

7 July 2021

**Circumstances in relation to the material
detriment test, the employer insolvency
test and the employer resources test**

The Pensions Regulator





Pensions Management Institute

Moving pensions forward

Registered Office:
Devonshire House
60 Goswell Road
London
EC1M 7AD

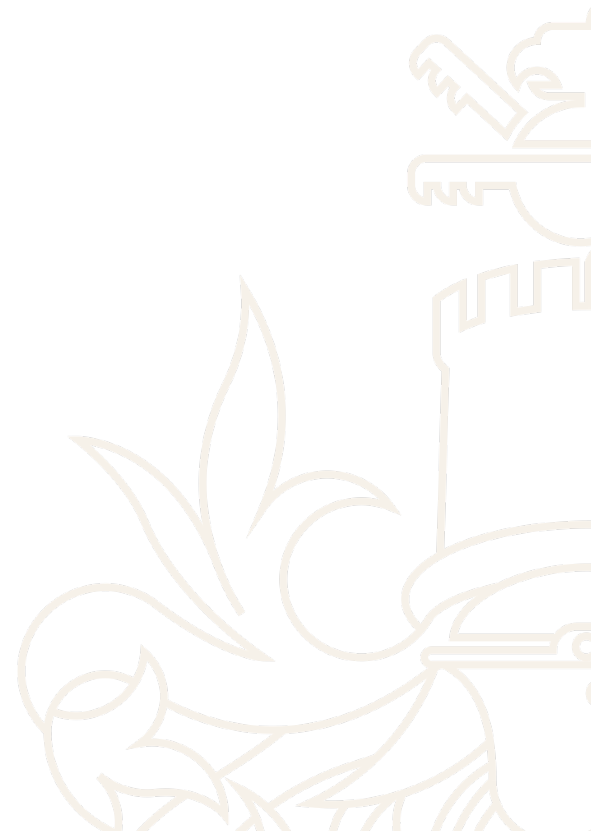
T: +44 (0) 20 7247 1452
W: www.pensions-pmi.org.uk

Response from the Pensions Management Institute to TPR consultation: 'Circumstances in relation to the material detriment test, the employer insolvency test and the employer resources test'

Introduction

PMI is the professional body which supports and develops those who work in the pensions industry. PMI offers a range of qualifications designed to meet the requirements of those who manage workplace pension schemes or who provide professional services to them. Our members (currently some 6,000) include pensions managers, lawyers, actuaries, consultants, administrators and others. Their experience is therefore wide ranging and has contributed to the thinking expressed in this response. Due to the wide range of professional disciplines represented, our members represent a cross-section of the pensions industry as a whole.

PMI is focused on supporting its members to enable them to perform their jobs to the highest professional standards, and thereby benefit members of retirement benefit arrangements for which they are responsible.



1. Is our overall approach in the draft code and code-related guidance consistent with the policy intent behind the changes introducing the two new alternative 'act' tests to the CN power?

We support the work being done by TPR and others in seeking to protect the benefits of pension scheme members, to reduce the risk of calls on the Pension Protection Fund (PPF), and to promote the good administration of work-based pension schemes. We note that the government's policy intent in introducing the two new alternative 'act' tests to the existing CN power is to focus on the effect of an act on an employer, which in turn affects its capacity to support the scheme. We consider that both new tests meet the policy intent.

Our comments in relation to this consultation mirror those which we made in response to TPR's criminal powers policy consultation, and we would refer you back to that response for more information. In particular, we believe that there is room to provide significant additional clarity and certainty to the industry, by setting out additional examples and parameters in respect of circumstances in which TPR may use its powers.

We believe there are added grounds for additional examples to be provided. Amongst other things, we believe that greater detail in respect of the interaction between the criminal penalties and the civil sanctions would be of assistance. This would reduce uncertainty for those advising on this in practice.

2. Is the code clear on what the tests are and the circumstances in which we will consider any of the tests to be met? If not, how could we make it clearer, without limiting the scope of the tests?

The draft code clearly sets out the material detriment test, the employer insolvency test, the employer resources test and the circumstances involved.

As regards the defence for a material detriment that an individual/company gave due consideration to whether or not the intended act or failure to act would cause material detriment, and reasonably concluded that it would not, we note that this defence is only available if TPR is satisfied that the relevant conditions are met. This may pose a difficulty in practice without substantial guidance, as a person and/or their advisers may be uncertain as to what circumstances and evidence would likely give rise to TPR being satisfied. We believe that this is an area where substantial guidance will be important.

3. Are the examples provided in the code-related guidance useful in illustrating the circumstances in which we might consider the new 'act' tests to be met? Are there any other examples you would consider helpful?

We believe that TPR's guidance could be further added to in order to alleviate the concerns that have been raised by the industry.

We support the underlying principles of TPR's objectives to protect the benefits of pension scheme members, to reduce the risk of calls on the PPF, and to promote the good administration of work-based pension schemes.

Some of the main examples that TPR uses to illustrate the circumstances in which it might consider the new 'act' tests to be met are at the extreme end of what is obviously malpractice, i.e. removal of sponsor support.

However, it is the plethora of more commonplace actions that are of much more interest and concern to industry participants, and which we believe could cause changes in commercial norms, in the absence of clearer guidance. If TPR wishes to avoid this outcome, it would be helpful to have more examples that are more borderline/nuanced in their presentation.

It would also be beneficial to obtain greater clarity about activities and behaviours TPR would view as acceptable. We are concerned that there is currently not enough clarity around the subjective elements of the circumstances and that this in turn is not helpful to practitioners, sponsors and trustees in navigating normal commercial practice. Examples include what mitigation would be deemed "appropriate" when security is granted. It would be beneficial for a sliding scale approach to be demonstrated around the normal commercial decision of an employer granting security.

TPR states in a previous consultation that it would "not usually expect to prosecute anyone under section 58B who could establish a statutory defence to a material detriment CN under section 38B". It would be beneficial if this was further amplified with additional guidance. We would assume that for any protection on a particular set of facts, clearance on a Contribution Notice would be taken to extend to the other offences as well, but it would be helpful if this could be explicitly confirmed.

4. Do you have any other feedback?

N/A

