

OUR INDUSTRY IS CHANGING. ARE WE?

*“Rights and obligations in an evolving Retirement Funds environment”*

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**EXPERIENCES OF A S15K TRIBUNAL: SOME LEGAL ISSUES**

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## THE SURPLUS APPORTIONMENT PROCESS

- Determine actuarial surplus
- Investigate improper use and application of proviso
- Design surplus apportionment scheme
  - Minimum benefits
  - Residual surplus to stakeholders (members, pensioners, deferred pensioners, employer)
- Communicate scheme to stakeholders
- 12 weeks to lodge objections
- Registrar's approval

## WHERE DOES THE S15K TRIBUNAL FIT IN?

- s15B(10) + s15K(1): Tribunal established if -
  - Board fails to submit scheme within 18 months
  - Reg not satisfied that scheme is reasonable and equitable
  - Reg considers that unresolved complaints require investigation
  - Board of FMR requests tribunal
- s15B(1): Any reference in s15B to “board” to be construed as reference to “tribunal”
- Composition
  - At least 3 members from approved panels
  - Lawyer, actuary, two members with experience in retirement fund financing

## NATURE OF THE TRIBUNAL PROCESS

- s15K(7): follow any process, including procedures in inquisitorial manner, affording stakeholder a hearing and issuing subpoenas
  - Options:
    - Written submissions and/or hearing
    - Evidence at hearing or settle facts on papers
  - Two parts to process:
    - Determining amount of surplus (valuation, improper use, proviso etc)
    - Who gets what (min benefits; residual surplus; apportionment etc)

## ■ NATURE OF THE TRIBUNAL PROCESS (cont)

- Two parts in one process OR in two stages
- How would tribunal decide?
  - Amount of improper use & application of proviso
  - Likely impact on amount of surplus
  - Registrar's approval
  - Avoid re-doing scheme
  - Are proper & meaningful representations possible?
- Additional considerations: discovery-like processes could lead to cost and delay

## ■ PARTICIPATION OF THE FUND

- Nature & extent of fund's participation
- s15B(10): any reference in s15B to “board” to be construed as reference to “tribunal”
- Trustees have no decision-making power in tribunal process & do not make representations to tribunal
- Delineation of duties between fund & tribunal
- Trustees still have duties to members

## PARTICIPATION AND COSTS OF FMR

- s15B(3): Appt of FMR to assist board identify former members, communicate proposals, collate objections, submit report & comment on board's exercise of discretion
- Does FMR cease to play role once tribunal appointed?
- If pay FMR costs, should all stakeholders' costs be paid?

## PARTICIPATION AND COSTS OF FMR (cont)

- FMR appt to assist board and therefore tribunal
- Should hear representations from FMR
- Board has discretion re: use of surplus budget – power now exercised by tribunal
- Justification for FMR costs:
  - Stage 1 legal arguments in interests of all members & pensioners
  - Statutorily appointed & compulsory
  - Lack of resources
- FMR costs not justified at second stage – stakeholder interests diverge

## WHICH PROVISIONS APPLY TO THE TRIBUNAL?

- Option 1: s15K replaces s15B(9) but rest of s15B applies:
  - s15K: Registrar must accept determination as satisfying requirements of s15B(9) unless tribunal did not exercise discretion properly or in good faith
  - s15B(10): Reference to board in “this section” ie. s15B, to be construed as reference to “tribunal”
- Option 2: s15K replaces all of s15B
  - But problems re: application of min benefits, FMR, improper use
- Option 3: s15K replaces s15B(9), rest of s15B applies unless specifically replaced

## REGISTRAR'S POWER TO REVIEW TRIBUNAL'S WORK

- s15B(9)(h): Scheme submitted by board of no force & effect unless Reg satisfied, *inter alia*, that reasonable & equitable, & meets reasonable benefit expectations
- s15K replaces s15B(9)
- s15K(15): where scheme submitted by tribunal, Reg must accept as satisfying requirements of s15B(9) unless discretion not exercised properly & in good faith
- Reg review power limited to discretion (actual apportionment, which former members to include etc)
- No review of legal findings (improper use etc)

## APPEALING REGISTRAR'S DECISION

Reg Decision



Appeal Board



High Court

appeal to  
s26 – FSB Act

review to  
PAJA

- Discretionary decisions & legal findings
- Discretionary Decisions:
  - If Reg accepts determination, accepts exercise of tribunal's discretion
  - Appeal Reg decision to Appeal Board
  - Review Appeal Board's decision to HC
  - Direct review of tribunal discretion not competent – ito PAJA, must exhaust domestic legal remedies first

## ■ APPEALING OR REVIEWING TRIBUNAL DECISIONS (cont)

- Legal Findings:
  - No appeal to HC
  - Review ito PAJA
  - S6 grounds; error of law; irrelevant considerations taken into account; relevant considerations ignored; arbitrary or capricious; not rationally connected; unreasonable; unconstitutional or unlawful

## REGISTRAR'S JURISDICTION TO DETERMINE APPLIC OF PROVISO

- S15B(6) proviso: Board may exclude improper use if Reg is satisfied that use was approved by members or trade unions representing members, after a clear & comprehensive communication exercise as part of a negotiated utilisation of surplus
- Board makes applic to Reg ito PF114
- Reg power of review iro tribunal's findings on the proviso?

## REGISTRAR'S JURISDICTION TO DETERMINE APPLIC OF PROVISO (cont)

- Option 1: Reg must approve ANY decision re applic of proviso
- Option 2: Reg approval necessary ONLY if tribunal decides improper use to be excluded because proviso applies
  - If tribunal finds that proviso applies – legal finding
  - Proviso grants discretion: “may” exclude not “must” exclude
  - Decision to exclude is discretionary – Reg can review, appeal to Board, review to HC
- Legal finding regarding applic of proviso: review to HC

## PRECEDENT

- Tribunal determinations not precedent for other tribunals or courts
- Only binding on parties involved
- Different tribunal's could come to different decisions
- HC will have to settle issues

## ■ PRACTICAL ISSUES TO CONSIDER

- Initiating the process in an inclusive way
- Clear, simple and understandable communication with stakeholders
- Managing expectations
- Dealing with queries

## ■ PRACTICAL ISSUES TO CONSIDER

- The most effective way of communicating the tribunal's findings – from the perspective of cost as well as ensuring that parties understand the determination
- Media and PFA attendance at hearing
- Distributing the determination to media and other third parties
- The tribunal's indemnity
- Reviewing the surplus budget