



Consultation on the new provisions for Member Nominated Trustees

This document comprises the response of Amicus to two related consultation Documents i.e

- Code of Practice : ‘Member-nominated trustees and directors – putting arrangements in place’ (The Pensions Regulator)
- The Occupational Pension Schemes (Member-nominated trustees and Directors) Regulations 2005 (Department of Work and Pensions)

Amicus

Amicus is a major UK trade union, with the largest membership of all trade unions in the private sector.

Most of our members are in trustee-based occupational pension schemes and in many of those schemes our members are acting as trustees.

Pensions are a priority area for our Union reflecting the importance of pensions to our member and their concerns over the security of their benefits.

Amicus has played an active part in campaigning for MNT provisions to be extended and we support strongly an increase in the proportion of trustees who are required to be MNTs.

Our general view is that the narrow view in law that who is selected as trustees is of no significance, as all trustees are subject once appointed to the same legal obligations, is out of touch with reality. The identity of trustees and their rights in relation to selecting them are an issue of major concern for many of our members.

Code of Practice

Our main concerns about the code of Practice relate to items which are not covered in it rather to what is said about the areas which are covered and as a result this response is not specifically focused on the particular questions that the Consultation Document poses. These concerns relate to :-

- the lack of any obligation on the trustees to consult about the system of selection they implement ; and
- the omission of any guidance as to the factors as might guide trustees in determining constituencies for the selection of MNTs

Putting arrangements in place

Question 1 asks whether six months is sufficient time for trustees to decide upon the arrangements they wish to put in place to secure MNTs. We do accept that this is a sufficient period but we think the Code should have something to say about the process of decision as well as the time it takes.

It seems inconceivable that trustees will not consult the employer in respect of the proposals they bring forward, not least because of their practical involvement in elements of administering the system. We believe that trustees should be obliged to consult with, and give an opportunity to comment to, recognised trade unions and other organisations representing scheme members before they decide on their arrangements. This is an omission in the legislation but the Code, while it cannot direct, could say that to do so was a matter of good practice.

The requirement to have MNTs has a number of purposes and one of the key ones is to build confidence amongst members that the trustees will act to safeguard their interests. If trustees announce what turns out to be an unpopular set of arrangements for selecting MNTs then it will do a lot of damage to this purpose and produce a situation where members have no confidence that the MNTs are expressing their concerns in trustee meetings and handicap the development of good relations between members of the scheme and the MNTs generally.

The Selection Process

In paragraph 43, which lists methods of selection which trustees should consider, we believe that 'selection by trade unions' should be added as one of the options. This is an established basis in some schemes, which enjoys the confidence of the scheme members. Trade union trustees have a number of advantages in terms of their providing resources for trustees independent of the employer and scheme as well as facilitating good communication between trustees and scheme members.

A further key reason for MNTs is that it is considered desirable that some of the trustees should not be appointed by the employer. We would therefore suggest that the Code make clear that any employer say in the selection of MNTs is not desirable. This employer say might take the form of employer or employer-appointed trustees participating in selection panels or employer representatives participating in selections by pension management committees. Arrangements of this nature undermine confidence of members in the selection process and can also encourage candidates to come forward who are motivated by the desire to advance their personal career.

The Selection Process - constituencies

This is an area where the Code has deliberately, or perhaps inadvertently, said nothing specific at all. However, it is very common in larger schemes that MNTs are selected from different constituencies whether on the basis of member type (active or pensioner) or on different sections of the active membership (which might reflect geographical factors, different sections of rules or status distinctions). Member's perceptions of the fairness and appropriateness of the selected constituencies will condition their attitude to and confidence in MNTs.

Whilst we accept that this is an area which is difficult to prescribe in any detail and where some flexibility may be helpful. However, the absence of any guidance and the absence of any channel to challenge an unpopular basis determined by the trustees is of great concern to us.

We have already noted that the trustees need not consult on their proposals. The MNT legislation and regulation only lays down skeletal requirements which suggest trustees cannot be challenged on the question of whether selection arrangements are appropriate as long as the required result of one third member trustees is achieved. The Code of Practice gives no guidance at all except what trustees deduce that 'fair' and 'proportionate' might mean in this context.

Amicus has attempted to ascertain whether the Pensions Ombudsman might look at complaints from members unhappy about the basis of constituencies that the trustees have chosen. A member might complain that there is maladministration on account of the fact that the arrangements have caused an injustice to them by depriving them of the right to be selected as an MNT. Alternatively they might argue that in implementing the requirement the trustees are bound not solely by the specific MNT legislation but also by the more general requirements of trust law. On this reckoning a patent failure to consider the interest of all members and to act in the best interests of members might be construed as a breach in the law.

We are awaiting further comment from the Pension Ombudsman on these issues and would suggest that the Regulator and the DWP ought to consider his possible role in relation to disputes.

Timescales for nomination and selection

The proposed timescales for planning (6 months) implementing (6 months) and reviewing arrangements (3-5 years) would seem to be reasonable. As noted above, we believe the planning phase should be such as to allow consultation to take place.

The Regulations

The move to 50% MNTs

(i) Timing

Government policy is now that MNTs should comprise 50% of trustee boards and this reflects a manifesto commitment (having been announced first to the TUC Congress and subsequently affirmed in the 'Warwick agreement')

Amicus believes that the best time to introduce this requirement would be in 2006-7 i.e at the same time as the revised arrangements for MNT appointments are introduced.

Failing this, it would be desirable that a date for implementation were announced as soon as possible and certainly prior to trustees beginning to implement the new arrangements for MNT appointments in 2006-7. This is in order that early implementation of 50% arrangements would be encouraged and otherwise that in devising new arrangements account could be taken of the further requirement which needed to be accommodated, so that those new 'interim' arrangements would not be disrupted unnecessarily when the 50% requirement followed.

(ii) Independent Trustees

We are content to see independent trustees disregarded when it comes to calculating 50% provided that some basic conditions are met.

The conditions would have to cover the selection and removal process for the independent trustees. This could not be left to the employer and would have to be confirmed by the 50:50 board. A higher condition of expertise should also be required as compared to that required of other trustees.

(iii) The impact on decision-making

The issue here is presented as centring on the appointment of the Chair of a 50:50 board and whether they should have a casting vote. However the role of the Chair in influencing the Agenda, in overseeing the preparation of minutes and in executing the wishes of the trustees between meetings need to be recognised as well.

We would support the idea that any rule which restricted the right of an MNT to be the chair should not be valid. However, we would also suggest that the Chair should have to have a limited term of office. This would mean that an incumbent who lost the confidence of some of the trustees could be replaced as a matter of course via a process in which there was no casting vote.

Guidance which counselled that casting votes should be a last resort and suggested that the function should be rotated periodically as between company-appointed and MNTs would be desirable.