

FREQUENTLY RECURRING MISTAKES IN CONSTITUTIVE DOCUMENTS OF SUPERANNUATION FUNDS

The FSC in the course of processing applications for registration of superannuation funds under the Pensions (Superannuation Funds and Retirement Schemes) Act ("the Act) has identified a number of errors which are often reflected in the constitutive documents in support of the applications. The following list, while not exhaustive, is produced by the FSC to assist in the preparation of the constitutive documents to facilitate compliance with the requirements for registration of superannuation funds under the Act.

- 1) **Unique name of plan**. There is inconsistency between the name of the plan stated in the original trust deed and rules and the amended constitutive documents submitted for approval without evidence of the proper steps being taken to effect the name change.
- 2) **Participants' meetings and appointing a chairman for a participants' meeting**. There are often references to general or special meetings but it is not clear whether they are intended to be participants' meetings. The procedure for appointing the Chairman for such meetings is frequently not stated. There is often an erroneous provision which states that in the absence of the Chairman, the Board of Trustees can act as the chairman of such a meeting. According to regulation 5(6) of the Governance Regulations, the chairman of the participants' meeting shall be a person who is a participant entitled to vote at the meeting and has been validly so appointed under the fund's constitutive documents. [Items 7 and 15 of the Second Schedule to the Registration, Licensing and Reporting Regulations "the Second Schedule" and Regulation 5(6) of the Governance Regulations]
- 3) **Pensioner trustees**. In outlining the categories of persons who are eligible to nominate, elect or remove the pensioner trustee, there is often a reference solely to pensioners and no reference is made to the deferred pensioners. [Item 5 of the Second Schedule and the definition of pensioner trustee in Regulation 2 of the Governance Regulations]
- 4) **Contributions to the Fund**
 - a) Failure to state that contributions which are deducted from earnings of employees are to be paid to the Investment Manager within one week of the end of the month in which the deductions were made. [Section 13(2)(f) of the Act]
 - b) Failure to stipulate in the Constitutive Documents a timeframe within which the sponsor's contributions must be remitted to the Investment Manager. [Regulation 10(h) of the Governance Regulations and Items 17 (b) and(d) of the Second Schedule]
 - c) In the case of defined benefit plans, a failure to include the duty to remit the sponsor's special contributions for the amortization of unfunded liabilities or solvency deficiencies in the amount and frequency as recommended by the actuary but which shall not be less frequently than quarterly. [Item 17 (c) of the Second Schedule]

- 5) **Trustees' discretion.** Provisions giving a very wide discretion to trustees to pay a member's benefit to any person or entity they deem fit in circumstances where the member (or beneficiary) is unable to manage his affairs or to give a proper receipt due to illness, infancy or other incapacity. These provisions do not seem to give consideration to the requirements under Regulations 7(1) (l)(m)(n)(o) and 7(2) of the Governance Regulations.
- 6) **Commutation of small pensions.** According to Regulation 25 of the Governance Regulations, where the annualized rate of a pension or pension benefit which a person is entitled to be paid is ***not more than*** fifty percent of the national minimum wage, then at his option he shall be paid a lump-sum representing the commuted value of the pension or pension benefit. In relation to this Regulation there is often:
- a) failure to indicate that such a payment is at the member's option. Several plans state a finite sum as the ceiling which is not consistent with the percentage ceiling prescribed.
 - b) no consideration given to subsection (2) of the Regulation in the construction of the relevant provision. The Regulation indicates that where the member opts to be paid the commuted value he shall give written notice thereof to the trustees at ***any time before the payment*** of the pension or pension benefit.