

Case Team procedure

Reserved Regulatory Functions and Applications made under Section 10(2)(b) of the Pensions Act 2004 (the Act)

Case Team procedure

Introduction

1. This is the Case Team procedure of the regulator in relation to the exercise of the reserved regulatory functions set out in Schedule 2 to the Act and applications made under section 10(2)(b) of the Act, determined in accordance with section 93(1) of the Act. It outlines the procedure that the Case Team will typically follow in relation to these functions. It provides for the standard and special procedures in sections 96-98 of the Act. Where there are relevant matters which are covered by the Act, statutory provisions have not been repeated in this document unless this seems appropriate. This document should be read in conjunction with the procedure of the Determinations Panel determined under s93(3) of the Act.

Definitions and interpretation

2. Unless the context otherwise requires, the following expressions used in this document shall have the following meanings:
 - a. The Act – the Pensions Act 2004. Any reference to a section unless otherwise stated is to the relevant section of the Act
 - b. The regulator – the Pensions Regulator as established under section 1 of the Act
 - c. Determinations Panel – the Determinations Panel established under section 9 of the Act
 - d. Determinations Support – the team of the regulator which provides advice and administrative support to the Determinations Panel
 - e. Case Team – the team at the regulator (including, where appropriate, the relevant Executive Director) which handles the case, including preparation of the Warning Notice and presentation of the case to the Determinations Panel at any oral or public hearing
 - f. Directly Affected Party – a person appearing to the Case Team to be directly affected by the regulatory action under consideration
 - g. Determinations Panel Procedure – the procedure determined by the Determinations Panel under section 93(3) of the Act.
3. Any term used in this document which is defined for the purposes of any provision of Part 1 of the Act shall, unless the context otherwise requires, have the meaning used in the Act.

The statutory framework

4. The regulator is established under section 1 of the Act.
5. The regulator must determine, under section 93 of the Act, the procedures it will follow in relation to the exercise of the regulator's regulatory functions. Under section 93(1) of the Act, the regulator has determined the procedure to be followed, as set out in this document.
6. Under section 94 of the Act, the regulator must publish a statement of any procedure determined under section 93. This procedure will therefore be published on the regulator's website.

Reserved regulatory functions – preliminary investigations

7. Where the Case Team considers it appropriate to do so, it will carry out an investigation into the facts and circumstances of a case. This investigation may include, for example, requests for information and inspection of premises. In circumstances in which the regulator is then considering commencing regulatory action by issuing a Warning Notice, the Case Team may, where it considers it appropriate to do so, discuss its concerns with the potential Directly Affected Party (Parties) of the regulatory action. This may be by way of an exchange of correspondence or any other method of communication that the Case Team deems appropriate. The Case Team will take the content of these discussions into account when deciding how it wishes to proceed.

Reserved regulatory functions – standard procedure

8. If the Case Team reaches the conclusion that the exercise of one or more of the regulator's functions may be appropriate (whether or not it has discussed its concerns with the potential Directly Affected Party (Parties)), it will, in accordance with sections 10 and 95 of the Act, prepare and issue a Warning Notice. The Case Team will decide which persons appear to be directly affected by the regulatory action under consideration and will serve the Warning Notice upon those persons.

Warning Notice

9. Contents of the Warning Notice will ordinarily include:
- i. the circumstances of the case, the action or decision under consideration and the grounds and evidence on which the Warning Notice is based, including where appropriate the details of any alleged breach of law
 - ii. material received or obtained by the regulator that might reasonably be considered to support or undermine the case for the exercise of the function(s) (excluding material which is legally privileged). On occasion, such material may not be disclosed where there is good reason not to do so and the regulator is satisfied that there will be no unfairness. In that event the Case Team would, in most circumstances, inform the Directly Affected Parties of this, although circumstances may arise in which it would not be appropriate to do so. The Case Team may disclose additional information if it considers that it is necessary to do so to ensure fairness
 - iii. details of the specific functions that are under consideration. In cases where a Contribution Notice is sought under section 38 of the Act, the Case Team will ensure, if applicable, that the requirements of section 96(1B)(a) of the Act are met
 - iv. the length of time for service of written representations to the Case Team (at the Case Team's discretion). The Case Team shall insert a time frame that it considers gives the Directly Affected Parties a reasonable time to properly respond to the matters raised in the Warning Notice and any accompanying documents. This will not normally be less than 14 days, although in appropriate cases, the time frame may be shorter. The Case Team may grant extensions to this period, if it considers it appropriate to do so and will expect any requests for extensions to be received within 14 days of receipt of the Warning Notice in cases where the time frame for representations set out in the Warning Notice is 21 days or longer. In cases where the time frame for representations set out in the Warning Notice is less than 21 days, the Case Team will expect any requests for extensions to be received no later than two working days before the expiry of the time frame
 - v. details of the regulator's ability to publish pursuant to section 89 of the Act (see further paragraphs 34 and 35 below).

Representations

10. If any Directly Affected Party wishes to make representations in response to the Warning Notice at this stage, these should be sent (by email or letter) to the Case Team (and to any other Directly Affected Parties, if that Directly Affected Party so wishes) within the time frame specified in the Warning Notice, or as varied by agreement with the Case Team. The purpose of providing representations to the Case Team at this stage is twofold. First, it allows the Case Team to assess whether or not it is still of the view that the exercise of the function(s) may be appropriate (as is set out at paragraph 13(iii) below, if the Case Team concludes that this test is no longer met, it will not refer the matter to the Determinations Panel). Second, if the matter is so referred, any representations provided can be sent to the Determinations Panel.
11. Representations should state whether or not the Directly Affected Party accepts the contents of the Warning Notice and whether the Directly Affected Party intends to oppose the exercise of the function(s) in question. In cases where a Contribution Notice is sought under section 38 of the Act, the Directly Affected Party may also wish to show the matters mentioned in section 38B(2) of the Act. It would be helpful if representations could also attach all evidence that the Directly Affected Party wishes to rely upon (eg documentary, witness and expert). This will assist the Case Team in considering the representations and deciding whether or not to refer the matter to the Determinations Panel. It may also assist the Directly Affected Party because it may mean that there is no need for the Directly Affected Party to submit any further representations to the Determinations Panel, if the matter is referred to it.

Request for a hearing

12. Any request for the determination to be reached after an oral or public hearing before the Determinations Panel should also be made by the Directly Affected Parties by letter or email to the Case Team within the time frame for serving representations (see also paragraphs 31 to 37 of the Determinations Panel Procedure for further information about oral and public hearings).

Steps following representations

13. The Case Team will review and consider any representations which are served within the time frame set out in the Warning Notice (or a time frame otherwise agreed with the Case Team), in order to consider whether or not it is still of the view that the exercise of the function(s) may be appropriate. As part of this consideration, the Case Team may undertake further investigations if it considers it appropriate to do so. The Case Team may also send copies of the representations received to any of the other Directly Affected Parties where it considers this to be appropriate. After completion of this review, the Case Team will communicate its conclusion to each Directly Affected Party which may be, for example:
 - i. that the regulator will be referring the matter to the Determinations Panel in order for it to make a determination, in which event the Case Team will send the Warning Notice and all representations received to Determinations Support, together with any communications received pursuant to paragraph 12 above, details of the Case Team's own view on whether or not an oral or public hearing is appropriate and a Request for the Determinations Panel to make the determination (Request). The Case Team will also at this stage ensure that all representations received are made available to any Directly Affected Parties who have not already received these
 - ii. that, in the light of issues raised in the representations, or the outcome of any further investigations, or further evidence received, the Case Team shall be providing further comments on the representations in the form of a Response to representations (Response), in which event, the Case Team shall give the Directly Affected Parties a reasonable opportunity to reply to the Response (Reply)
 - iii. that the 'may be appropriate' threshold test contained in sections 10 and 95 of the Act is no longer met and the regulator will not be referring the matter to the Determinations Panel, either at all, or with respect to the exercise of a particular function(s), or with respect to a particular Directly Affected Party.
14. If representations are not received from a Directly Affected Party within the time frame set out in the Warning Notice (or a time frame otherwise agreed upon with that Directly Affected Party) the Case Team will take such action as it deems appropriate. This could include referring the matter to the Determinations Panel to make some or all of the determination(s) requested in the Warning Notice (although, if representations have been received from any of the other Directly Affected Parties in the same matter, the Case Team may choose not to refer the matter to the Determinations Panel until it has reached a conclusion in accordance with paragraph 13 above).
15. The Case Team shall keep disclosure under review and, should it receive any additional material which falls within the description set out in paragraph 9(ii) above, or if there is any existing material in the categories in 9(ii) which becomes relevant in this regard (for example, after receipt of representations), the Case Team shall disclose this as soon as possible to the Directly Affected Parties (and Determinations Support, if appropriate). If additional material is disclosed by the Case Team prior to the referral of the matter to the Determinations Panel, the Case Team shall give the Directly Affected Parties the opportunity to comment on this.

16. If a Directly Affected Party wishes to raise a procedural issue in the period before any referral by the Case Team to the Determinations Panel, it should be raised with the Case Team who will consider it and make a decision. The Case Team may share details of the issues among any of the other Directly Affected Parties, if it considers it appropriate to do so.

Role of the Case Team following referral to the Determinations Panel

17. Following the submission of a Request, the Case Team shall comply with any directions issued by the Determinations Panel (including, for example, preparing submissions for any oral or public hearing). See also paragraph 20 (withdrawal) below.

Reserved regulatory functions – special procedure

18. The special procedure will be used where the Case Team consider that section 97 of the Act applies (eg where the Case Team believe that there may be a need to exercise one or more of the regulator's functions immediately to protect members' interests or scheme assets). In that event the Case Team shall prepare and send a Special Procedure Request form to Determinations Support. In cases falling within section 97(3) and (4) of the Act, any Warning Notice, representations, Response and Replies served up to that point will also be sent to Determinations Support. The Special Procedure Request form will explain why it is considered that the case falls within section 97(1) of the Act and will also attach a draft of any Order requested¹. In cases falling within section 97(2) of the Act, the Special Procedure Request form will also include material which falls within paragraph 9 above, so far as is appropriate. The Directly Affected Parties will not be sent the Special Procedure Request form, or be told about the Case Team's intention to use special procedure before the Determinations Panel first considers this request.
19. Following the submission of a Special Procedure Request, the Case Team shall comply with any directions issued by the Determinations Panel (including, for example, preparing submissions for the compulsory review hearing). The Case Team may undertake further investigations prior to the compulsory review, if it considers this to be appropriate. See the Determinations Panel Procedure for more detail on how it approaches special procedure cases.

¹ This ordinarily arises in requests for the appointment of an independent trustee.

Withdrawal of Request or Special Procedure Request

20. Save for cases referred to the Determinations Panel under paragraphs 21 to 30 below, a Request or Special Procedure Request may be withdrawn by the Case Team from the Determinations Panel at any time prior to the reaching of its determination (for example where the Case Team no longer considers that special procedure should apply, or that the exercise of the function(s) may be appropriate, as a result of representations served or new evidence received, or due to an appropriate resolution being reached between the parties or otherwise). If this happens, the Case Team will send a letter confirming withdrawal and explaining its effect to all Directly Affected Parties (if appropriate). The Case Team will also confirm withdrawal to Determinations Support save that, if a Determinations Panel hearing is in progress, withdrawal of the Request or Special Procedure Request may be made orally (in which event, the Case Team shall subsequently confirm this in writing).

Applications under section 10(2)(b) of the Act

Standard procedure

21. If the regulator receives an application that properly falls within the ambit of section 10(2)(b) of the Act, the Case Team shall prepare a Warning Notice which will contain details of the application made together with the information set out in paragraph 9 above, so far as appropriate, and a statement from the Case Team on the merits of the application. The Case Team's statement on the merits of the application will include the Case Team's views on whether the application satisfies any applicable legislative grounds for the exercise of the function. It will also outline whether the Case Team considers that it is appropriate for the function to be exercised (having regard to the contents of the application and the outcome of any Case Team investigation up to that point).
22. The Case Team will serve the Warning Notice upon those persons that appear to it to be directly affected by the regulatory action under consideration. The Directly Affected Parties will be invited to make representations to the Case Team on the Warning Notice if they wish.
23. The Case Team shall set a time frame that it considers gives the Directly Affected Parties a reasonable time to properly respond to the matters raised in the Warning Notice, such as the Case Team's statement on the merits of the application, and any accompanying documents. This time frame will not normally be less than 14 days, although in appropriate cases, the time frame may be shorter. The Case Team may grant extensions to this period, if it considers it appropriate to do so and will expect any requests for extensions to be received within 14 days of receipt of the Warning Notice, in cases where the time frame for representations set out in the Warning Notice is 21 days or longer. In cases where the time frame for representations set out in the Warning Notice is less than 21 days, the Case Team will expect any requests for extensions to be received no later than two working days before the expiry of that time frame.

24. The purpose of the representations at this stage is to enable the Case Team to consider its statement on the merits of the application in the light of such representations, and, if appropriate, prepare a Response in order to assist the Determinations Panel in reaching its decision. In addition, all representations provided to the Case Team will be sent to the Determinations Panel when the application is sent on to it. If any Directly Affected Party wishes the determination to be reached after an oral or public hearing, it should make this request by letter or email to the Case Team within the time frame for serving representations.
25. Once the deadline for service of representations to the Case Team has been reached, the Case Team will consider whether to prepare a Response. It may also send copies of representations received to any of the other Directly Affected Parties where it considers this appropriate.
26. If the Case Team decides not to prepare a Response, it will send to Determinations Support the Warning Notice and any representations received, so that the matter is formally referred to the Determinations Panel. The Case Team will also at this stage set out its view on whether or not an oral or public hearing is appropriate and will ensure that all representations received are made available to any Directly Affected Parties who have not already received these.
27. If the Case Team decides to prepare a Response, it will send the Response to Directly Affected Parties and allow a reasonable time for the Directly Affected Parties to prepare a Reply. At the end of this time, the Case Team will send to Determinations Support the Warning Notice, any representations received, the Case Team's Response, and any Reply received from the Directly Affected Parties, so that the matter is formally referred to the Determinations Panel. The Case Team will also at this stage set out its view on whether or not an oral or public hearing is appropriate and will ensure that all representations received are made available to any Directly Affected Parties who have not already received these.
28. In the case of an application under section 10(2)(b), the applicant is permitted to withdraw the application before any determination is reached.

Special procedure

29. If the regulator receives an application that properly falls within the ambit of section 10(2)(b) of the Act and the Case Team consider that section 97 of the Act applies, it shall prepare and send a Section 10(2)(b) Special Procedure Request form to Determinations Support. In cases falling within section 97(3) and (4) of the Act, any Warning Notice, representations, Response and Replies served up to that point will also be sent to Determinations Support. The Section 10(2)(b) Special Procedure Request form will explain why it is considered that the case falls within section 97(1) of the Act and will also include a statement from the Case Team on the merits of the application together with a draft of any Order requested². In cases falling within section 97(2) of the Act, the Section 10(2)(b) Special Procedure Request form will also attach material which falls within paragraph 9 above, so far as appropriate. The Directly Affected Parties will not be sent the Section 10(2)(b) Special Procedure Request form, or be told about the Case Team's intention to use the special procedure before the Determinations Panel first considers this request.
30. Following the submission of a Section 10(2)(b) Special Procedure Request, the Case Team shall comply with any directions issued by the Determinations Panel (including, for example, preparing submissions for the compulsory review hearing). See the Determinations Panel Procedure for more detail on how it approaches special procedure cases.

² This ordinarily arises in requests for the appointment of an independent trustee.

General

31. This document sets out the procedure that the regulator expects to follow in the circumstances described. In reaching any decision pursuant to this procedure, the Case Team shall comply with the relevant legal requirements and shall also have regard to, where relevant, the regulator's statutory objectives. There may be occasions on which the regulator considers it appropriate to depart from this procedure. In that event, the regulator will provide as much notice of the procedure it is to apply as possible.
32. The regulator will review this procedure from time to time as needed and notice (by way of publication on the regulator's website) shall be given of any revisions made.
33. References in this document to the law that applies in Great Britain should be taken to include corresponding legislation in Northern Ireland.

Publication

34. Under section 89 of the Act, the regulator may, if it considers it appropriate to do so, publish a report of the consideration given by it to the exercise of its functions and the results of that consideration.
35. The regulator's policy relating to the publication of Determinations Panel determination notices may be found at: www.tpr.gov.uk/-/media/thepensionsregulator/files/import/pdf/essential-guide-publish-information-cases

Determined by the regulator on 24 January 2013.
Revised and determined by the regulator on 8 May 2014 and published on 16 May 2014
(the revised provisions come into effect from the date of publication).
Amended February 2019.

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