for them in the government's consultation on *Consolidation of Defined Benefit Pension Schemes*, which was published on 7 December 2018.

² consistently with the main characteristics identified at paragraph 24 of the government's December 2018 consultation paper

³ For more details in relation to commercial consolidators, please see the text of the APL seminar on *The Pension SuperFund for Trustee Advisors* given by Camilla Barry of MacFarlanes LLP in October 2018 and, of course, the comments of the panel at this year's conference.

⁴ "We consider that the current legislative framework does not prevent a superfund setting up and attempting to attract other funds to consolidate" (paragraph 12) and "The pension liabilities from the ceding scheme will be transferred to the superfund through the existing bulk transfer process" (paragraph 16).

⁵ or, specifically, the accrued rights of a member which are not relevant money purchase rights (as defined in regulation 12(1) of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991)

⁶ assuming the member is entitled to short service benefit for the purposes of section 71 of the Pension Schemes Act 1993, otherwise regulation 12 will not apply (a transfer made under it is a permitted alternative to the provision of short service benefit for the purposes of s.73)

- if the transferring scheme has contracted-out benefits, the transfer will need to constitute a "connected employer transfer" and / or a "connected employer transfer payment" for the purposes of Part II and / or Part III of the Contracting-out (Transfer and Transfer Payment) Regulations 1996 ("**the Contracting-out Transfer Regulations**").

Copies of the relevant parts of both regulations, as at 24 October 2019, are set out in the appendix for ease of reference.

I refer to:

- a scheme that is to transfer the accrued rights of a member as "**the transferring scheme**";
- a scheme that is to receive a transfer of accrued rights as "**the receiving scheme**";⁷ and
- an employer⁸ in relation to the transferring scheme as "**the transferring scheme employer**" and an employer in relation to the receiving scheme as "**the receiving scheme employer**".⁹

Permissions in common

Many of the gateways to enable a transfer to be made without consent – being the "same employer permission", the "same group permission" and the "financial transaction permission" (see below) - are substantively the same under both sets of regulations, but there are additional gateway permissions under the Preservation Regulations that are not present under the Contracting-out Transfer Regulations.

There are other conditions relevant to a transfer being made without consent under the regulations. The conditions include the actuarial certification requirement under the Preservation Regulations¹⁰ and requirements as to the benefits to be provided under the receiving scheme, in the case of the Contracting-out Transfer Regulations¹¹. For the purposes of this paper, I assume that the other conditions are capable of being fulfilled, which should be the case in practice.

If the rules of the transferring scheme and / or the receiving scheme include further conditions, they will also need to be fulfilled.

Differences between the regulations

The non-substantive, contextual differences between the permissions under two sets of regulations are (i) the references to "earners" and "persons" under the Contracting-out Transfer Regulations as against "members" under the Preservation Regulations and (ii) the references to "transfer or transfer payments" under the Contracting-out Transfer Regulations as against (solely) "transfer" under the Preservation Regulations.

⁷ "transferring scheme" and "receiving scheme" are used in both regulations. Whilst they are not defined in either, it is clear that they are intended to have the meaning that I give to them.

⁸ For the purposes of both the Preservation Regulations and the Contracting-out Transfer Regulations, an employer is essentially the person who is responsible for paying National Insurance contributions in relation to an employee or office holder – in relation to the Preservation Regulations, see regulation 2; "employer" is not defined under the Contracting-out Transfer Regulations, so (as they are made pursuant to the Pension Schemes Act 1993) the definition of "employer" in s.181 of the Pension Schemes Act 1993 applies.

⁹ "transferring scheme employer" and "receiving scheme employer" are also used in the Preservation Regulations (only) but specifically in the context of a without consent transfer of the accrued rights of a member which are relevant money purchase rights; in that context, they are given a particular meaning that differs from what I mean by those terms in this paper

¹⁰ regulation 12(3)

¹¹ regulations 3(c) and (e) (pursuant to regulation 4) and regulation 9

The additional permissions that (if either applies) would in principle allow a transfer without consent under the Preservation Regulations, but are not present so as to allow a transfer without consent under the Contracting-out Transfer Regulations are:

- where:
 - the transferring scheme and the receiving scheme relate to persons who are or have been in employment with different employers;
 - there is a group of members transferring; and
 - the relationship between the transferring scheme employer and the receiving scheme employer is one of (i) the scheme's principal employer or controlling employer and (ii) an employer subject to the rules of the scheme ("**the principal employer permission**"). "Principal employer" is defined in regulation 12(11) as "*the principal employer for the purposes of the scheme*" and "Controlling employer" is defined in the same regulation as "*...the employer that has the power to act on behalf of all employers in the scheme in relation to the scheme rules*"; and
- the employers are partnerships having at least half of their partners in common ("**the partnership permission**").

Below, I focus first on the gateway permissions that are in common as between the Preservation Regulations and the Contracting-out Transfer Regulations, but will return to the principal employer permission later¹².

The permissions in common

The three permissions that (if any is satisfied) open the gateway to a transfer without consent, under both the Preservation Regulations and the Contracting-out Transfer Regulations, are where:

- the transferring scheme and the receiving scheme relate to persons who are or have been in employment with the same employer ("**the same employer permission**"); and
- the transferring scheme and the receiving scheme relate to persons who are or have been in employment with different employers, there is a group of members transferring and either:
 - the employers are members of a group of companies consisting of a holding company and one or more subsidiaries within the meaning of section 1159(1) of the Companies Act 2006 ("**the same group permission**"); or
 - the transfer is a consequence of a financial transaction between the employers ("**the financial transaction permission**").

So, in simple terms, they open the door to a transfer without member consent where the same person is the employer in relation to both schemes or otherwise, where a group of members is transferring, the transferring scheme employer and the receiving scheme employer are part of the same corporate group or there has been a financial transaction between them and the transfer is consequent upon it.

I will consider each of these permissions, starting with the financial transaction permission.

¹² and the partnership permission, in passing

The financial transaction permission

There are a number of points to note in relation to this permission, which Clara relies on in its model. I will first analyse the permission in abstract and then consider it in the context of Clara's model¹³.

What is a financial transaction?

"Financial transaction" is not defined in the regulations.

In the absence of any definition, the term will be given its ordinary meaning. In principle, "financial transaction" is a broad phrase and I see no reason why a Court would limit it. It could, for example, mean "any arrangement between two or more parties involving or relating to money or money's worth in any way, other than a gift."

What are not financial transactions?

For the purposes of the regulations, a financial transaction has to be between the employers. So, it would not suffice:

- if, for example, the transferring scheme employer were being wound up and other transactions were happening between that employer and other parties, to point to the winding up itself and / or any transactions with third parties; or
- to point to any arrangements made between the transferring scheme employer and the trustees of the transferring scheme and / or of the consolidation scheme.

Must a transaction be of at least any particular amount?

There is nothing in the regulations that specifies any minimum amount of transaction and I can see nothing that means one must be read-in. Accordingly, there is no lower (or upper) limit on the amount of any financial transaction.

Transfer as "a consequence of" a financial transaction

In other contexts¹⁴, materially the same language has been given its ordinary meaning, connoting a causal link.

It does, of course, have to be interpreted in the context of the regulations, which have a purpose of prescribing circumstances where a transfer may be made without the consent of members, as would otherwise be required.

There is *obiter* support for the same or similar interpretation specifically in relation to regulation 12 of the Preservation Regulations from *Merchant Navy Ratings Fund v Chambers*. In that case, bulk transfers without consent were part of an arrangement that would enable employers to withdraw from the scheme, with such arrangements being part of a wider proposal for dealing with a substantial deficit in the scheme. Blackburne J had this to say at paragraphs 52 and 53:

"51 Mr Warren, Mr Nugee and Mr Green further submitted that paragraph 2(b)(i) of the regulation would also be satisfied in that the proposal constitutes a financial transaction between employers

¹³ I acknowledge and am grateful for the generous assistance of Mark Grant of CMS Cameron McKenna Nabarro Olswang LLP in explaining Clara's model, its position on the technical points arising in relation to the financial transaction permission and the reasoning supporting that position.

¹⁴ landlord and tenant (*Preston v Norfolk County Council*), employment (*Iron and Steel Holding and Realisation Agency v Compensation Appeal Tribunal*) and marine insurance (*Hall Brothers Steamship Company v Young*)

and the transfer, in the case of a withdrawing employer, would be a consequence of that transaction.

52 I have considerable doubt about the accuracy of that submission. It is difficult to see future transfers as a consequence (the expression appearing in paragraph (2)(b)(i)) of the proposal and not simply as events which have been made possible or enabled by it. It is difficult to see that the proposal has anything to do with the financial transaction referred to in the subparagraph."

Clara's model

The Clara scheme is a sectionalised occupational pension scheme.

Where there is to be a bulk transfer without consent to the Clara Scheme, the transferring scheme employer makes a payment to a company affiliated to the original Clara scheme employer. This is in return for the affiliated company ("**the Clara Section Employer**") starting to participate in a new section of the Clara scheme and becoming the statutory employer to whom the transferring scheme employer's pension liabilities will transfer as a result of the subsequent bulk transfer.

There are two questions to be answered, which I address in turn below:

- is there a financial transaction between the transferring scheme employer and the Clara Section Employer; and, if so,
- is the bulk transfer a consequence of that transaction?

Is there a financial transaction?

From my analysis above, there is a low bar for what constitutes a financial transaction. I consider there to be one as part of Clara's process, due to the payment to be made by the transferring scheme employer to the Clara Section Employer.

Is the bulk transfer a consequence of that transaction?

For me, this question is less straightforward to answer.

It could be said that the financial transaction is, in practice, the bulk transfer itself – being a multi-party transaction involving the employer and trustees of each of the transferring and receiving schemes - with any payment to the Clara Section Employer being a term of that transaction.

As I understand it, Clara's position is that it is neither necessary nor appropriate to bundle together and treat as one:

- the actual financial transaction, being one as between the transferring scheme employer and receiving scheme employer, as required by the regulations. This is the payment by the transferring scheme employer to the Clara Section Employer in return for it agreeing to take on the transferring scheme employer's pension liabilities; and
- the subsequent bulk transfer, which takes place between different parties. Under the Clara scheme, the power to accept any transfer in is vested in the trustee. Further, Clara anticipates that any power to transfer out under the transferring scheme will usually be vested in the transferring scheme trustee (alone or jointly with the employer).

Assuming that, in the above circumstances, the bulk transfer is separate from – and not, itself – the financial transaction, is it a consequence of the transaction.

In practical terms, the position is the other way round: the financial transaction is a consequence of the bulk transfer. This is in the sense that, (i) the transferring scheme employer wants to be discharged of its pension liabilities by way of a bulk transfer from its scheme to a scheme where someone else is the employer and (ii) but for the intended bulk transfer, there would be no payment by the transferring scheme employer to the Clara Section Employer. So, in other words, the intended bulk transfer causes the payment to be made.

Nevertheless, as I understand it, Clara's position is that:

- under its model, there must be a payment from the transferring scheme employer to the Clara Section Employer and that payment must come before any bulk transfer;
- without such a payment, there would be no employer under the Clara Scheme willing to take on the pension liabilities of the transferring scheme employer and so there would be no bulk transfer; and so
- in the payment and consequent actions of the Clara Section Employer *allowing* the bulk transfer to happen, the bulk transfer is a consequence of that financial transaction (it creates the causal link).

To my mind, *in the context of the regulations*, it is at the edges of what might mean something is a consequence of something else to include, as the "generating event" something that:

- enables something else to happen, rather than requires it to happen; and
- has no purpose independently of – and so would not happen but for – the other thing it is enabling to happen.

Nevertheless, there are no express limitations on the wording and Clara's position is that it should be given its ordinary meaning and that is broad – indeed, broad enough to allow its model to work.

Same employer permission and same group permission

A commercial consolidator seeking to operate in reliance on either the same employer permission or the same group permission would need to ensure that:

- the transferring scheme and the receiving scheme relate to persons who are or have been in employment with the same employer, or with different employers so long as the employers are part of the same corporate group; but
- the receiving scheme employer is not a statutory employer in relation to it and has no funding or other liabilities or responsibilities under the rules of the receiving scheme (given the intention of breaking the employer link to the liabilities that are to be transferred).

As I explain below, I do not consider that an employer would – *if it wishes to be an employer in relation to a receiving scheme for the purposes of the two sets of regulations* - be able to adhere to an occupational pension scheme and have a transfer of assets and liabilities made into the scheme in respect of it without becoming a statutory employer. That could be only for an instant, if desired, before an apportionment arrangement takes effect to transfer the statutory employer liability to another employer in the receiving scheme and discharge the transferring employer.

Whether that would be possible in the context of a commercial consolidator depends, in particular, on what view the trustee of the consolidation scheme takes in relation to the funding test under The Occupational Pension Schemes (Employer Debt) Regulations 2005¹⁵.

¹⁵ Based on a helpful telephone call with Camilla Barry when I was preparing this paper – with due acknowledgment and thanks to Camilla – I understand that this is an option that is available in relation to The

Never being a statutory employer

The only way in which an employer could participate in the receiving scheme without ever being a statutory employer would be never to employ any active members of the receiving scheme or any persons who are eligible to be active members of the receiving scheme, based on *PNPF v Taylor (Pilots)*. If an employer were to adhere to the receiving scheme on that basis, it does not seem to me that the receiving scheme would then *relate to persons who are or have been in employment with the employer* (as is required under all the permissions under both the Preservation Regulations and the Contracted-out Transfer Regulations). Instead, the receiving scheme would seem to relate solely to persons who are or have been in employment with the consolidation scheme employer (not being the same employer as the transferring scheme employer, or in the same group as the transferring scheme employer).

There are three points to note:

- regulation 12(2) of the Preservation Regulations has previously been interpreted widely so as to give it practical effect – see paragraphs 45 to 53 of Blackburne J's judgment in *MNRF*. In particular, the ruling meant that a scheme applied to employment with an employer so long as at least one of its employees had ever accrued benefits under it (or possibly, had ever been eligible to accrue benefits under it)¹⁶;
- regulation 12(2) previously provided a gateway permission in circumstances where "*the transferring scheme and the receiving scheme apply to employment with the same employer*" (paragraph (a)) or "*with different employers*" (paragraph (b)); in 2012 it was amended so as to provide a gateway permission in circumstances where "*the transferring scheme and the receiving scheme relate to persons who are or have been in employment with the same employer*" (paragraph (a)) or "*with different employers*" (paragraph (b)). The amendments were made by The Occupational and Stakeholder Pension Schemes (Miscellaneous Amendments) Regulations 2013, SI 2013/459 ("**the 2013 Regulations**"), regulation 2(4).

In light of the breadth given to the previous wording by the Court in *MNRF*, it does not seem to me that the successor language produces any different effect. In particular, it does not seem to me that a scheme can properly be said to relate to persons who are or have been in employment with an employer, if no employee of such an employer has ever accrued benefits under it or even been eligible to do so¹⁷.

My analysis is consistent with the Government's March 2013 response to a consultation on a draft of the 2013 Regulations.

The 2013 Regulations also amended the Contracting-out Transfer Regulations, to allow for a transfer of contracted-out benefits without consent to a scheme that had ceased to contract-out. The changes were made to regulation 12(2) to align the language of the Preservation Regulations with the language to be used in the equivalent provision in respect of contracted-out benefits under the Contracting-out Transfer Regulations. Page 10 of the response made clear that there was no policy intention, in making changes to regulation 12(2), to affect the interpretation that the Courts had given to it; and

Pension SuperFund and that it is fully expected that its trustee will not have any concerns in relation to the funding test.

¹⁶ "... I consider that I should give the regulation a broad rather than a narrow interpretation in order to enable transfers of short service benefit to be effected without the need to obtain the relevant member's consent provided always, as I conceive to be the objective of paragraph (2) of the regulation, that there is some kind of employment connection between the transferring scheme and the receiving scheme" (paragraph 50)

¹⁷ being an analysis that is consistent with *Pilots*, albeit that case looked at a similar issue and in relation to different legislation

- in light of all that I say above, if an employer were to adhere to a commercial consolidator on terms that:
 - none of its employees will be active members of the receiving scheme, and
 - the employer will not have any funding or other liabilities or responsibilities under the rules of the receiving scheme, but,
 - which allows for a without consent transfer of assets and liabilities from another scheme in relation to which it is an employer,

it does not seem to me that the commercial consolidation scheme would then relate to those of the current and former employees whose pensions and / or deferred benefits are to be transferred into it at any time in advance of such a transfer; at most, the deed of adherence paves the way for the commercial consolidation scheme to relate to the persons concerned, *after any transfer to it.*

The principal employer permission

Finally, I return to a gateway that enables a transfer to be made without consent under the Preservation Regulations, but not under the Contracting-out Transfer Regulations: the principal employer permission¹⁸.

The principal employer permission was added by The Pensions Act 2014 (Abolition of Contracting-out for Salary Related Pension Schemes) (Consequential Amendments and Savings) Order 2016, SI 2016/200 ("**the 2016 Order**"), article 2(2)(b). It was then amended by the Occupational Pension Schemes (Preservation of Benefit and Charges and Governance) (Amendment) Regulations 2018, SI 2018/240, regulation 2(5).

The principal reason for the amendments made in 2016 was to write into the Preservation Regulations the detail of the same group permission and the partnership permission. Previously, the Preservation Regulations had achieved that by cross-referring to a provision in the Occupational Pension Schemes (Contracting-out) Regulations 1996 that fell away on the abolition of DB contracting-out. The principal employer permission was added as part of the amendment that made that change.

It seems that the Government did not consider that it was making any substantive change by inclusion of the principal employer permission.

The consultation on the draft Order of October 2015 simply states:

"10 Article 3 provides for amendments to the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 (S.I 1991/167). Article 3(2) [became article 2(2) in the finalised Order] amends regulation 12 to replace the description of employers currently provided by regulation 64(2) of the Occupational Pension Schemes (Contracting-out) Regulations 1996 (SI 1996/1172) ("the 1996 Regulations"). With abolition, the 1996 Regulations will be revoked and replaced by the 2015 (No 2) Regulations. The new definition however follows the same lines as originally provided for in regulation 64(2)."

The Government's response to the consultation in March 2016 states that:

"(ii) Changes to the definition of "connected employer"¹⁹ in the new regulation 12(2A) of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991

¹⁸ I will not say anything specifically on the partnership permission, as I consider the analysis in relation to it to be the same as in relation to the same group permission noted above for all material purposes.

¹⁹ This was the term used under the Occupational Pension Schemes (Contracting-out) Regulations 1996 to describe employers who bore such relationships to each other as would enable the same group permission or the partnership permission to be used.

33. Several respondents questioned the wording of the definition of “connected employer” provided by article 3(2) of the draft Order (article 2(2) of the final Order), and whether it exactly replicated the current provision. Some respondents thought it widened the definition, and others thought it imposed new restrictions.

34. Our view is that the definition of “connected employer” has not changed, we have simply amended it to remove the cross reference to regulation 64(2) of the Occupational Pension Schemes (Contracting-out) Regulations 1996 which will cease to exist.”

So, the principal employer permission was added without fanfare – and without any intention to change anything²⁰, but did it, as a matter of law, produce any new effect (in allowing a without consent transfer in circumstances where one would not have been permitted before)? I do not consider that it did. So, I agree with the government's response to the consultation, but in turn wonder why it was considered necessary or desirable to include the new wording at all.

There are three points, in particular, that I considered in reaching the above conclusion.

Point 1: unequal effect?

I considered whether the absence of any new effect under the Contracting-out Transfer Regulations might be a pointer to no new effect also having been created under the Preservation Regulations. This is notwithstanding that the Preservation Regulations were amended so as to include the principal employer permission and the Contracting-out Transfer Regulations were not.

The absence of coherence between the two regulations would not, I think, be sufficient to prevent the provision that generates the principal employer permission being given its ordinary meaning. (So, if, contrary to my conclusion, the principal employer permission were to have created a new effect in principle, this point would not have required otherwise.)

There was already – and remains - a curious gap as between the two; this is in the partnership permission being available under the Preservation Regulations, but not under the Contracting-out Transfer Regulations. So, even before the principal employer permission muddied the waters, the two sets of regulations were not fully coherent as to gateway permissions for transfers without consent.

Point 2: which scheme?

I considered which scheme or schemes are at issue, for the purposes of the reference to “*the scheme's principal employer or controlling employer*” and “*an employer subject to the rules of the scheme*”?

“Scheme” is defined in regulation 1 of the Preservation Regulations simply as “*an occupational pension scheme*”, so that does not provide any assistance.

The principal employer permission applies where the transferring scheme and the receiving scheme relate to persons who are or have been in employment with different employers. So, the starting point is that one of them will need to employ, or have employed, persons to whom the

²⁰ I did wonder whether the wording could have been included to assist transferring schemes that have non-associated employers, but the consultation response makes clear otherwise. Moreover, there is no reason in principle why such schemes could not use the same employer permission or the same group permission, in exactly the same way (and subject to exactly the same issues) as a transferring scheme which has associated employers.

transferring scheme relates and the other employer will need to employ, or have employed, persons to whom the receiving scheme relates²¹.

Further, the employers have to bear the relevant prescribed relationship to each other. For that to be the case, it seems to me that one of the employers would need to be the principal employer or the controlling employer and the other an employer subject to the rules *of the same scheme*.

It would be a very significant change, if it were the case that this provision permitted a transfer without member consent by the principal employer or controlling employer of one scheme to another scheme, simply because that other scheme has an employer that is subject to its rules (and so without a need for any kind of actual connection between the employers). That would allow a transfer without consent from a defined benefit pension scheme to virtually any other such scheme. I do not consider that to be the outcome for two reasons.

First, the transferring scheme employer and receiving scheme employer need to bear the prescribed relationship to each other. It does not seem to me that, as a matter of ordinary language, two employers that have no connection whatsoever between them, could be said to be in any kind of relationship with each other.

Second, it seems to me that the reference to "the scheme", in "*the scheme's principal employer or controlling employer*" and "*an employer subject to the rules of the scheme*" must mean the same scheme. If that were not the case, the terms "the transferring scheme" and "the receiving scheme", which are used in regulation 12(2), would surely have been used.

Further, it seems to me that the scheme at issue must be the transferring scheme.

Regulation 12 provides for circumstances in which a scheme may allow a member's accrued rights to be transferred to another occupational pension scheme without the member's consent. So, in context, the reference to "the scheme" must be to the scheme that is being given permission to transfer members' accrued rights without consent.

Point 3: transfer of money purchase benefits

I also considered the position in relation to the transfer of relevant money purchase rights without consent, which may be done where any of three conditions is satisfied²².

One of the conditions – that set out in regulation 12(8) – is similar to the same employer permission. There are, however, a few differences.

The key difference for our purposes is the absence of a need for the receiving scheme employer to employ, or have employed, anyone who has accrued benefits under the receiving scheme.

It is enough if the receiving scheme employer is the principal employer of the receiving scheme. Whilst, in many cases, that will mean that the employer employs, or has employed, at least one member who has accrued benefits under the receiving scheme or is eligible to do so, that need not necessarily be the case.

I cannot see any basis for asserting that, just because the position is as set out above in relation to the transfer of relevant money purchase rights without consent, a different interpretation – so as to be consistent with the above – must be given to the relevant permissions in relation to the transfer of defined benefits without consent. Whilst they are contained in the same regulation, they are distinct provisions.

Further, the provisions in relation to the transfer of relevant money purchase rights without consent were only added in 2018. This is many years after most of the permissions considered

²¹ as explained in relation to the same employer permission and the same group permission above

²² as set out in regulation 12(7), 12(8) and 12(9)

above were part of the Preservation Regulations and even two years after when the principal employer permission was added to them²³.

Mark Smith, Taylor Wessing LLP
8 November 2019

²³ There were some minor amendments made to the principal employer permission at the same time as when the transfer of relevant money purchase rights without member consent provisions were added, but that does not change my analysis in any way.

Appendix

Regulation 12 of the Preservation Regulations

12 Transfer of member's accrued rights without consent

(1) For the purposes of section 73(4) of the Act, a scheme may provide for the member's accrued rights which are not relevant money purchase rights to be transferred to another occupational pension scheme (as described in section 73(2)(a)(i) of the Act) without the member's consent where the conditions set out in paragraphs (2) and (3) of this regulation are satisfied.

(1A) For the purposes of section 73(4) of the Act, a scheme may provide for a transfer payment to be made to another occupational or personal pension scheme (as described in section 73(2)(a) of the Act) without the member's consent where the conditions set out in paragraph (6) of this regulation are satisfied.

(1B) For the purposes of section 73(2)(b) and (4)(b) of the Act, a scheme may provide for the member's relevant money purchase rights to be transferred to another occupational pension scheme without the member's consent where the conditions set out in one of paragraphs (7) to (9) are satisfied.

(2) The condition set out in this paragraph is that the rights of a member are being transferred from the transferring scheme to the receiving scheme and either—

(a) the transferring scheme and the receiving scheme relate to persons who are or have been in employment with the same employer; or

(b) the transferring scheme and the receiving scheme relate to persons who are or have been in employment with different employers, the member concerned is one of a group in respect of whom transfers are being made from the transferring scheme to the receiving scheme, and either—

(i) the transfer is a consequence of a financial transaction between the employers; or

(ii) the employers are companies or partnerships bearing a relationship to each other in one of the ways described in paragraph (2A).

(2A) The relationships between the employers referred to in paragraph (2)(b)(ii) are—

(a) the employers are members of a group of companies consisting of a holding company and one or more subsidiaries within the meaning of section 1159(1) of the Companies Act 2006 (meaning of "subsidiary" etc);

(b) the employers are—

(i) the scheme's principal employer or controlling employer; and

(ii) an employer subject to the rules of the scheme; or

(c) the employers are partnerships having at least half of their partners in common.

(3) The condition set out in this paragraph is that—

(a) the relevant actuary gives a certification, by completing the certificate in Schedule 3, in relation to the members' rights in the receiving scheme;

(b) the relevant actuary sends that certificate to the trustees or managers of the transferring scheme;

(c) the transfer takes place within 3 months of the date of the relevant actuary's signature in the certificate; and

(d) there are no significant changes to the benefits, data and documents used in making the certificate (see the benefits, data and documents specified in the certificate) by the date on which the transfer takes place.

(4) For the purposes of making the certification in paragraph 1 of the certificate in Schedule 3, where long service benefit in the transferring scheme is related to a member's earnings at, or in a specified period before, the time when he attains normal pension age then, in the case of a member in pensionable service at the date of transfer, the value of the rights to be transferred

shall be based on pensionable service (including any transfer credits) in the transferring scheme up to that date and projected final pensionable earnings.

(4A) For the purposes of making the certification in paragraph 2 of the certificate in Schedule 3, the relevant actuary shall, in considering whether there is good cause, have regard to all the circumstances of the case and in particular—

- (a) to any established custom of the receiving scheme with regard to the provision of discretionary benefits or increases in benefits; and
- (b) to any announcements made with regard to the provision of such benefits under the receiving scheme .

(4B) Where it is proposed that a member's accrued rights are to be transferred in accordance with this regulation, information about the proposed transfer and details of the value of the rights to be transferred (including rights in respect of death in service benefits and survivors' benefits) shall be furnished to the member not less than one month before the proposed transfer is due to take place.

(5) In this regulation “the relevant actuary” means—

- (a) where the transferring scheme is a scheme for which an actuary is required under section 47 of the Pensions Act 1995 to be appointed, the individual for the time being appointed in accordance with subsection (1) of that section as actuary for that scheme;
- (b) in any other case, a Fellow of the Institute and Faculty of Actuaries or a person with other actuarial qualifications who is approved by the Secretary of State, at the request of the trustees or managers of the scheme, as being a proper person to act for the purposes of this regulation in connection with the scheme.

(6) The conditions set out in this paragraph are that—

- (a) the transferring scheme is or has been a stakeholder pension scheme, within the meaning of section 1 of the Welfare Reform and Pensions Act 1999 or Article 3 of the Welfare Reform and Pensions (Northern Ireland) Order 1999, and the scheme is such a scheme;
- (b) the transferring scheme has commenced winding-up; and
- (c) the transfer payment is of an amount at least equal to the cash equivalent of the member's rights under the scheme, as calculated and verified in a manner consistent with regulations made under section 97 of the 1993 Act (calculation of cash equivalents).

(7) The condition set out in this paragraph is that the receiving scheme is authorised under the Pension Schemes Act 2017.

(8) The conditions set out in this paragraph are that—

- (a) the transferring scheme employer and the receiving scheme employer are undertakings;
- (b) the transferring scheme employer is a group undertaking in relation to the receiving scheme employer; and
- (c) the member whose rights are to be transferred is a current or former employee of an undertaking which is a group undertaking in relation to the transferring scheme employer or the receiving scheme employer.

(9) The conditions set out in this paragraph are that—

- (a) within the year ending with the date of the transfer, the trustees of the transferring scheme have obtained and considered written advice in relation to the transfer from a person whom they reasonably believe to be qualified to give that advice by reason of that person's ability in, and practical experience and knowledge of, pension scheme management (“the appropriate adviser”); and
- (b) the trustees of the transferring scheme have determined that the appropriate adviser is independent of the receiving scheme after considering whether, during the year ending with the date on which the advice was provided, the appropriate adviser (or, where the

appropriate adviser is an undertaking, a group undertaking in relation to the appropriate adviser) has—

- (i) received payment for services from the receiving scheme;
- (ii) received payment from a service provider or a group undertaking in relation to a service provider; or
- (iii) received payment from the receiving scheme employer or a group undertaking in relation to the receiving scheme employer.

- (10) Where an employer has the sole power to effect a transfer of a member's accrued rights—
- (a) paragraph (9) has effect as if “member's employer has” were substituted for “trustees of the transferring scheme have”; and
 - (b) the employer must confirm to the trustees of the transferring scheme that it has complied with paragraph (9) as so modified.

- (11) In this regulation—

“controlling employer” , in relation to a scheme, is the employer that has the power to act on behalf of all employers in the scheme in relation to the scheme rules;

“group undertaking” has the meaning given by section 1161(5) of the Companies Act 2006 (meaning of “undertaking” and related expressions);

“principal employer” , in relation to a scheme, is the principal employer for the purposes of the scheme in accordance with the scheme rules;

“receiving scheme employer” means the principal employer or controlling employer of the receiving scheme;

“relevant money purchase rights” are rights to money purchase benefits, where the assets held for the purpose of providing those benefits do not include any guarantee or promise in relation to the amount of the benefits to be provided, or the amount available for the provision of the benefits;

“services” means advisory, administration or investment services provided to the receiving scheme, and a “service provider” is a provider of such services to the scheme;

“transferring scheme employer” means the principal employer or controlling employer of the transferring scheme;

“undertaking” has the meaning given by section 1161(1) of the Companies Act 2006.

Relevant definition from regulation 1 of the Contracting-out Transfer Regulations

“connected employer transfer” and “connected employer transfer payment” mean respectively a transfer of guaranteed minimum pensions from one salary-related scheme to another and a transfer payment in respect of section 9(2B) rights from one salary-related scheme to another where either—

- (a) the transferring scheme and the receiving scheme relate to persons who are or have been in employment with the same employer; or
- (b) the transferring scheme and receiving scheme relate to persons who are or have been in employment with different employers, and the earner or person concerned is one of a group of persons in respect of whom transfers or transfer payments are being made from the transferring scheme to the receiving scheme and either—
 - (i) the transfer or transfer payment is a consequence of a financial transaction between the employers, or
 - (ii) the employers are members of a group of companies consisting of a holding company and one or more subsidiaries within the meaning of section 1159(1) of the Companies Act 2006 (meaning of “subsidiary” etc)