

# Recent Developments in Pensions

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*Hogan Lovells Pensions Team*

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# Investment update

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# Butler-Sloss case

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# Butler-Sloss case

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- High Court case from April 2022
- Court approved the trustees adopting an investment policy aligned with Paris Agreement
- But...
  - Charity trustees rather than pension
  - Charities' principal purpose was for “environmental protection”
- Relevance for pension trustees?

# What was the case about?

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- Two charities established by the Sainsbury family (c.£62mil)
- Principal purpose was “environmental protection”
- Charities provided various grants of money
- Wide discretionary power of investment under the trust
- Wanted to adopt an investment policy which avoided investments not consistent with Paris Agreement

# Bishop of Oxford case

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- 1991 case concerning investment of Church of England funds
- Judge held that charity trustees need to invest to further the purpose of the charity – and starting point is usually maximising financial return
- But an exception was where the investment directly conflicted with charity’s purpose – eg cancer charity and tobacco investment.
- Judge held that where *“trustees were satisfied that investing in a company engaged in a particular type of business would conflict with the very objects the charity is seeking to achieve, they should not so invest.”*
- But did “should” mean “they can’t”, or it was a discretion?
- Given environmental purpose clauses, were Sainsburys trustees prohibited from investing in certain assets, or did they merely have discretion not to?

# Judge's conclusions

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- Held that judge in Bishop of Oxford case didn't mean to hold there was a prohibition (or if he did he was wrong!).
- Held that charity trustees should:
  - Further the purpose of the trust
  - Normally achieved by maximising financial return
  - Where trustees are of the “reasonable view” that an investment conflicts with the charitable purpose, they have discretion to exclude the investment
  - Must balance all relevant factors including seriousness of the conflict, impact on donors, financial implications of the decision.
  - Need to “be careful” in making decisions on “purely moral grounds” recognising that the supporters of the charity may hold different views.
- Approved their Paris Agreement investment policy

# Implications for pension trustees?

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- (relatively) high-profile
- Court approval of trustees' investment policy explicitly targeting alignment with Paris Agreement
- Likely to be seized upon by pressure groups
- But...:
  - Case exclusively concerned charities
  - Charities' purpose is to benefit the charity as a whole (public benefit) – it doesn't have specific beneficiaries
  - Made no comment at all about knock-on implications for pension trustees

# Investment round-up

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# Paris Alignment metric

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- TCFD – current law requires Trustees to calculate 3 metrics
- DWP consulted on 4th – alignment of scheme assets with Paris Agreement 1.5 degree rise in global temperatures
- Comes into force 1 October 2022
- Applies for scheme year underway on 1 October 2022 (but can use data/calculations in that year before 1 October 2022)

# Reporting on stewardship

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- DWP issued updated guidance 17 June 2022
- Applies to stewardship reporting in SIP and IS
- Trustees must have regard to the guidance for IS in respect of scheme year ending on/after 1 October 2022
- TPR is “primary audience” for SIP and IS (?)
- Consider producing simpler “member-facing” guide
- Encourages trustees to keep non-financial factors “under review”
- Asset managers:
  - Discouraged from passing the buck
  - Use selection process to probe whether asset managers can accept trustees’ expression of wish re voting/stewardship

# CMA – investment objectives & fiduciary management

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- CMA Order in force 10 December 2019:
  - Set investment objectives for investment consultants
  - Compulsory tendering for fiduciary managers where 20% threshold met
  - Annual compliance reporting to CMA
- DWP been intending to transfer this to TPR for 3 years...
- Draft Regulations laid – come into force 1 October 2022

# Investment update

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# Pensions dashboards: steps trustees should consider

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# Pensions dashboards

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- Purpose is to give members access to “pension dashboards” – electronic service to access pension information from most pension schemes
- Obligations on UK based occupational pension schemes with 100+ members
- Staged depending on size of scheme and DB/DC/hybrid benefits
- TPR recently warned:

“be prepared – your pensions dashboard deadline is coming”

# Obligations on trustees

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- Cooperation with Money and Pensions Service (MaPS)
- Register scheme with MaPS
- Connect scheme to MaPS
  - In accordance with MaPS connection, security and technical standards
- Stay connected unless all members become pensioners / scheme no longer in scope
- Provide information in accordance with MaPS service & operational standards to MaPS / qualifying dashboard

# Connection

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- Connect by “staging deadline” and within scheme’s “connection window”
  - Connection window: within one month of staging deadline
  - Staging deadlines between 30/06/23 and 31/10/25
- Ensure scheme remains connected to MaPS unless exception applies
- Notify MaPS asap of:
  - Connection changes eg scheduled downtime
  - Systemic issues eg cyber attacks which could impact dashboard security



# Providing information: Stage 1

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Trustees decide  
matching criteria

Trustees  
complete  
matching

Trustees create &  
register “pension  
identifier” with  
their resource  
server and MaPS

Receive “Find  
request” from  
MaPS

Positive match  
for non-  
pensioner  
member

## Providing information: Stage 2

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Trustees receive “view request”

Trustees check with MaPS that member consented

Trustees provide view data to dashboard which issued view request

- Format / manner in MaPS standard / guidance

# View data: information to be provided

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- Administrative data
  - Eg, nature of benefit, employment information, administrator information
- Signpost data
  - Eg, SIP, information on member borne costs and charges (DC only)
- Value data
  - Eg, for deferred DB members: accrued value in accordance with rules, valued to illustration date
  - Data must be from statement or calculation in previous 12 months
- Contextual information – provided with value data
  - Eg, explicit flags/risk warnings

# Compliance

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- Trustees must:
  - Keep records of how carried out steps in standards for 6 years
  - Provide “management information” on request to MaPS, TPR, FCA
- TPR may issue compliance notice; third party compliance notice; penalty notice (£5k / £50k)

# Latest developments

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- Further DWP consultation on Dashboards Available Point (DAP)
- DAP - point at which pensions dashboards services available to all members of the public
  - Proposal: Secretary of State required to give 90 days advance notice of when the DAP will be
- Private Member's Bill prohibiting trustees from being indemnified for fines from scheme assets
- TPR published initial guidance to help trustees get ready
  - Useful checklist of actions need to take

# Actions for trustees

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- Points to discuss with your administrator
  - What is your data looking like – does any need to be digitised?
  - What matching criteria should be used?
  - Will they use an integrated service provider (ISP)?
  - Process for calculating DB deferred members' benefits
  - What will the new services cost?
  - How will they resource queries arising from dashboards
  - Record keeping and reporting

# Actions for trustees (cont)

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- Legal issues
  - Consider which contracts will need updating?
  - If your administrator is using an ISP, will you be required to contract directly with the ISP?
  - Who is liable if things go wrong – for example provision of incorrect benefit figures or failure to maintain connection
    - Liability caps and how fit with TPR powers on financial penalties?
  - Consider whether privacy notices and GDPR and cyber policies need updating
  - How to deal with “tricky” benefits eg underpin benefits
  - What happens if you are in the process of correcting accrued benefits that have been overstated?
  - What caveats will be included with the benefit information provided?
    - Consider having your own communications with members?

# Pensions dashboards: steps trustees should consider

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# Updates from TPR

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*Rebecca Howard*  
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# Agenda

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- Consultation on draft enforcement policy and updated prosecution policy
- TPR regulatory intervention report
- Annual Funding Statement
- Other bits and pieces

# Policy consultation

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# Consultation on new/revised policies

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- A reminder:
  - Pension Schemes Act 2021 strengthened TPR's regulatory framework
  - Policies are being developed in interests of transparency and to clarify what those subject to enforcement action can expect
  - Consulted on policies in investigation and prosecution of new offences; monetary penalties; overlapping powers; information gathering
- Now consulting on policy on wider enforcement powers and reviewing existing prosecution policy

# Consultation on new/revised policies (2)

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- New enforcement policy combines related content into single policy
  - Existing policies of enforcement of DB funding powers and DC and public sector compliance powers will be replaced
  - New policy will:
    - Include overlapping powers and information gathering policies consulted on in 2021
    - Not cover auto-enrolment, CDC or master trust authorisation
  - Consulting on parts not covered in previous consultation
- Explains enforcement powers and options:
  - Regulatory e.g. statutory notices
  - Penalty powers
  - Civil powers e.g. asking court for injunction
  - Criminal powers

# Enforcement outcomes

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## Prevention

- E.g. prevention of future scams or failure to pay contributions

## Remedy

- E.g. correction of failure to give annual benefit statements

## Restoration

- E.g. failure to pay member / employer contributions to scheme

## Deterrence

- E.g. where persistent or deliberate non-compliance



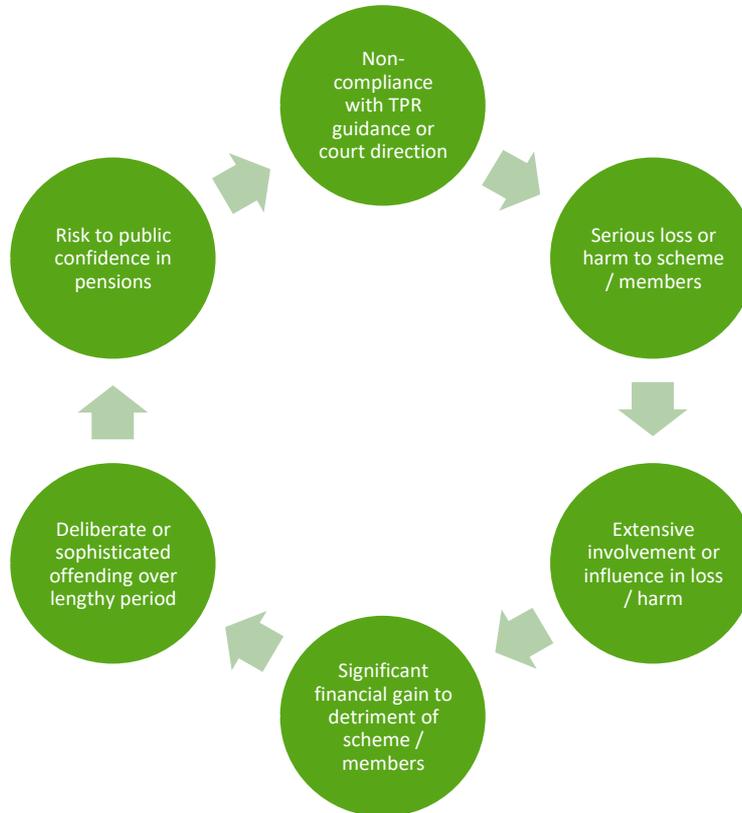
# Draft prosecution policy

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- Prosecute in line with statutory objectives
  - Also interests of justice and public at large
- Companies: relevant individuals may also be prosecuted
- Position is slightly different in Scotland/NI
- Most investigations will start with use of regulatory information gathering powers

# Factors likely to lead to focus on criminal investigation

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# Criminal Investigations

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- Usually expect actions and reasons for actions to be well documented
- Where grounds to suspect criminal offence committed and answers may be used in evidence: interview in line with PACE and Criminal Procedure and Investigations Act 1996
- TPR will inform suspect if later decides not to prosecute but will reserve right to review position
- NB s310 PA 2004: statements made in compliance with “information requirement” can only be used in criminal proceedings or proceedings leading to various financial penalties in limited circumstances
- Decision to prosecute needs to satisfy evidential test and public interest tests

# Regulatory intervention report

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# TPR regulatory intervention report

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- Dosco Overseas Engineering Ltd and Hollybank Engineering Co Ltd – statutory employers
- Oscar Overseas Engineering Ltd (1973) Pension & Assurance Scheme
  - DB scheme
  - 584 members
  - Assets £53 million
  - section 75 deficit £38.8 million
- Parent company Dosco Holdings Ltd

# TPR regulatory intervention report

2010: SMT Scharf AG acquired DOSCO Group from Billington Holdings Plc

- Clearance Application

2011: Scharf gave loans and guarantees to employers to support the business

2012: commissioned "special report" for Scharf supervisory board

- Pension fund-related risks: recommended sale rather than continuing operations or closing the group – would have risked call on Scharf's guarantees
- Steps to remove Scharf's support to group including £1m guarantees
- Instructed actuary to use different assumptions to reduce deficit in accounts

Mr Cain: personal consultancy arrangement

- Incentivised to find buyer in 2013: 10% sale proceeds min 250k euros

## Sale: management buyout

May 2013:  
sale of Dosco  
Holdings for  
€2 Million to  
shell  
company,  
Dosco  
Mining Ltd

- €1.5 million consideration funded by loans from employers
- €500,000 interest-bearing loan from Scharf payable over 5 years
- €250,000 paid to Mr Cain under consultancy agreement
- Mr Cain: 60% shareholding in Dosco Mining Ltd
- No clearance application
- Failed to notify/consult trustees until day after completion
- 8 months' later employers went into administration, PPF assessment period, PPF+ buy-in

# Regulatory Action

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## March 2019: Warning Notices against Scharf and Cain

- complete disregard for interests of scheme by inappropriate disposal to shell acquisition vehicle
- deprivation of parental support on which employers historically relied
- extraction of £1.4 million cash
- personal benefit to Cain under consulting agreement
  - December 2020: £130,000 settlement with Cain
  - August 2021: CN against Scharf for nearly £2.1 million
  - £1.4 million principal sum and additional £670,000 for lost investment returns and interest
  - first time DP awarded additional sum for lost investment returns and interest
  - Scharf referred DP's decision to Upper Tribunal but withdrew reference in July 2021

# Annual funding statement

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# Annual funding statement

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- Valuation dates 22 September 2021 to 21 September 2022 (Tranche 17)
  - For both 31 December 2021 and 31 March 2022 valuation dates, aggregate funding level ahead of expectations three years previously
- All T17 valuations to incorporate principles of current DB code and guidance
- Significant economic uncertainty:
  - High inflation; increased energy/fuel prices; potential for further interest rate increases; Ukraine conflict; Covid; Brexit
  - Impact on covenant, scheme assets, contingent assets and ABC arrangements
- Trustees should remain alert to funding and covenant changing very quickly
- Accompanying key risk tables same as 2021, except recovery plan updated to 6 years (was seven years)

# Trustees to categorise impact of market events on employer

## Limited impact on business:

- No balance sheet weakening and cash flow remains strong
- "Business as usual" approach; not expect DRC reduction or extension of recovery plans

## Has been a material impact:

- Trading has recovered or is recovering strongly, or impact expected to be short lived; medium term not negatively impacted
- Request for DRC reduction should be short-term; higher contributions later; shareholder distributions inconsistent with the lower DRCs

## Continued material impact

- Recovery uncertain and could take years; short-term affordability stressed; medium-term unclear
- Ongoing requests for liquidity support require suitable mitigation

Broadly similar categories to 2021 statement

# Shareholder distributions and other covenant leakage

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## TPR minimum expectations

- Seeing increased return of cash to shareholders post-pandemic
- Dividends/shareholder distributions exceed DRCs
  - Expects strong funding target and relatively short recovery plan
- Employer weak or tending to weak:
  - Expects DRCs larger than shareholder distributions unless short recovery plan and strong funding target
- Weak employer unable to support scheme:
  - Expects cessation of shareholder distributions
- Trustees should be vigilant to other forms of covenant leakage (eg cash pooling, group trading arrangements, management fees)
  - Consider protections e.g. dividend sharing mechanism or negative pledge



# Actuarial and investment matters

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- Could be collateral calls for schemes with substantial geared hedging
- Build recent and short-term inflation rates properly into valuation calculations
- Permission for judicial review of plan to align RPI with CPIH from 2030 to be heard summer 2022
  - However pre-and post-2030 assumptions should reflect current understanding of position
- More time needed to assess long-term impacts of Covid on mortality
  - Any reduction in liabilities to be no more than 2%, unless accompanied by strong supporting evidence

# Annual funding statement – looking ahead

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## Forthcoming valuation related publications

- All T17 valuations will be regulated in accordance with existing legislation and guidance currently in force
- Second consultation on draft funding code expected "later in 2022"
  - Allowing time to learn from DWP consultation on draft funding and investment regulations
  - Will include changes to August 2015 guidance on assessing and monitoring employer covenant
  - Expect more detail on treatment of guarantees and ESG

# Other bits and pieces

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# TPR Corporate Plan 2022/24

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- Year 2 (2022/23) TPR expects to implement and embed new powers, including notifiable events changes
- New DB funding code to apply from autumn 2023 (September 2023?)
  - On basis consultation issued on draft funding and investment regs “spring 2022”
  - Will apply to schemes with valuation dates on/after code’s commencement date
- Single code to be published “during 2022”
- Revised scam strategy to be published in 2022
- Note also CDC, dashboards and DC “value for money”

# TPR Joint guide to reporting pension scams

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- Encourages reporting of knowledge or suspicions of pension scams
- Report if:
  - Believe a scam already happened
  - A red flag is raised on a transfer
  - Suspect a scam may be taking place or have suspicions about those involved
- Via Action Fraud, also to FCA and TPR where relevant
- Report to FCA if significant increase in transfers with same adviser
- Report to TPR if requirements met for statutory transfer but warning signs of scam and trustees feel must refuse transfer

# Updates from TPR

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*Rebecca Howard*  
Counsel, London  
*Pensions*

Any questions?

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# Q&A Responses (1)

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1. If you go through the competitive tender process to appoint a FM for 50% of the assets and then decide 12 months later to give the successful manager 100%, do you have to go through the process again or can you just get on with it?
  - You don't need to re-tender - the regulations say once you get over the 20% threshold and do a tender you don't need to re-tender if you give the same provider more assets.
2. Is there expected to be a limit on how many requests an individual can make to the Dashboard each year?
  - We am not aware of any current proposal to limit the number of requests. We suspect this would be contrary to the policy intent, but if this becomes an issue the DWP could introduce a restriction.

## Q&A Responses (2)

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3. If Trustees can select their own matching criteria for dashboard requests but a TPA is going to use an ISP, will the ISP be able to cope with a range of different matching facilities or in practise will that choice be removed from trustees?
  - While we don't know for certain, we suspect that trustees choice may well be limited as their administrator/ISP will not want too much variation in matching criteria.



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