

OUR INDUSTRY IS CHANGING. ARE WE?

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

**PENSION LAWYERS**



**A S S O C I A T I O N**

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# LEGAL IMPLICATIONS OF FINANCIAL ADVICE IN MEMBER INVESTMENT CHOICE FUNDS

- **DC Plan Philosophy**
- **What is Financial Advice?**
- **DC Plan Governance**
- **The duty to provide financial advice**
- **Who holds the baton? who holds the whip?**
- **Should there be legislation or guidelines**

## ■ DC PLAN PHILOSOPHY

- Employee demand
- Cost certainty for the employer
- Easier to understand/more transparent
- Less costly to administer
- Benefit values are easily transportable
- Investment risk lies with the member
- Retirement benefit adequacy risk lies with the member

## ■ DC PLAN PHILOSOPHY cont.

- Fixed contributions
- Individual member accounts
- Investment of contributions to provide retirement benefits
- Variable benefits – dependant on:
  - *amount of contributions, plus*
  - *period of membership*
  - *investment performance*
- Member investment choice availability

## WHAT IS FINANCIAL ADVICE ?

- FAIS – financial advice/ investment advice
- Member choice: “ *Members of a pension or provident fund can select from a range of options where to invest their money.*”
- Majority of Plans in S.A. do not provide investment choice.
- Begs the question – Is this an issue at all?

## DC PLAN GOVERNANCE

- Pension Legislation and Common Law
- Roles and Responsibilities of employer, trustee and member in respect of financial advice
- Does financial advice form part of DC Plan Governance?

## ■ Pension Legislation and Common Law

- Pension Funds Act
- Labour legislation
  - forms part of employment contract
- Common Law
  - Pension Plan compulsory Obligations of the Employer, Trustee, Members other stakeholders

## ■ ROLES AND RESPONSIBILITIES OF EMPLOYER – re ADVICE

- Plan design
- Membership category criteria
- Facilitate trustee selection, training, meetings etc.
- Contribution levels and costs (funding policy)
- Payment of contributions
- Benefit Adequacy
- Investment policy
  - availability of member investment choice
  - Range of investment choice

## ■ ROLES AND RESPONSIBILITIES OF TRUSTEES – re ADVICE

- Making recommendations to employer/ sponsor on funding policy, investment policy and member choice.
- Asset allocation of investment fund(s) – investment mandates
- Selection and monitoring of investment managers and investment funds and other third party stakeholders
- Developing and delivering plan investment information to members
- Provide member education and investment decision making tools
- Monitor and contain costs
- Delegate duties to experts – retain ultimate responsibility

## THE DUTY TO PROVIDE MEMBER FINANCIAL ADVICE

- Member investment choice debate – moral dilemma or legal obligation
- Does financial advice form part of DC plan governance?
- Practical consequences of providing investment choice
  - Limited vs entire range of funds
- ERISA - US
- CAP Guidelines – Canada

## ■ ROLES AND RESPONSIBILITIES OF MEMBERS – re ADVICE

### ■ PLAN MEMBERS' RESPONSIBILITY

- Become informed about the Plan
- Read ongoing communication and education material
- Attend member education seminars
- Ask questions
- Upon withdrawal or, termination take the required steps to protect the fund value
- Obtain investment and benefit adequacy advice ( do not necessarily rely solely on DC benefits)
- Make investment selection and review and monitor investment selection on a regular basis

## Does Financial Advice form part of DC Plan Governance?

- Duty to provide education
- Duty to provide investment decision making tools
- Duty to provide a financial adviser
  - Selection process
  - Service contract
  - Performance measurement benchmarks
  - Monitoring
  
- Costs and fees

## Practical consequences of providing member investment choice

- Gives members greater control over their retirement provision
- Generally accepted that the greater the choice the greater the costs
- Direct correlation between range of choice and amount of investment education, communication, time spent on fund selection and investment monitoring
- Gives Trustees different responsibilities ( perhaps even more)
  - Responsible for providing the members with the education and tools to make their investment selection ( Confirmed in Nat. Treasury retirement reform paper)
- Gives employers additional responsibilities
  - Warning Flags include:
    - Large number of members in default fund
    - Members making a large number of investment switches



# ERISA

- Legislation
- Safe Harbour



## CAP Guidelines

- Guidelines
- Financial Advice is specifically excluded
- No safe harbour

## WHO HOLDS THE BATON? WHO HOLDS THE WHIP?

- Governance structure
  - Employer
  - Trustee
  - Member
- SEI Survey
- Myners Report
- Mercer Survey

## ■ SHOULD THERE BE LEGISLATION OR GUIDELINES

- Does it matter?
- Legislation
  - Less flexible
  - Needs to be carefully drafted – even perfect.
  - Provide for all types of plans
- Guidelines