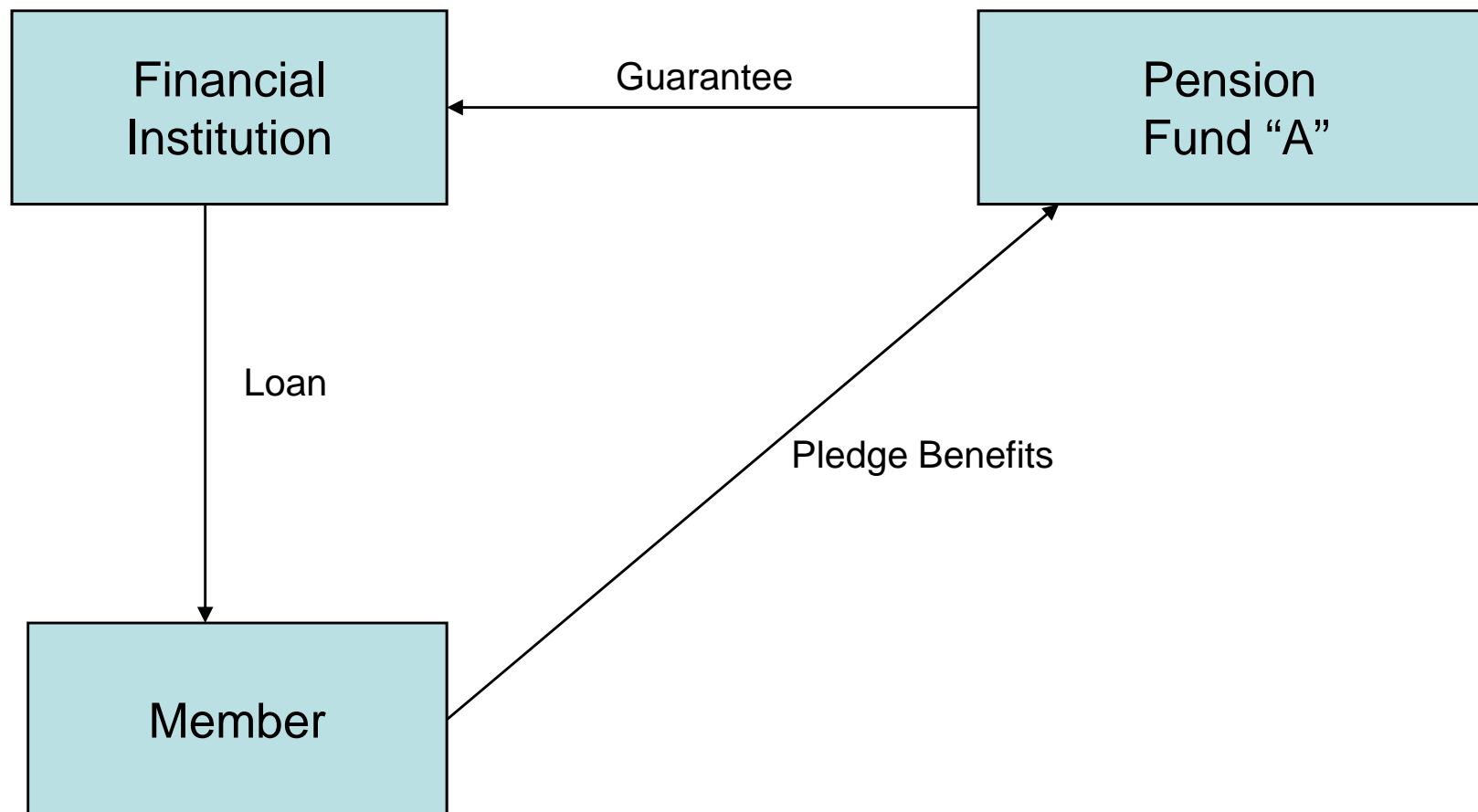


HOUSING LOANS: Impact of S14 and the National Credit Act

GRAHAM DAMANT

Midnight
in the
garden of good and evil

SECTION 19(5)-THE HOUSING LOAN TRIANGLE

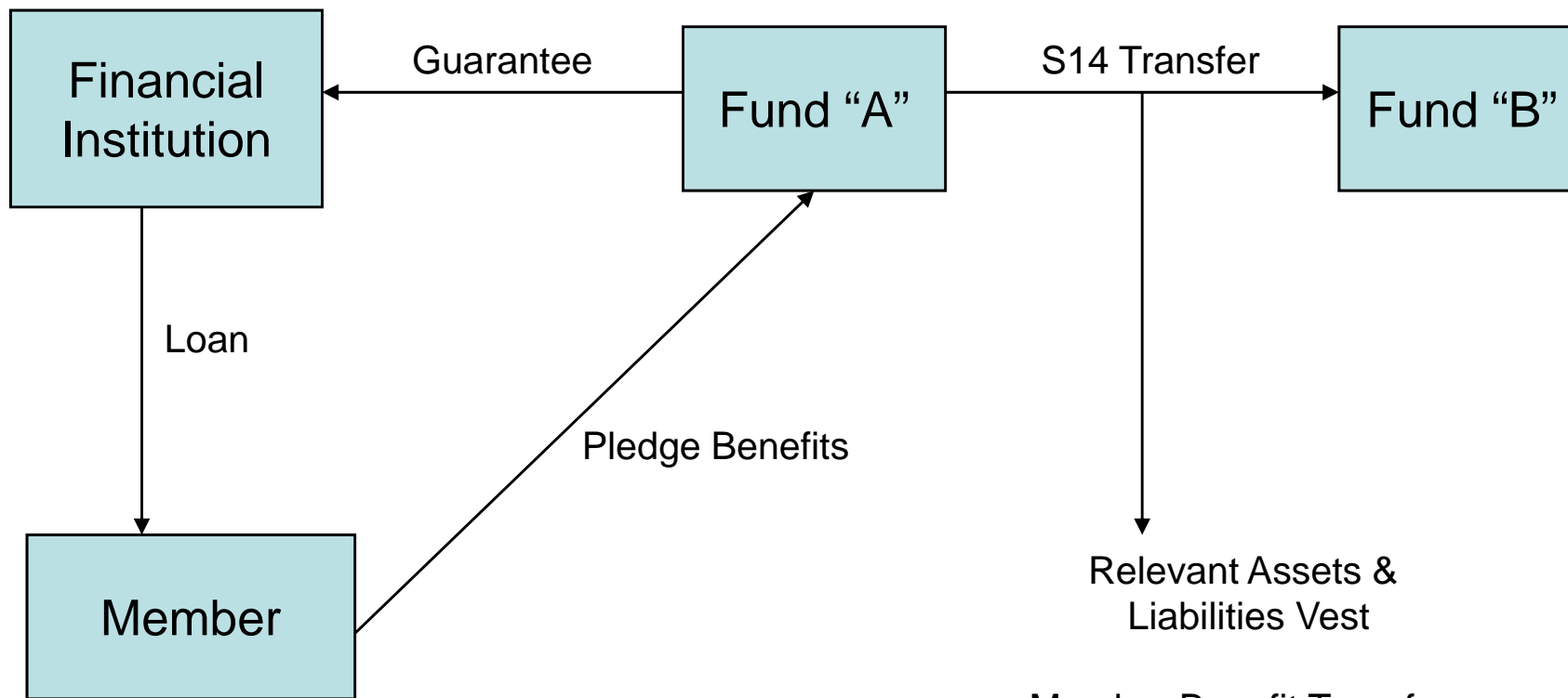


COMMENT ON TRIANGLE

- Odd form of pledge
- Member has no asset to pledge
- Guarantee in form or “surety” or “surety and co-principal debtor”
- Financial institution to comply with National Credit Act
- Member defaults - S37D Permits recovery prior to termination



THE TRIANGLE WHEN A S14 TRANSFER OCCURS



Member Benefit Transfers

Does Pledge & Guarantee Transfer?



DOES PLEDGE AND GUARANTEE TRANSFER

- Is a pledge an asset?
- Is a guarantee a liability?
- Distinction between surety and co-principal debtor
- But what about S14(4)?



SECTION 14(4)

- Recognises cannot simply replace one debtor with another –

“The transaction affected in terms of this section shall not deprive any creditor of any right or remedy which he had immediately prior to that date against any party to the transaction”



SECTION 37D(1)(a)(ii)(bb) RECOGNISES THIS

- Can deduct if:

“In the case of a transfer of the member to another fund, the amount of the benefit which the fund is so entitled to transfer, if the board of the transferor fund is satisfied that it is not otherwise reasonably possible to negotiate the repayment or to transfer the loan or the guarantee”

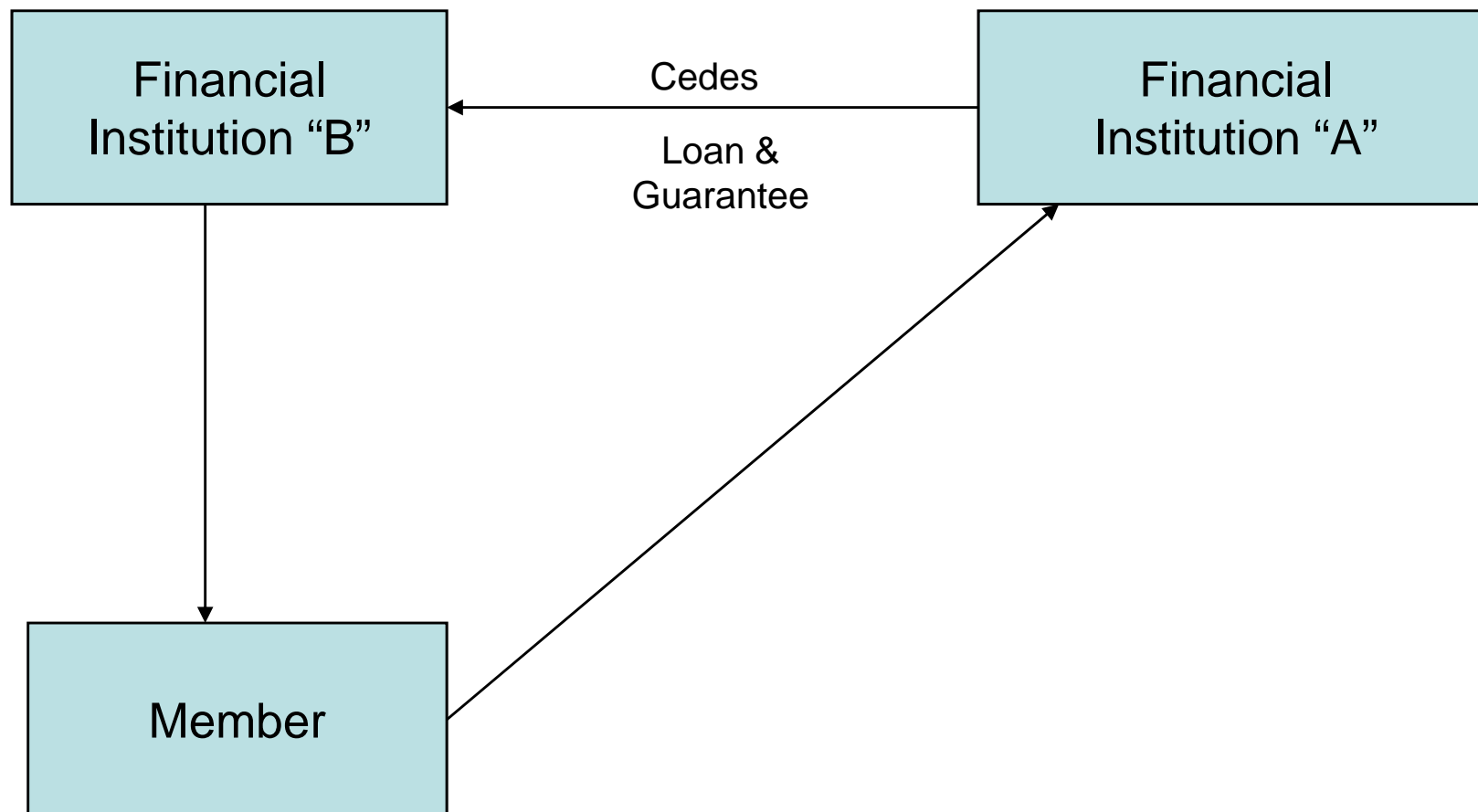


AGREEMENTS NEED TO RECOGNISE THIS

- Pledge needs to have agreement to sign pledge in favour of Transferor Fund
- Guarantee needs to have agreement to release Fund A in return for guarantee from Fund B
- No impact on loan agreement



THE TRIANGLE WHEN FINANCIAL INSTITUTION CHANGES



DOES CESSION CREATE NEW CREDIT AGREEMENT?

S95 – Changes, deferrals and waivers-

“The provision of credit as a result of a change to an existing credit agreement, ... is not to be treated as creating a new credit agreement for the purposes of this Act if the change, ... is made in accordance with this Act or the Agreement”



HOWEVER IF CREDIT AGREEMENT WAS PRIOR TO 1 JUNE 2006

Section (4)(5) of Schedule 3-

“Despite Section 95, for the purposes of this item, a change after the effective date to any credit agreement that was made before (June 2006) constitutes the making of a new credit agreement, unless it is a change to-

(a) the interest rate ...; or

(b) ... the credit limit”



CONCLUSION

- Can cede from one financial institution to another if credit agreement is after 1 June 2006
- If before 1 June 2006 arguably needs new risk analysis



SOLUTIONS

- Amend S14 to allow for automatic transfer of pledge and guarantee
- Exclude cession from NCA

