

EVERSHEDS  
SUTHERLAND

## White Paper Conference

TPR Becoming Tougher

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# Agenda

1. TPR's approach and evolution
2. Industry feedback
3. TPR in action
4. TPR and corporate activity
5. Lessons from Carillion
6. Anecdotal and personal experience
7. The White Paper
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# TPR's Approach and evolution

## TPR's Approach and evolution

- Critical friend, not wagging finger
- Advising and supporting, not pursuing and penalising
- But also...
- Robust approach – educate, enable and enforce replaced by clearer, quicker, tougher
- If improvements not made, will increasingly take enforcement action
- Increased action to administer fines for administrative failings
- Better armed to deal with “serious instances of poor oversight”
- To continue to act as a deterrent

## TPR's Approach...

- Standard of trusteeship is “patchy”
- Contrasting pockets of excellence and poor practice

Therefore...

- Prefers all to get the basics right instead of some doing very well and others very poorly

But on the whole...

- Majority of schemes are “well managed, transparent and solvent”
- Not to be disheartened by the shortcomings of a few
- Be encouraged these are the exceptions, not the rule

## TPR's Evolution – TPR Future

- Feedback exercise (genesis of TPR Future)
  - TPR to be visible
  - Stakeholders to understand what TPR's expectations are
  - TPR to be more ready and faster to use its powers
- Mirrored in a budget increase of £3.5m for its compliance and enforcement work
- £80m budget, half of which is for Auto Enrolment
- Allows for a 15% increase in headcount
- Expectation of a significant difference in the way TPR is able to act and react
- To give TPR the ability to respond more quickly and decisively
- Successful interventions over past 12 months will likely lead to more interventions over next 12 months

# Industry feedback

## TPR's – Your Feedback

Do you think TPR is striking the right balance in its approach to enforcement?

- 34% - Yes, there is a good balance
- 26% - No, TPR is not being tough enough
- 14% - No, TPR is being too tough
- 26% - Don't know

## TPR's – Your Feedback

*“Where it needs to be tough, it is weak, and where it is not necessary to be tough, it is too tough”*

*“Strong powers already available are sadly underused”*

*“Over-zealous in trying to protect the PPF”*

*“Caught between a rock and a hard place”*

## Testing times for TPR

- Arcadia – “*avoid another public spat... Truce?*”
- BHS
- Box Clever
- British Steel
- Carillion

# TPR and corporate activity

## TPR's effect on Corporate activity

- Trinity Mirror £41.2m now + £29.2m over 9 years to Northern & Shell schemes
- GKN – Melrose deal results in £1 Billion to GKN schemes
- First Group – bid by Apollo – material detriment firmly on radar
- Global IT and Computer manufacturer – sale of business resulted in £1.5 Billion cash to DB pension schemes

**TPR in action**

## TPR In Action

- Dominic Chappell – fined for failure to provide info to TPR
- Six DC schemes – fined for failure to produce Chair's Statement
- Crest Healthcare and Sheila Aluko – AE failures and providing false/misleading info to TPR
- NOW: Pensions – fined £70,000 for administrative failings, issued with Improvement and Third Party Notices
- All Metal Services – defended TPR action on failure to file scheme return

## TPR In Action

- Pakistan International Airline RBS Trustees – fines for account audit failures (first use of s10 PA95 power)
- Stotts Tours (Oldham) and Alan Stott – prosecuted for failure to comply with AE duties
- TPR and police investigating schemes suspected of links to cold calling
- Workchain Ltd – first prosecution for TPR under s1 Computer Misuse Act 1990
- Samuel Smith Old Brewery (Tadcaster) and Humphrey Smith – failure to provide timely financial information

# Lessons from Carillion

# Carillion

- Could the Trustees have asked for more money? They did, repeatedly
- Could the covenant advice have been better? It was unequivocal - demand more
- Were dividend comparisons cited? Yes, in each of the 2008, 2011 and 2013 valuations
- Could TPR have been asked to use its s231 powers? They were, in both 2008 and 2011
- Could de-risking have taken place earlier? After 2017 profit warning
- S231 Powers under review? *"It appears to the Regulator... [trustees/employer] have failed...[or] have been unable..."*
- And spare a thought for the PPF – c£900m deficit in the Carillion plans headed their way

“

*With characteristic alacrity, [TPR] started its arduous process of chasing money down from Carillion a few days after it was formally announced there was no money left...*

**Frank Field**

”



*I struggle to see how a power that has only been deployed once in 13 years can possibly act as a credible deterrent to wilful scheme underfunding... It would hardly have scheme sponsors quaking in their boots and it is difficult to imagine TPR emerging victorious from negotiations with a ruthless American private equity firm.*

**Frank Field**



“

*The defensive and under prepared performance you and your senior colleagues gave before the joint committee certainly gave me no assurance that the TPR leadership is equipped to bring about the necessary cultural change.... Those that will be affected by the white paper, surely now know the game has changed.*

**Frank Field**

”



*In hindsight, we would have reached a decision to bring our powers to bear more quickly and we would not have continued so long in a negotiation situation. We would have tried to bring that to a conclusion quicker.*

**Lesley Titcomb, TPR Chief Exec**





*I am not sure there is much to learn from all this activity, save that perhaps we are asking TPR to do a job that no regulator, however better resourced and empowered, can perform.*

**Robin Ellison, Chair of Carillion (DB) Pension Trustee Limited**



**Anecdotal and personal experience**

## Anecdotal and personal experience

- Expect TPR to have learned from the cauldrons of BHS and Carillion
- But don't expect TPR to fight your fights for you
- Expect, for a period, given what it has experienced, TPR to want to protect itself
- Contrast the early days...
- You must:
  - act early;
  - be proactive;
  - take advice;
  - be seen to be doing all the above

## Anecdotal and personal experience...

- A good audit trail is worth its weight - document everything; keep records
- Know what powers you have, consider them and be able to show you have considered them
- Use them wisely
- But ensure you use them and can show you have used them and the results
- Try to act in a way that would not attract criticism in a post-event examination by independent third parties

## Anecdotal and personal experience...

- Expect TPR to expect you to use your powers, even if it appears to you unreasonable to do so
- If it appears unreasonable, document why
- If engaging TPR, be up front as to why it's unreasonable
- Don't rely on moral hazard – a bird in the hand is worth two in the bush
- Be prepared for TPR to focus on something different than the reason on which you are inviting them to focus
- Be prepared for TPR to want to cover its backside – the mud won't be sticking to them if they can help it
- So where will the mud stick...? On you...?
- Make sure your clients know about legal professional privilege

# The White Paper

## The White Paper

- New punitive fines for those “*who deliberately put their pension scheme at risk*”
- Possibly retrospectively to the date of the white paper (19 March 2018)
- New criminal offence “*to punish those found to have committed wilful or grossly reckless behaviour in relation to a DB scheme*”
- Including directors and connected persons – will focus the minds
- Review of notifiable events regime – transaction scope and timing requirements

## The White Paper...

- Companies will have to make a “*statement of intent*” in consultation with trustees before a “*relevant business transaction*” takes place.
- Relevant business transactions are those with the “*highest potential risk*” – eg sale or takeover of a sponsoring employer
- Strengthen TPR’s information gathering powers – including to compel professional advisers otherwise unable to co-operate (eg due to confidentiality issues)
- Fines as an alternative to criminal sanctions for failure to co-operate

## The White Paper...

- A legislative duty to co-operate is being given further consideration
- No mandatory clearance – the proposal received a mixed response
- Possible review and strengthening of TPR's existing anti-avoidance powers and clearance guidance and director disqualification
- Scheme funding:
  - no general affordability problem
  - but there should be clearer scheme funding standards

## The White Paper...

- TPR will consult on a revised DB funding Code of Practice and meaning of prudence
- Legislation to require compliance with some or all of the new funding standards
- TPR power to take action in the event of non-compliance
- No change on 15 month valuation cycle
- Mandatory DB Chair and three yearly Chair's statement, expected to include:
  - strategic plan to achieve the SFO;
  - describe the scheme's long term financial destination

# **TPR's Annual Funding Statement**

# Annual Funding Statement

- Valuation effective dates of 22.9.17 to 21.9.18
- Clearer, quicker, tougher approach in aftermath of Carillion
- Integrated risk management – key theme
  - investment risk;
  - funding risk;
  - covenant risk
  - scheme maturity
- scheme size not a barrier to mitigate risk and no excuse for poor risk management
- Contingency planning – legally enforceable if possible (eg over secured assets)
- Brexit uncertainty

# Annual Funding Statement

- Assumptions
  - rationale for discount rate used
  - evidenced based mortality assumptions
  - transfers out – monitor scheme experience
  - maturity acceleration risk to funding
- Growing disparity between dividend growth and stable DRCs
- Long recovery plans vs relatively large dividend payments
- Effect on covenant
- “Fair” treatment but no ratio set by TPR
- Negotiate robustly for relativity between dividends and DRCs
- Beware covenant leakage – intra group loans, business transfers, dividends, exec pay, etc

## Annual Funding Statement...

- 90% increase in “proactive casework”
- smaller schemes – watch out
- The stronger the covenant:
  - higher contributions
  - stronger TPs
  - shorter RPs
- Warning on TPR powers:
  - enforcement for late valuations
  - increase in threat of s231

**A few practical steps**

## A few practical steps

Key – Good governance

- Motivated, knowledgeable and skilled Trustees
- Structure and process to enable timely decisions and risk management
- Clear scheme objectives
- Clear link between good governance and good fund performance and reduced operational risk
- Essential for effective scheme management

## A few practical steps...

Good governance – what does it look like?

- Trustees – motivated, knowledgeable and skilled
- Advisers – lawyer, actuary, covenant assessor, etc
- Budget – realistic, targeted
- Engage – own the scheme; own the relationship with the employer
- Use advisors wisely – value add, trustee meetings, updates, investment manager value add

## A few practical steps...

### A Trustee Business Plan...

- align with Employer business plan
- vision, goals
- objectives and actions to reach goals
- governance, compliance
- funding, investment strategy
- risk management – identify, manage
- employer relationship
- costs and budget
- member experience

## A few practical steps...

### Scheme Risk Register: Identify...

- controllable vs uncontrollable – evaluate likelihood of impact
- risk management strategy – actions and controls to mitigate
- conflicts of interest
- funding
- investment strategy
- TKU
- sponsor solvency
- cyber risk

## A few practical steps...

### Good governance...

- Chairmanship – effective
- Conflicts of Interest Policy – identify, manage
- Trustee training logs - board, individual
- Employer covenant – present, review
- Employer - information sharing protocol

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