



AN FSCA INTERPRETATION RULING IN RESPECT OF SECTION 37C OF THE PENSION FUNDS ACT

The Financial Sector Conduct Authority (“FSCA”) has issued:

- **FSCA Communication 10 of 2020 (Retirement Fund): publication of FSCA Interpretation Ruling 1 of 2020 (RF) on the application of section 37C of the Pension Funds Act (the Act), issued 25 March 2020; and**
- **FSCA Interpretation Ruling 1 of 2020 (Retirement Fund): interpretation and application of section 37C of the Act**

This Interpretation Ruling takes effect on 25 March 2020.

The FSCA has also withdrawn Information Circular PF No. 2 of 2010.

Readers will remember that we published a note about paid-up members and section 37C of the Pension Funds Act (the Act) recently. The note dealt with the Financial Sector Conduct Authority’s (FSCA) recent DRAFT documents issued on this topic. The FSCA has now finalised these notes.

BACKGROUND

For some time there has been debate around whether or not section 37C applies to the lump sum death benefits of paid-up members and in what circumstances. We are referring to paid-up members as provided for in the default regulations. That is, members that have left service of the employer but have not instructed the fund in writing as to payment or transfer of their benefit.

The question has arisen: if paid-up members die, must the fund pay out lump sum death benefits in terms of section 37C or not? The rules of funds submitted to the FSCA for registration have differed in this regard.

The Interpretation Ruling seeks to notify the industry how the FSCA interprets the Pension Funds Act to answer this question.

SUMMARY

According to the Interpretation Ruling, section 37C will apply to:

- paid-up members' benefits,
- deferred retirees' benefits (as defined in the Interpretation Ruling); and
- unclaimed benefits,

where no instructions in writing to the Fund to transfer or pay out their benefit has been made by the member prior to the member's death.

THE INTERPRETATION RULING

What is an Interpretation Ruling?

The idea behind an Interpretation Ruling (which is provided for in the Financial Sector Regulation Act) is that the FSCA, through an Interpretation Ruling, promotes clarity, consistency and certainty in the interpretation and application of financial sector laws, in this case section 37C of the Pension Funds Act.

Once an Interpretation Ruling is issued by the FSCA, the FSCA must then act in accordance with the Interpretation Ruling until such time, *to paraphrase*, as a court gives a different interpretation to the Interpretation Ruling or the particular provision of the legislation is done away with.

There is some debate about whether or not Interpretation Rulings apply only to the FSCA (to promote clarity and consistency as to how the FSCA will act) or whether they also apply to (and are required to be followed by) financial institutions that the FSCA supervise, for example retirement funds. The Interpretation Ruling does not directly address this debate. The FSCA has previously said, however, that it is of the view that retirement funds must follow Interpretation Rulings.

TERMINOLOGY

A “**paid up member**” is a member whose service has been terminated (before retirement) but the member has not yet instructed the fund in writing as to whether she/he wants his benefit transferred to another fund or paid out to her/him. A paid-up member is a member of the fund.

The FSCA defines a “**deferred retiree**” as a member who has reached retirement age but has not elected to withdraw their retirement benefit or a member who has reached retirement age and elected to remain in a pension fund under the pension fund rules. [Note that this definition is different to the definition of “deferred pensioner” in the Act.]

REASONING BEHIND THE INTERPRETATION RULING

Section 37C provides how a lump sum death benefit is allocated, not calculated;

Section 37C applies notwithstanding anything to the contrary in any other law or the fund rules;

Reference to “*payable ...upon the death of a member*” in section 37C means that it is the *death of the member* that resulted in the benefit becoming payable. If the fund received a written instruction from the member to pay out or to transfer the benefit prior to the member's death, *then it is that written instruction that caused the benefit to be payable* (not the death of the member) and accordingly section 37C will not be applicable;

Even when a member exits the service of their participating employer, such member will only cease to be a paid-up member once such member instructs the fund in writing to pay out or transfer the member's benefits;

A paid-up member, a deferred retiree and a member of an unclaimed benefit fund are all a 'member' as defined in the Act, and section 37C is applicable to members.

Reference to “*any benefit*” in section 37C includes:

- (a) a paid-up member's benefit;
- (b) a deferred retiree's benefit; and
- (c) an unclaimed benefit.

When a member instructs the fund in writing to transfer or pay out their benefit, that election causes the withdrawal that makes the benefit payable, not the death of the member. The same principle applies to unclaimed benefits.

Thus, section 37C applies in the following circumstances

The Interpretation Ruling interprets that section 37C will be applied to benefits:

- (1) When a paid-up member, (who has left service) has not instructed the fund in writing as to whether she/he wants her/his benefit transferred to another fund or paid out to her/him and such member dies;
- (2) When a member entitled to an unclaimed benefit has not instructed the fund as to how they want their unclaimed benefit paid and such member dies;
- (3) When a deferred retiree has reached retirement age in terms of the fund's rules but has either:
 - (a) not elected to withdraw from the fund (which we interpret to mean the fund has not yet been instructed as to how the member wants his retirement benefit to be paid); or
 - (b) elected (which we interpret to mean the fund has received an instruction) to remain in a pension fund under the pension fund rules; and the deferred retiree dies.

Thus, section 37C does not apply in the following circumstances

From the Interpretation Ruling we would deduce that section 37C would not apply in the following circumstances, although the Interpretation Ruling does not say so specifically:

- (1) A paid-up member has instructed the fund in writing as to whether she/he wants her/his benefit transferred to another fund or paid out to her/him and such member then dies after providing the instruction and before the benefit has been paid;
- (2) When a member entitled to an unclaimed benefit has instructed the fund as to how they want their unclaimed benefit paid and then such member dies after providing the instruction and before the benefit has been paid;
- (3) When a deferred retiree has reached retirement age in terms of the fund's rules and has either:

- (a) elected to withdraw from the fund (which we interpret to mean the fund has been instructed as to how the member wants his retirement benefit to be paid) and then dies after making the election and before the benefit has been paid; or
- (b) elected (which we interpret to mean the fund has received an instruction) to remain in a pension fund under the pension fund rules but then later makes an election as to how their retirement benefit is to be paid and then dies before the benefit has been paid.

AMENDING RULES

The FSCA's Communication states that:

“As a result of the publication of the Interpretation Ruling, retirement funds may now proceed to finalise amendments to their rules, as required by regulation 38 of the PF Act, consistent with the Interpretation Ruling”.

Funds that have rules that are drafted in a way that do not accord with the FSCA's Interpretation Ruling will need to consider whether they are required to amend their rules. If a Fund is going to amend its rules, it should do so without delay.

AMENDMENTS TO SECTION 37C OF THE ACT

The FSCA state that they will engage Treasury to consider amendments to section 37C of the Act with respect to paid-up members and deferred retirees as well as more general amendments to section 37C of the Act to enhance clarity and simplicity.