Financial Assistance Scheme – developments to 2007

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The *Pensions Act 2004* established a Pension Protection Fund (PPF) which provides compensation for members of final salary occupational pension schemes which, from 6 April 2005, commence winding up underfunded on the insolvency of the employer. It is now covered in a separate note – *Pension Protection Fund* SN/BT/3917. The *Pensions Act 2004* also established a separate scheme – the Financial Assistance Scheme (FAS) – to provide some compensation to members of schemes that started to wind up between 1 January 1997 and the date the PPF commenced operations (6 April 2005.) More on the background to the establishment of the FAS is contained in SN/BT/3330.

The FAS has been subject to criticism since its inception on the grounds that the support it provides is less generous than that provided by the PPF. Under its earliest version, only those qualifying members who were within three years of their normal scheme retirement age (as of 14 May 2004) could receive top-ups to around 80% of their expected "core pension." Some surviving spouses and civil partners were also eligible. A payment cap of £12,000 a year applied and payments were subject to a "de minimus" of £520.

A report by the Parliamentary Ombudsman in March 2006 made findings of maladministration and made five recommendations, including that the Government should consider "whether it should make arrangements for the restoration of the core pension and non-core benefits" to scheme members covered by her recommendations. The Government did not accept that that maladministration had occurred and accepted only the recommendation that there should be a review of the time taken to wind up defined benefit pension schemes. A report by the Public Administration Select Committee in July 2006 supported the Ombudsman's findings of maladministration and the recommendation for more generous recompense than that provided by the FAS. This was followed in February 2007 by a decision of the High Court on an application for Judicial Review. This quashed the Secretary of State's rejection of one of Ombudsman's findings of maladministration and directed the Secretary of State to reconsider the Ombudsman's first recommendation. A further development was the decision of the European Court of Justice in January 2007 regarding the compatibility of UK legislation with the European Insolvency Directive.

The Government has announced significant extensions to the scope and generosity of the FAS on three occasions:

In May 2006, it announced that qualifying members who were within seven years of their normal scheme retirement age (as of 14 May 2004) would receive top ups to 80% of their expected core pension. For people seven to 11 years from scheme retirement age the figure would be 65 per cent, and for people between 11 and 15 years from retirement it would be 50 per cent.

In Budget 2007, it announced that all qualifying members would have their pensions topped up to 80% of their core pension rights, subject to a cap of £26,000. The de minimus payment rule was removed.

In December 2007, it announced that members would have their payments topped up to 90% of accrued pension subject to a cap of £26,000, the value of which would be protected. Assistance would be paid from the scheme's normal retirement age, subject to a lower age limit of 60. Payment of assistance derived from post-1997 service would be increased in line with inflation (subject to a 2.5% limit). Assistance would be extended to members of some schemes which wound up under-funded where the employer remained solvent.[1]

This note covers the development of the FAS up to the end of 2007; the various reports by the Parliamentary Ombudsman and the Public Administration Select Committee; the legal challenges; and different reviews set up by the Government. Details of developments from 2008 onwards are covered in SN 3085 *Financial Assistance Scheme*.

[1] Explanatory Memorandums to the *Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007 No, 3581; Financial Assistance Scheme (Miscellaneous Provisions) Regulations 2008 No. Draft.*

Contents

1 Background

The pension protection provisions in the *Pensions Act 2004* are designed to address the problem which attracted increasing public attention during 2002 and 2003 of defined benefit (DB) pension schemes winding up and failing to pay their members the pensions they had been promised.

1.1 Defined benefit schemes

The crucial point about DB schemes is that members know what pension they will eventually get. Typically they get 1/60th of final salary for each year of service. So if their final salary is £30,000 and they have 30 years' service, their pension will be £15,000 per year (30/60th x £30,000) DB schemes can be contrasted with defined contribution (DC) schemes where members only know what they pay in. For example, their salary may be £30,000. Both the member and the employer pay 5% into the pension fund, making a total contribution of £3,000 pa. If the fund builds up to – say - £200,000 by the time they retire and they get an annuity of - say - 5%, their pension will be £10,000, but this could vary enormously either way depending on the investment performance of the fund and annuity rates when the pension is taken.

On 18 December, the Pensions Regulator and Pension Protection Fund published its '*Purple Book*', an analysis of the defined benefit pension landscape. This found that:

> A majority of the schemes, 58%, are closed to new members, open schemes make up 31%. There are 41% deferred pensioners, 33% are pensioner members and 26% are members actively employed by the sponsor of their pension scheme. [2]

[2] Pensions Regulator and Pension Protection Fund, *The Purple Book, DB pensions universe risk profile.* p 10.

The Pensions Policy Institute published its report on *The Changing Landscape of Private Sector Defined Benefit Pension Schemes* in October 2007. This said that occupational Defined Benefit provision in the private sector in the UK had been declining:

> • The majority of DB schemes in the private sector (60%) are now closed to new members or are in the process of closing down completely.
>
> • Although the number of open DB schemes in the private sector has fallen, fewer DB schemes have closed in recent years.
>
> • Smaller DB schemes are more likely to be closed to new members than larger schemes.
>
> • A significant proportion of all members (43%) are in DB schemes that are still fully open to new members. Not all of these members, however, are active members and some are existing pensioners.
>
> • Only one quarter (26%) of scheme members are active members (i.e. are accruing a pensionable service) and many of them (42%) are now in closed DB schemes.
>
> • The majority of active members are in a small number of large schemes, which tend to be better funded than small schemes.
>
> • Total contributions into DB schemes, and employers' special contributions in particular, have been increasing to help reduce the deficit between assets and liabilities.
>
> • Contribution rates to DB schemes are increasing, and tend to be higher than contributions in Defined Contribution (DC) schemes.
>
> • Scheme sponsors are moving away from providing DB schemes and are instead offering DC.[3]

1.2 Pension promises broken

During the first few years of the 21st century, more and more cases came to light in which people found that their defined benefit pensions weren't guaranteed after all. Perhaps the best known examples were former employees of Allied Steel and Wire (ASW), one of Britain's largest steel companies with plants in Cardiff and Sheerness. The company went into receivership in the summer of 2002 and when it wound up its pension fund there was not enough money to pay all the members their entitlements. Heart-breaking cases of men who had worked for decades for the same company and were within months of retirement started to appear in the press and to be raised in the House. For example, Andrew Parr, 59, was expecting about £15,000 a year after contributing to the scheme for 22 years but was told he may get less than £4,000.[4]

Derek Wyatt, MP for Sittingbourne and Sheppey, where the Sheerness plant was, said in an adjournment debate on ASW on 16 October 2002:

> Unless we are in our 50s and beginning to think about retirement—that fantasy house we have dreamt about or that cruise we have always wanted to take—we rarely think about our pension and what it is worth. We pay into a scheme and expect it to bring if

[3] Pensions Policy Institute, *The changing landscape for private sector Defined Benefit pension schemes*, October 2007, p3

[4] ASW employee, " It's a steal say steelworkers on eve of protest rally", *Daily Telegraph,* 7 Jun 2003

> not rich dividends, at least a comfortable existence. I am beginning to think that a large majority of working people in this country are in for a nasty shock.[5]

Other cases of underfunded schemes raised in the House included:

- Basford Group – Desmond Browne, MP for Kilmarnock and Loudoun, Westminster Hall debate 28 February 2001, cc 292WH-300WH
- Ravenshead Glass – David Watts, MP for St Helens North, Westminster Hall debate 3 July 2001, cc 60WH-68WH
- United Engineering Forgings – Sandra Osborne, MP for Ayr, Westminster Hall debate, 22 January 2002, cc 239WH-246WH

1.3 How could this happen?

Insolvent employer

When a company with a defined benefit pension scheme goes into liquidation it winds up its pension scheme. The funds in the scheme are used to buy immediate annuities for existing pensioners and deferred annuities for active and deferred members. These annuities are bought from insurance companies and should provide pensions equal to what the member would have got under the scheme rules.

However, recently it has often been the case that the scheme does not have sufficient assets to pay for these annuities. With the falling stock markets since the turn of the century, many schemes' assets have declined in value while their liabilities might have increased. In theory, the employer should make up the deficiency - this is known as the "debt on the employer" or the "section 75 debt". But an insolvent employer has many debts and, unfortunately, the pension fund trustees are unsecured creditors, coming at the bottom of the pile after creditors like the banks.

One example quoted in a debate was of Lister Petter, where the pension fund will apparently get less than one penny in the pound.[6] At one stage, Turner & Newall (with a pension fund deficit of £875 million) was expected to get only 7.2p in the pound.[7]

If the scheme gets any money it is unlikely to be enough to buy annuities for all the members so the statutory priority order on winding up comes into play. This order has been changed several times over recent years, but, until 6 April 2005, when new provisions under the *Pensions Act 2004* came into force, the basic rule was that pensions in payment came first (the immediate annuities) and preserved pensions for those below pension age (the deferred annuities) came after them. [8] This meant that while people who had already retired might receive their full pensions, people who might have been only days away from retirement might only get 20% or less of what they were expecting.

Solvent employer

Where a decision is taken to wind up a pension fund, a valuation is made of the pension fund's assets and liabilities. Where the fund is found to be in deficit, any shortfall is treated as a debt due from the sponsoring employer to the trustees of the scheme under section 75

5 HC Deb c 434 16 October 2002
6 David Drew, HC Deb, 19 October 2004, c213WH
7 Financial Times, 27 August 2004, 'Trustees for T&N pension to reject offer'
8 An account of the priority order in force at different dates is given in SN/BT/3399, *Winding up a pension scheme*

Pensions Act 1995.[9] Prior to June 2003, the valuation of the fund was done on a Minimum Funding Requirement (MFR) basis and non-pensioner members were required to be put in a position where they would receive the Cash Equivalent Transfer Values (CETV) that would normally be paid in the case of someone who left the company. DWP's 2003 Pensions White Paper commented that these CETVs were too low to provide people with the pensions they expected at retirement:

> 10. Currently, if a solvent employer winds up an underfunded defined benefit occupational pension scheme that they sponsor, non-pensioner members may receive Cash Equivalent Transfer Values (CETVs) which are too low to provide them with the pension they were expecting at retirement. The rights they have already accrued in the scheme can be cut drastically.
>
> 11. Companies that choose to wind up their schemes pass their investment risk on to non-pensioner members, as they transfer their money into money purchase arrangements. Moreover, because the actuarial assumptions underpinning the CETV calculation have become out of date, CETV levels are now providing less protection than was originally envisaged.
>
> 12. One consequence of this is that someone who is still working when the scheme winds up can end up much worse off than someone of the same age who took early retirement. We are determined to tackle this injustice.
>
> 13. The Government believes a solvent employer who chooses to wind up a scheme should ensure that there are sufficient funds in the scheme to meet the full costs of the rights accrued by scheme members unless doing so would put the company itself at risk, in which case the trustees, exercising their fiduciary duties, can agree a lower amount.[10]

For this reason, the rules were changed so that where a scheme started to wind up on or after 11 June 2003 and the employer was not insolvent, any deficit is determined by valuing the benefits scheme members would get on a basis that they are bought out in full via annuities.[11]

In some cases the employer is not in a position to meet its debt to the pension scheme. The courts have held that it can be permissible for the trustees, exercising their fiduciary duties, to agree a lower amount – or "compromise" the employer's debt to the scheme, if this is to the benefit of pension scheme members. In the case of the *Bradstock Group Pension Scheme,* for example, the scheme was in substantial deficit and the employers had no realistic prospect of being able to pay the instalments necessary to bring the funding up to the required level by the prescribed date. Unless the debt could be compromised, the employers would be forced into liquidation. The court held it was permissible to compromise a debt for the benefit of scheme members.[12]

Since 6 April 2005, trustees who agree a compromise which results in benefits below the PPF level render the scheme ineligible for entry to the PPF unless the compromise is part of a scheme of arrangement or takes place during a PPF assessment period when the PPF's

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[9] Section 75, Pensions Act 1995
[10] DWP, *Simplicity, security and choice: Working and saving for retirement. Action on occupational pensions,* Chapter 2, Cm 5835, June 2003
[11] Pensions Act 2004, Occupational Pension Schemes (Winding Up and Deficiency on Winding Up etc) (Amendment) Regulations 2004 (SI 2004/403)
[12] Tolley's Pensions Law, para H4.18

Board is acting as creditor of the employer.[13] Since April 2005, the Pensions Regulator has been responsible for regulating pension fund deficits, and new scheme funding requirements have been introduced.[14]

1.4 What was done about it?

The campaign on behalf of these “pension victims” was very effective. Many MPs raised the

plight of their constituents in debates in the Commons. Prominent among them were Kevin Brennan, MP for Cardiff West, and Derek Wyatt, MP for Sittingbourne and Sheppey, both of whom represented ASW members.[15] Frank Field secured a lot of publicity for his *Pensions Winding Up Bill,* introduced on 16 December 2002, which was designed to use unclaimed assets to compensate losers.[16] A Panorama programme, “How safe is your pension?”, in November 2002, attracted a wide audience.[17] A Pension Action Group, with a popular website, was formed to lobby Parliament and Ministers.[18] The campaign secured the help of Dr Ros Altmann, a pension specialist,[19] and trade unions became involved in organising rallies.[20]

Eventually the Government announced in its *Pensions White Paper* published on 11 June 2003 that it would:

> establish a compensation scheme known as the Pensions Protection Fund, run by a statutory body, to protect private sector defined benefit scheme members whose firms become insolvent with unfunded liabilities in their pension scheme.[21]

In his statement on the White Paper, Andrew Smith, then Secretary of State for Work and Pensions, said:

> Sometimes, when firms go bust, the money is not there to meet pension commitments. Recent cases have shown the terrible injustice when that happens, and the public are right to demand action. We should not accept that just because a firm goes out of business workers can find that a pension that they have saved in for all their working lives becomes worth next to nothing. (…) Ever since I started looking at this I have asked why, if people expect their holiday provider or motor insurer to be covered if the firm goes bust, there is no cover for something as important as an occupational pension. We will therefore legislate to set up a pension protection fund. That fund will take over the schemes of insolvent companies to ensure not only that pensions in payment are protected, but that those still working can be sure of getting 90 per cent. of what they were promised. It will be paid for by a fixed-rate levy and an additional risk-related premium, which, together with a salary cap, will minimise perverse incentives and moral hazard. The fund will be a non-Government body. It will meet its obligations through the power to set and vary the level of charge without

[13] Pension Protection Fund (Entry Rules) Regulations 2005. SI 2005 No. 590. Regulation 2 (2) to (4). OPRA Update 10, December 2004, *Avoiding pension liabilities – implications of the Pensions Act 2004 for employers and trustees*

[14] Pensions Act 2004, Supporting regulations came into force in December 2005

[15] See, eg, Adjournment debate, 16 October 2002

[16] Bill 36 of 2002/03

[17] *How safe is your pension? Panorama, 17 November 2002* (Internet Archive Wayback Machine)

[18] http://www.pensionstheft.org/1112.html

[19] http://www.rosaltmann.com/

[20] See,e.g.*TUC to hold pensions demonstration* , TUC press release, 30 March 2004

[21] DWP, *Simplicity, security and choice: working and saving for retirement: action on occupational pensions*, Cm 5835, June 2003, para 2.5

> recourse to public funds. Taken with the other measures, that is a big extension of pension security, for the first time guaranteeing protection if a company scheme goes bust.[22]

Legislation for the PPF was included in *Pensions Bill 2003/04* presented to Parliament in February 2004 and is now contained in Part 2 of the *Pensions Act 2004*.

However, this did not help people who had already lost out – such as the workers at ASW. In reply to a question from Frank Field on his statement on 11 June 2003, Andrew Smith had said:

> He raised the agonisingly awful issue of people who have already lost their pension entitlements. Nothing would be more cruel than for me to come to the Dispatch Box and raise false hopes about what might happen. If we are legislating for the future, in terms of establishing a pension protection fund, that would apply in the future and not retrospectively.[23]

The campaign for pre-PPF losers continued and intensified and eventually culminated in an all party New Clause requiring the Government to introduce a compensation scheme for these people put down for Report stage in the Commons. It was clear that the Government would lose this vote and, on 14 May 2004, a few days before Report Stage, Andrew Smith, himself, put down a Government New Clause laying the basis for a Financial Assistance Scheme, to be financed by £400 million of Government money:

> **The Secretary of State for Work and Pensions (Mr. Andrew Smith):** The Pensions Bill introduces the pension protection fund that will ensure workers get a worthwhile pension when the sponsoring employer becomes insolvent and their scheme winds up underfunded. But the protection the fund gives is cover for the future, and cannot help those who have already lost out.
>
> The severe losses that some individuals have already suffered in insolvent pension wind-ups has caused considerable hardship. The Government will therefore make available £400 million of public money to be paid in instalments over 20 years with the possibility of further contributions from industry, to provide assistance in such cases.
>
> Details of the fund's operation will be worked out in consultation with stakeholders, and we will review the operation of the fund in three years' time.
>
> The Government are tabling an amendment to the Pensions Bill today.[24]

2 How the FAS works and who it covers

2.1 Legislation and guidance

Part 6 (section 286) of the *Pensions Act 2004* (as amended by *the Pensions Act 2007*) and regulations made under it, in particular: the *Financial Assistance Scheme Regulations 2005* (SI 2005/1986) and the *Financial Assistance Scheme (Modifications and Miscellaneous Amendments) Regulations 2005* (SI 2005/3256).

[22] HC Deb 11 June 2003, cc 683-684,
[23] Ibid, c690
[24] HC Deb 14 May 2004, c 32WS

2.2 Development of FAS

The Government has announced extensions to the scope and generosity of the FAS on a number of occasions. A concise explanation to this is provided in the Explanatory Memorandum to the *Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007* (SI 2007 No. 3581).

Policy background

The original intentions for FAS were as follows:

> 7.1 The Financial Assistance Scheme (FAS) was originally designed to focus help on those who had suffered significant losses and were closest to retirement as it was felt that these members were least likely to be able to make up any shortfall in their retirement income.
>
> 7.2 In its original form the FAS provided assistance to members of qualifying defined benefit occupational pension schemes which started to wind up, under-funded, between 1st January 1997 and 5th April 2005, where the relevant employer was subject to a qualifying insolvency event.
>
> 7.3 Under this earliest version of the FAS, only those qualifying members who were within three years of their normal scheme retirement age (as of 14th May 2004) could receive top-ups to around 80 per cent of their expected core pension.
>
> 7.4 Some surviving spouses and civil partners of qualifying scheme members who died after their scheme started to wind-up were also eligible for a payment from the FAS, as were some of those who were in receipt of a survivor's pension before wind-up started.
>
> 7.5 A payment cap of £12,000 per year applied which meant that qualifying members would receive assistance that would top up their scheme pension to 80% of their expected core pension, or to £12,000 per year, whichever was the lower figure.
>
> 7.6 Payments were also subject to a de minimis of £520 a year. This meant that payments would not be made unless they were calculated to be over £10 per week (before revaluation of the payment was applied).[25]

The first extension – May 2006

The first extension to the FAS was announced on May 2006:

> 7.9 In May 2006, the Government announced a £1.9bn extension to the scheme - bringing the total funding to £2.3bn in cash terms over 60 years. This extension to the scheme was estimated to help around 40,000 people over its life time.
>
> 7.10 Under this extension, which came into force on 16th December 2006, qualifying members who were within seven years of their normal scheme retirement age (as of 14th May 2004) would receive top-ups to around 80 per cent of their expected core pension. For people seven to 11 years from scheme retirement age the figure would be 65 per cent, and for people between 11 and 15 years from retirement it would be 50 per cent.

[25] Explanatory Memorandum to the *Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007* (SI 2007 No. 3581)

7.11 The cap and de minimis rules were retained and applied to all beneficiaries in the same way and at the same level as previously described.[26]

The second extension – Budget 2007

A further extension to the FAS was announced in Budget 2007:

> 7.12 In his Budget Statement on 21st March 2007, the Chancellor of the Exchequer announced that public funding for the Financial Assistance Scheme would be significantly increased. The key changes:
>
> • all qualifying members of qualifying pension schemes will have their pensions topped up to a level broadly equivalent to 80% of the core pension rights accrued in their scheme (subject to the cap);
>
> • the cap will be increased from £12,000 to £26,000 a year;
>
> • the minimum payment rule (de minimis) will be removed…
>
> 7.15 In addition, the Government announced on 18th April this year that it will further extend FAS to cover members of schemes that began winding up between 1st January 1997 and 5th April 2005, where a compromise agreement is in place and enforcing the debt against the employer would have forced the employer into insolvency. It is estimated that this will mean that FAS will help around 13,500 members.
>
> 7.16 Following an approach from an affected scheme, the Government is also amending its definition of excluded schemes so that certain Small Self Administered Schemes may become eligible to seek assistance for their members from the FAS.
>
> 7.17 The Government is also amending the provision which currently prescribes a cut-off date by which an employer insolvency event must occur in order for a scheme to qualify for the FAS.[27]

These were introduced by the *Financial Assistance Scheme (Miscellaneous Amendment) Regulations 2007* (SI 2007, No 3851), which came into force on 18 December 2007.[28] In debate on the regulations, the then Minister for Pensions Reform, Mike O'Brien said:

> The operational unit has identified individuals who will benefit from these changes. Assessment and payment can begin as soon as the regulations come into force and members should start to receive they money they are owed – including backdated arrears – in the next few weeks, and we hope that many of them will receive he payments before Christmas.[29]

The third extension – December 2007

Following the interim report of the 'Young Review', Minister for Pensions Reform, Mike O'Brien said that the Government believed it would be possible to increase further the level of compensation provided through the FAS:

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26 Ibid; *FAS Regulations 2005/1986, Schedule 2, para 3(3) and 4*

27 Explanatory Memorandum to the *Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007.*

28 HM Treasury, *Budget 2007. Building Britain's long-term future: Prosperity and fairness for families.* 21 March 2007 HC 342, para 5.56; HC Deb, 28 March 2007, c113WS

29 Fourth Delegated Legislation Committee Deb, *Draft Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007,* 11 December 2007, c5

> The cost of extending the FAS towards the 90 per cent mark can now be met by making better use of the assets remaining in pension schemes, matched by a further contribution from the Government.[30]

In addition, the Government said it had accepted that it is "not appropriate in the longer term for the FAS cap to remain static."[31] In addition, the Young Review was asked to consider whether there are other schemes where the sponsoring employer has not undergone an insolvency event that it would be reasonable to include in the FAS.[32]

The final report of the Young Review was published on 17 December 2007 (see section G below.) At the same time, the Government announced a further extension of the FAS. The then Secretary of State for Work and Pensions, Peter Hain, said:

> I can announce today the following extensions to the Financial Assistance Scheme:
>
> • All scheme members will be guaranteed 90% of their accrued pension at the date of commencement of wind up, revalued to their retirement date.
>
> • This will be subject to a cap of £26,000, the value of which will be protected.
>
> • Payment of assistance derived from post-1997 service will be increased in line with inflation (subject to a 2.5% limit).
>
> • Assistance will be paid from the scheme's normal retirement age, subject to a lower age limit of 60 (people who are unable to work due to ill health will also be able to apply for early access to their payments from the age of 60, subject to actuarial reduction).
>
> • Where their share of scheme funds allows, members will be able to commute some portion of their pension to a lump sum
>
> • Assistance will be extended to members of schemes which wound up under-funded (after 1st January 1997 and before the employer was required to meet the full buy-out cost) where the employer is still solvent.
>
> The final details of these proposals will be confirmed in the New Year, when we will outline the legislation necessary to give effect to this package. We will do this as quickly as possible and call on all parties involved to work with the Government to ensure this commitment results in increased payments in the fastest possible time. Our priority will be to ensure that people who have already reached their scheme pension age receive payment at 90%.[33]

3 The rules

3.1 Eligible schemes

Broadly speaking, private sector defined benefit schemes winding up with assets insufficient to meet liabilities that started winding up during the period beginning on 1st January 1997 and ending on 5th April 2005 (when the PPF came into operation).[34] From 18 December

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30 HC Deb, 17 July 2007, c194

31 *Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007. The Government response to the consultation*

32 Explanatory Memorandum to the *Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007. para 7.19*

33 HC Deb,17 December 2007, c100WS

34 HC Deb 2 December 2004, cc 64-66WS and SI 2005/1986, reg 9

2007 the rules were changed to allow a small number of Small Self Administered Schemes (SSAS) to gain entry to FAS. The rationale for the change is that although the vast majority of such schemes were established on a money purchase basis:

> we have received representations from a scheme that offered defined benefits and that is ruled out by this provision. The members of the scheme appear to be in similar circumstances to members of other schemes that are already being assisted by the FAS: they had an accrued right to a defined benefit that has been significantly depleted through no fault of their own as a result of their employer's insolvency. We believe the FAS should be extended to include such members.[35]

Schemes must notify the FAS of specified details during the notification period, 1 September 2005 – 28 February 2006, although there is discretion for late notification to be allowed.[36] Initially, a scheme needed to have experienced an insolvency event by a particular date in order to qualify. However, the rules have been changed on a number of occasions (see below).

An indicative list of potentially eligible schemes was published on 22 February 2005 and is available at:

http://webarchive.nationalarchives.gov.uk/+/http://www.dwp.gov.uk/lifeevent/penret/penreform/3c_schemelist.asp

A list of schemes which pension schemes that have been notified to the FAS, qualifying pension schemes that have been accepted by the FAS, and non-qualifying pension schemes that have not been accepted by the FAS is available at:

http://webarchive.nationalarchives.gov.uk/20080305145930/http://www.dwp.gov.uk/lifeevent/penret/penreform/fas/pension_schemes.asp

Solvency of the employer

Originally, for a scheme to qualify for FAS, the employer had to have experienced an insolvency event by 28 February 2006.[37] However, over time this deadline has been extended. On 27 February 2007, it was extended until 31 August 2007 to give more time to trustees to complete "negotiation with employers in relation to insolvency and qualification for the Financial Assistance Scheme."[38] Following a recommendation of the Young Review, the Government announced that it would not enforce that date.[39] The *Financial Assistance Scheme (Miscellaneous Amendment) Regulations 2007* (SI 2007, No 3851), removed the date by which an insolvency event must occur:

> We expect that employer insolvency will already have occurred or will occur soon for most relevant schemes and we will assume that scheme wind-up and employer insolvency were linked in relation to employer insolvencies that occur before 1st

[35] Explanatory Memorandum to the *Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007* SI 2007 No. 3581, para 7.30; See also, Fourth DLC Deb, Draft Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007, 11 December 2007, c5

[36] SI 2005/1986 regulation 14 (5)

[37] Department for Work and Pensions, *'The Financial Assistance Scheme – an in depth guide for trustees and pension professionals' (FAS P2)*, August 2005.

[38] HC Deb, 27 February 2007, c84WS

[39] Explanatory Memorandum to the *Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007* SI 2007 No. 3581, para 7.30

> January 2009: we have no reason to believe otherwise and this assumption will aid administrative processes.
>
> For employer insolvency events that occur after that date evidence of a connection will need to be provided and the scheme manager will have to take the view that scheme wind-up and the insolvency event were linked in a relevant way in order for the scheme to qualify for the FAS. For example, schemes might provide evidence from company accounts that shows the employer was in a difficult financial position before the start of scheme wind-up which continued up to the insolvency event.[40]

They also allow schemes certain schemes where a compromise agreement is in place and where enforcing the debt on the employer would have forced it into insolvency:

> provide the scheme manager with discretion to accept certain schemes that began winding up between 1st January 1997 and 5th April 2005 as qualifying schemes where no insolvency event referred to elsewhere in the regulations has occurred to the employer, where:
>
> • a compromise agreement is in place; and
>
> • he is satisfied that had a compromise agreement not been entered into either the value of the employer's assets would have been less than the amount of its liabilities, taking into
>
> account its contingent and prospective liabilities, or
>
> • the employer would have been unable to pay its debts as they fell due. In order for us to take decisions on whether or not this new provision is met scheme representatives will need to provide suitable evidence. We envisage that such evidence might include:
>
> • statements of accounts showing the employer's assets and liabilities;
>
> • evidence of the full debt that would have been payable by the employer had the debt not been compromised;
>
> • evidence of the binding agreement that compromised the employer debt; and
>
> • documented reasons for accepting the compromise agreement and any supporting documentation, for example copy of an independent auditors report about the employer's financial position.[41]

On 17 December, the Government announced that FAS would be extended to schemes that wound up under-funded (after 1st January 1997 and before the employer was required to meet the full buy-out cost) where the employer is still solvent.[42]

3.2 Eligible individuals

To be eligible, an individual must have been a member of the scheme immediately before it began to wind up.[43] Initially, only qualifying members who were within three years of normal

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40 Explanatory Memorandum to the F*inancial Assistance Scheme (Miscellaneous Amendments) Regulations 2007* SI 2007 No. 3581, para 7.30

41 Ibid

42 HC Deb, 17 December 2007, c100WS

scheme retirement age (NRA) (as of 14th May 2004) could receive top-ups to around 80% of expected core pension. In May 2006, it was announced that support would be extended to those within 15 years of NRA, with the level of support depending on the number of years from NRA. In March 2007, it was announced that support of up to 80% of core pension rights would be extended to all qualifying members of pension schemes.[44]

Initially, payment started from the age 65, backdated to 14 May 2004 or the recipient's 65th birthday, whichever is the later.[45] Terminally ill scheme members aged under 65 who were not expected to live longer than six months were eligible for FAS immediately.[46] The Government announced on 17 December that eligibility was to be extended so that:

> Assistance will be paid from the scheme's normal retirement age, subject to a lower age limit of 60 (people who are unable to work due to ill health will also be able to apply for early access to their payments from the age of 60, subject to actuarial reduction).[47]

3.3 Amount

Initially, qualifying members within three years of normal retirement age (NRA) could receive top-ups to around 80 per cent of their expected core pension. A payment cap of £12,000 per year applied and payments were subject to a de minimis of £520 a year.[48]

Under the extension announced in May 2006, which came into force on 16 December 2006, the level of support was tapered according to age:

> Qualifying members who were within seven years of their normal scheme retirement age (as of 14th May 2004) would receive top-ups to around 80 per cent of their expected core pension. For people seven to 11 years from scheme retirement age the figure would be 65 per cent, and for people between 11 and 15 years from retirement it would be 50 per cent.

In Budget 2007, it was announced that:

- all qualifying members of qualifying pension schemes would have their pensions topped up to a level broadly equivalent to 80% of the core pension rights accrued in their scheme (subject to the cap);
- the cap would be increased from £12,000 to £26,000 a year;
- the minimum payment rule (de minimis) would be removed.[49]

In December 2007, a further increase was announced: qualifying members would receive a combined total of 90% of their accrued pensions from their FAS payments plus any actual

43 Financial Assistance Scheme Regulations 2005 (SI 2005 No. 1986), Regulation 15

44 Explanatory Memorandum to the F*inancial Assistance Scheme (Miscellaneous Amendments) Regulations 2007* SI 2007 No. 3581; Regulation 7 amends Schedule 2 of the Financial Assistance Scheme Regulations 2005 (SI 2006, No 1986)

45 HC Deb 4 April 2005, cc 126WS-128WS and SI 2005/1986, reg 17(2)

46 Government response to consultation, 22 June 2005 and SI 2005/1986, reg 17(3)

47 HC Deb, 17 December 2007, c100WS

48 Explanatory Memorandum to the Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007 No. 3851, para 7.3-5

49 Ibid, para 7.12

pension received from their scheme (subject to a cap of £26,000 a year, the value of which would be protected).[50]

Initially, FAS payments were not index-linked on the grounds that "many of the schemes involved were not index-linked in the first place."[51] In December 2007, it was announced that payment of assistance derived from post-1997 service would be increased in line with inflation (subject to a 2.5% limit).[52]

3.4 Process for deciding awards

Before the FAS can decide whether a pension scheme qualifies for the FAS, it needs some basic information. For a scheme to be considered, it should have completed notification by 28 February 2006, although notification can be accepted after that time if there is good reason for doing so.[53] The FAS website explains the stages to the FAS process:

> There are four stages to the FAS process
>
> Notification
>
> Qualification
>
> Assessment
>
> Payment
>
> During the initial stages of Notification and Qualification the circumstances of the scheme as a whole are considered to decide whether the qualifying conditions for FAS are met. A scheme professional will usually complete this stage of the process and provide the necessary documentation. Only members of schemes that have successfully completed both of these stages can be considered for assistance.
>
> After a scheme has successfully completed Notification and Qualification, the scheme professional will be asked to provide the information needed to assess the eligibility of individual members of the scheme.
>
> Once the necessary member data is received, schemes enter the Assessment stage. This is when the work starts to identify individual members who are eligible for FAS and calculate the levels of assistance they are due.
>
> FAS payments usually commence to eligible members when they reach age 65, but the rules are different for survivors. Following Assessment any members who are due assistance immediately progress to the final stage of Payment. Eligible members who are not yet 65 will progress to payment as they become due. [54]

Further details of what is involved at each stage are provided on the same page.

Details of: the pension schemes that have been notified to the FAS; qualifying pension schemes that have been accepted by the FAS; non-qualifying pension schemes that have not been accepted by the FAS; and the current status of each scheme can be found at:

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50 Explanatory Memorandum to the Financial Assistance Scheme (Miscellaneous Provisions) Regulations 2008 No. Draft, para 7.6

51 Alan Johnson, HC Deb 28 February 2005, c 628

52 HC Deb, 17 December 2007, c100WS

53 DWP, *The Financial Assistance Scheme – a guide to individual scheme members*, FAS P1. October 2007. page 3.

54 DWP , *What happens when a scheme applies for FAS*

http://webarchive.nationalarchives.gov.uk/20080305145930/http://www.dwp.gov.uk/lifeevent/penret/penreform/fas/pension_schemes.asp[55]

The arrangements for making payments of FAS are explained in more detail in the Government's response to the Eighth Report of the Public Administration Select Committee, published in October 2007.[56] There is also a list of reasons why a qualifying member might not be getting FAS payments even though they are eligible and aged 65 or over.[57]

3.5 Payments

The regulations provided for most of the scheme's provisions to come into effect on 1 September 2005,[58] and, on that date, the DWP issued a press notice inviting the trustees or administrators of schemes which thought they might be eligible to apply.[59] The first payments were made in December 2005. FAS has been subject to some criticism at different stages for the limited number of payments it has made. A table on the FAS website shows the number of pension schemes or members (including survivors) at each stage of the FAS process.[60] Following debate on the Financial Assistance Scheme Regulations on 12 December, the Minister for Pensions Reform, Mike O'Brien, provided the following information regarding the number of pension scheme members receiving FAS payments:[61]

Payment Range Gross Figures to 11 December 2007	Number of members receiving annual payments	Number of members receiving initial payments	Total Number
£0.01 - 520		756	756
£521 - 1000	97	602	699
£1001 - 3000	176	1040	1216
£3000 - 5000	61	387	448
£5001 - £7000	27	243	270
£7001 - 9000	12	97	109
£9001 - 11000	2	21	23
£11001 - 12000	3	16	19
	378	**3162**	**3540**

Initial payments

There is discretion to make "initial payments" to members who have reached age 65 in cases where the scheme has not finished winding up. The award will be recalculated and any arrears paid when the scheme completes wind up.[62] Following the passage into law of the *Pensions Act 2007* the rate of initial payments increased from 60% to 80% of the expected core pension (less any interim pension the member is receiving from the scheme.) Initial

[55] Retrieved 14 May 2008
[56] Public Administration Committee, *The Pensions Bill and the FAS: An Update: Government Response to the Committee's Eighth Report of Session 2006-07,* Second Special Report of Session 2006-07. 17 October 2007. HC 1048
[57] Ibid, p6
[58] SI 2005/1986, reg 1
[59] DWP press release, 1 September 2005, *"FAS – time for trustees to apply",*
[60] http://webarchive.nationalarchives.gov.uk/20080305145924/http://www.dwp.gov.uk/lifeevent/penret/penreform/fas/statistics.asp
[61] DEP 2008/0007
[62] Government response to consultation, 22 June 2005 and SI 2005/1986, schedule 2

payments are subject to certain restrictions, such as the cap on FAS payments (now £26,000). [63]

The *Financial Assistance Scheme Annual Report 2006-07* explained that the reasons some schemes do not apply for initial payment include: scheme being too close to wind up; no members being eligible for FAS; and the fact that the scheme is already paying more than could be met by FAS initial payments.[64] In June 2007 the Government said it intended to introduce arrangements so that:

> Rather than relying on trustees to make applications on their behalf, individual scheme members who believe that they are eligible for payment can advise the FAS operational unit direct, which will then contact the scheme trustees to seek to arrangement a payment.[65]

On 20 September 2007, the then Pensions Reform Minister, Mike O'Brien announced a number of measures to speed up payments:

> The payment process is to be simplified to get around delays caused by trustees not applying for FAS "initial payments" to top up interim pensions paid by the winding up schemes. There should be no good reason for trustees to not ensure that eligible members receive FAS benefits.
>
> Payments at 80 per cent of expected core pension (subject to a cap) can be made to eligible members of winding up schemes in one of three ways:
>
> - The FAS will pay 80 per cent of core expected pension in full to members of winding up schemes, even if no interim pension is being paid by the scheme itself. This removes the expectation of pension payment from schemes still in wind up.
> - Where trustees wish to pay interim pensions in line with scheme funding positions, the FAS can top these up to 80 per cent as before.
> - Trustees can pay the 80 per cent from the assets available in their scheme if they feel this is appropriate, taking into account their duty to act in the best interests of their scheme members – with payments to eligible members guaranteed in the longer term by the taxpayer. Trustees should contact the FAS unit for help to calculate payments.[66]

3.6 Numbers of pensions scheme members within the scope of the FAS

An initial report published by the DWP in June 2004 estimated the number of schemes facing significant reductions in their expected pensions as a result of underfunded schemes winding up was 250, and the number of individuals at 65,000.[67] However, this was based upon a cut-off date (since removed) so that schemes which started winding up after April 2004 would have been excluded. It also excluded those with losses of less than £5 a week and less than 20% of their pension. Having removed the cut off date, by 21 March 2005, the Government had updated its estimate of the numbers affected: some 80,000 non-pensioner members of

[63] Pensions Act 2007, s18 (5); Explanatory Notes to Pensions Act 2007 para 355 ; HL Deb, 24 July 2007, c705
[64] *Financial Assistance Scheme Annual Report 2006-07*
[65] HC Deb, 26 June 2007, c695W
[66] DWP Press Release, 20 September 2007, *Trustees' cooperation vital to FAS payment drive – O'Brien,*
[67] DWP, *Insolvent pension wind-up – report on numbers affected.* June 2004

schemes winding up since 1997 with insolvent employers could be facing losses of 20% or more of their expected pensions.[68]

Before the extension of the scheme in December 2006, some 15,000 people were expected to be covered by the topping-up payments to those within 3 years of their scheme pension age on 14 May 2004.[69] With the extension of the scheme to those within 15 years of scheme pension age on 14 May 2004, the Government estimates that "we will now be able to help around 40,000 people who have lost out on their pensions". [70]

The announcement in Budget 2007 further increased the number of people who would be eligible for the Financial Assistance Scheme, as well as increasing the amount some of those already eligible for the scheme would receive:

> As a result of the changes, we now expect about 130,000 people who have lost their pensions as a result of their employer undergoing a qualifying insolvency event to receive at least 80 per cent of their core expected pension, subject to the raised cap, from either FAS or their pension scheme.[71]

The announcement on 18 April 2007 that the FAS was to be further extended to cover members of certain schemes where a "compromise agreement" was in place is expected to help around 13,500 pension scheme members.[72] The extension to cover some Small Self Administered Schemes was expected to result in 2 such schemes with some 20 members being admitted to FAS.[73]

The Government expected that as a result of the further extension of the FAS announced on 17 December, some 140,000 people in total could potentially qualify for FAS.[74]

3.7 Funding

Originally, the Government provided £400 million in cash terms (£243 million in net present value terms) for the FAS over 20 years.[75] The Government had sought industry contributions and "it was very disappointing that no financial contribution has been forthcoming".[76] The *Financial Assistance Scheme Regulations 2005* allow for such contributions to be made to the fund in future.[77] The table below illustrates how the costs of the scheme have evolved over time:

The changing costs of the FAS (2007/08 terms) (1)				
Regime	**Terms**	**Total cash cost (£m)**	**Total NPV cost (£m)**	**No. of people helped**
Original FAS Scheme	80% to 3 years from pension	620 (2)	290	15,000

68 Malcolm Wicks, in reply to Nigel Waterson, HC Deb 21 March 2005, c 603W

69 Alan Johnson, HC Deb 22 February 2005, c 195, and Stephen Timms, Eleventh Standing Committee on Delegated Legislation, 12 July 2005, c 15

70 James Purnell, Tenth Standing Committee on Delegated Legislation, 6 December 2006, c6

71 HC Deb, Fourth Delegated Legislation Committee, Draft Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007, 11 December 2007, c4

72 HC Deb, Fourth Delegated Legislation Committee, *Draft Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007*, 11 December 2007, c5

73 Ibid, c4

74 HC Deb, 17 December 2007, c100WS

75 HC Deb, 14 May 2004, c32WS; SC Deb, 6 December 2006, c4

76 HC Deb 22 February 2005, cc 16-18WS

77 SI 2005/1986, reg 6

	age			
May 2006 extension	80% to 7 years, 65% to 11 yrs, 50% to 15 yrs	2,360	810	40,000
Budget 2007 extension	80% to all, £26,000 cap, no de minimus, compromise cases	8,560	1,990	130,000

Source: *Financial Assistance Scheme Review of Assets, Final Report,* December 2007, p 78
Figures are from DWP, costs are rounded to the nearest £10 million, numbers helped to the nearest 5,000 people

(1) These estimates differ slightly from the previously published results as they have been re-estimated using a new model

(2) £620 million was the estimated lifetime cash costs of the original FAS scheme, though the promised Government commitment was £400 milllion cash

The report of the FAS Review of Scheme Assets comments that:

> The profile of these cash costs is broadly bell-shaped and driven by the number of scheme members over 65. Therefore, they start at a relatively low level but increase rapidly to a maximum of around £240 million per year cash by the mid 2030's, with a subsequent decline as eligible members die.[78]

The Young Review was asked to look at whether better use could be made of assets in affected pension schemes.[79] The Government made a commitment that additional funding for the FAS identified by the Young Review would be matched by a further contribution from Government.[80] Andrew Young's interim report, published in July 2007, identified approximately £1.7 billion in assets in affected pension schemes that had not been used for annuity purchase.[81] His final report, published in December 2007, concluded that:

> to provide a guaranteed benefit level, the best value will come from Government absorbing all the residual assets in the schemes and then making the associated payments as they fall due.[82]

At the same time as this final report was published, the Government announced a further extension of FAS. It estimates that:

> The additional costs of this package will be £935 million in Net Present Value (NPV) terms. This will be on top of the £2.0 billon NPV we have already committed – £8.6 billion in cash terms. This will take the total commitment to £2.9 billion NPV, or £12.5 billion in cash terms. This exceeds the Government's commitment to match the additional value identified by Andrew Young.[83]

78 *Financial Assistance Scheme (FAS) Review of Assets, Final Report*, December 2007, p17, para 21
79 HC Deb, 28 March 2007, c113WS
80 HC Deb, 17 July 2007, c194
81 *Financial Assistance Scheme, Review of Scheme Assets, Interim Report,* July 2007, para 1.14;

82 HC Deb, 17 December 2007, c100WS
83 HC Deb, 17 December 2007, c100WS

3.8 Cash and net present value

There has been some controversy over how the cost of the scheme should be presented – in "cash terms" or "net present value" terms. The final report of the FAS review of scheme assets explains "net present value" as follows:

> Costs and benefits that occur in different time periods (cash costs) are not usually directly comparable since £1 today will, generally, buy relatively more than £1 in, for example, 2030. In order to make cash costs comparable they must be 'discounted' i.e. converted to a common time period. Discounting allows for the impact of inflation as well as the principle that people usually prefer to receive goods and services now (and pay costs later) and if they have to defer consumption they want to be compensated.
>
> A simple example (ignoring the effects of inflation, uncertainty and tax) is as follows: a person can receive £100 now or they can wait a year; however, £100 in one year's time is worth less as the money received now could be placed in a low risk investment and may grow to £105. Therefore, given a choice of £100 now or £100 in a year's time a rational person would opt for £100 today. Given the choice of £100 now or £105 in a year's time a person should (assuming no risk, tax, uncertainty or irrationality) be indifferent between the two options i.e. the present value of £105 to be received in a year's time is £100.
>
> For individuals the appropriate discount rate for converting future cash payments expressed in real terms (i.e. adjusted for inflation) to NPV is the real interest rate on money loaned or borrowed. Society as a whole also prefers to receive goods and services now (and defer costs to future generations). This is known as 'social time preference'; the 'social time preference rate' (STPR) is the rate at which society values the present compared to the future.
>
> HM Treasury issues guidance, via the Green Book, on the appropriate STPR and this is currently set at 3.5 per cent real for the first 30 years of a projects life, declining to 3.0 per cent for years 31 to 75 (for the full schedule of rates see Table 6.1 in Annex 6 of the Green Book). The decline in discount rates in the long term reflects the greater uncertainty attached to the distant future.[84]

Lord Justice Bean, in his decision on the judicial review relating to the Ombudsman's report on occupational pensions, said he considered the difference between the cash costs and net

present value costs to be important as "a matter of presentation", although "not in truth a difference of substance." A more telling point, in his view, was that the figures did not take account of the tax that would be payable and the benefits that would not be paid if pension payments were restored. However, he noted that "in any view it is a large sum of money."[85]

4 Reviews of the FAS

4.1 FAS administration

Concerns about the relatively small number of payments being made and the administrative costs, led to a review of the administration of the scheme.[86] The review team made the following key findings:

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[84] *Financial Assistance Scheme (FAS) Review of Assets, Final Report,* December 2007, p 77, Box 2

[85] R v Secretary of State for Work and Pensions ex parte Bradley and Others [2007] EWHC 242 (Admin), para 91 http://www.bailii.org/ew/cases/EWHC/Admin/2007/242.html

[86] DWP, *Review of the Financial Assistance Scheme,* 24 July 2006

- A different skill set and a revised approach to gathering data on scheme members is required to speed up payments;

- These skills exist in the private sector and the Pensions Protection Fund. Outsourcing, however, is not a viable option and we are examining options to inject skills into operations in the shortest time;

- The length of the wind-up process and competing trustee priorities are significant constraints to making more FAS payments;

- A detailed work analysis is required to critically review job roles, examine process timings and establish optimum staffing levels for the FAS Operational Unit;

- The long term governance of the FAS is best placed within The Pension Service.[87]

It was considered that the key barrier was the collection of data from schemes "about all individual members and the rights that they have built up so that we can work out how much to pay them." The Department was working with Mercer Human Resource Consulting on its processes and the data issues it had encountered.[88]

The Government had also established a review on the winding up of pension schemes and had made it clear that it thought this should happen within two years:[89]

Asked about the estimated average time to process applications in the last twelve months, the then Pensions Reform Minister, James Purnell, said on 5 February 2007:

> Before the financial assistance scheme is able to start processing applications for individual scheme members, the pension scheme has to complete the notification and qualification processes. These involve the trustees and administrators providing basic scheme information to the FAS Operational Unit. They then have six months to provide data on individual members before a notice requiring provision of this information can be issued.
>
> 'Notification' of a scheme occurs when trustees or members formally notify FAS of their scheme's basic details, after which a scheme can then be considered for FAS qualification. As at 29 December 2006, the average time taken (since FAS operations started in September 2005) from 'notification' of a scheme to the date of the first payment to a member of the scheme was 190 working days.
>
> Within this period, the average time taken (over the last 12 months) by the FAS Operational Unit from first receipt from the trustees or administrators of member data to the date of the first payment to a member of the scheme was 24 working days.[90]

In debate on the *Pensions Bill 2006-07*, he said that getting the FAS up and running had been a large task, but it was now paying everybody it was in a position to pay:

> I am afraid that there is a misunderstanding about the task that the financial assistance scheme has had to undertake, which the PPF or whoever else was tasked with running it would have had to undertake. The FAS has had to go through hundreds of schemes to see whether they are eligible; it has had to set up a new IT system; and it has had to get data from the trustees about exactly what people are entitled to and compare that with FAS. That is why there has been a significant upfront cost. That work is now

[87] Ibid
[88] Pensions Bill Deb, 6 February 2007, c362
[89] Ibid, c357
[90] HC Deb, 5 February 2007, c652W

largely complete, and we are paying everybody whom we are in a position to pay. Everybody who has asked for initial payments is being paid. There is no delay in FAS; the delay is in requests for initial payments. We need schemes to come forward and ask for those.[91]

The Financial Assistance Scheme Annual Report 2006-07 said that:

Implementing the review recommendations
3.7 Good progress has been made in implementing the recommendations.

• The data requirement for initial payments has been reduced and guidance has been tailored to take account of comments from the pensions industry. This increased the volume and throughput of member assessments.

• A contract has been established with a leading pension scheme administrator - Mercers Human Resource Consulting Limited to help inject additional skills and expertise into the Operational Unit. The FAS Operational Unit completed an analysis of staff skills and Mercers used this to design a bespoke training course to address the gaps.

• Work has been completed with the Pensions Regulator on how to use his influence to raise the priority level assigned to FAS data by administrators and trustees. Processes have been put in place for the referral to the Pension Regulator of cases where the Trustee or Administrators have indicated that they are not willing to cooperate with FAS.

• A balanced scorecard of measures was introduced over the summer to include revised targets for completed payments and other key work processes.[92]

• The Pension Service has agreed in principle that the Operational Unit should move to their organisation and work is underway to ensure that a transfer takes place as soon as practicable.

Expenditure on FAS administration since its inception is as follows: £1.06 million in 2004-05, £4.73 million in 2005-06 and £3.988 million in 2006-07.[93] The Government estimates that administration of the FAS "will cost around £4.5 million a year up to 2009-10, when we would expect the costs to reduce significantly once the eligibility of all schemes and members has been assessed."[94]

Recent answers to Written Parliamentary Questions provided the following information regarding processing times:

- The average length of time from the date of request to a scheme being accepted for initial payments had fallen from 41 days in October 2005 to 7 days in June 2007.[95]

- In order to obtain a decision on qualification for assistance under the financial assistance scheme (FAS) a pension scheme must successfully go through the two stages of notification and qualification. This involves the trustees and administrators providing basic scheme information to the FAS operational unit (FASOU). As at 29

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91 HC Deb, 18 April 2007, c328

92 *Financial Assistance Scheme Annual Report 2006-07.*
The report notes that "no transfer will take place in advance of the publication of the FAS Assets Review, in the light of which the continuing relevance of this recommendation will be reconsidered."

93 HC Deb, 25 June 2007, c468W

94 HC Deb, 25 July 2006, c1569W

95 HC Deb, 17 July 2007,c206W

June 2007, the average time taken (since operations started in September 2005) from receipt at FASOU of a correctly completed application form for qualification to a qualification decision being issued was 47 working days. Equivalent information on a month by month basis is not available and could be obtained only at disproportionate cost.[96]

- As at 6 July 2007 there are a total of 38 pension schemes whose status for the Financial Assistance Scheme is yet to be decided. Of these, 10 schemes (26 per cent.) are being considered based on the initial information provided by the trustees; we are awaiting further information from the trustees of 15 schemes (40 per cent.) and the remaining 13 schemes (34 per cent.) have indicated that a compromise agreement is in place, so we are unable to progress the application until the legislation to implement the extension to cover these schemes is in place.[97]

On 24 July 2007, Lord McKenzie said he would not rule out wanting to look again at FAS administration if the Review of Scheme Assets identified different approaches to funding.[98]

A review of the FAS data gathering process by Mercer Consulting, which made recommendations for change, was published on 16 August 2007.[99]

The Public Administration Select Committee recommended in July 2007 that the Government should "find ways of speeding up payment as a matter of urgency."[100] In response, the Government said:

> There is significant uncertainty over how many people are actually eligible for payment now and our best estimate is that there might be around 10,000 members within potential FAS schemes who have reached aged 65. As at 20th July 2007, only around 44% of the 683 schemes that qualify for FAS have applied for payments and provided acceptable data on their members. From these the FAS operational unit had conducted assessments on 5,001 people (including some aged under 65). There are no outstanding assessments and this represents all the people on who we have been provided with acceptable data by their scheme. There are 28 schemes that have applied for payments but have yet to provide acceptable member data.
>
> Of the 5,001 that have been assessed as eligible for payments from the FAS. 1,962 are being paid now, 76 will be paid as soon as the individuals have confirmed their personal details and 519 will be paid as soon as they reach age 65. The remaining 3,039 were ineligible either due to the de minimis limit, the cap or because they have been assessed as having no entitlement under other FAS rules.
>
> With Royal Assent of the Pension Bill, payments for those receiving initial payments which are currently 60% will be increased to 80%. Also as soon as the changes to the FAS announced in the Budget come into effect (which we hope will be at the end of the year), all relevant qualifying members who are not currently eligible for payments because of the cap and de minimis limit will be reassessed. <u>In the meantime, any scheme members who believe they are eligible for a payment can contact the FAS</u>

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[96] Ibid

[97] Ibid, c208W

[98] HL Deb, 24 July 2007, c706

[99] Mercer Consulting, *Review of the FASOU Data Gathering Process*,16 August 2007

[100] Public Administration Select Committee, *The Pensions Bill and the FAS: An Update.* Eighth Report of Session 2006-07. HC 922

Operational Unit direct on 0845 601 9941, who will then contact the scheme trustees to seek to arrange a payment.[101]

The response includes a case study and a more detailed operation of the arrangements for making payments of FAS, the operational difficulties faced and the steps being taken to address them. As stated above, a number of measures to speed up initial payments were announced on 20 September 2007.[102]

In debate on the *Pensions Bill 2007-08,* Pensions Reform Minister, Mike O'Brien explained that while he did not have a "closed mind" as to whether some people from the PPF should oversee the operation of the FAS. However:

> There is an argument for saying that the PPF should not take over something that is an entirely different sort of process. The new scheme is not holding assets and then making payments from them. It is operating more like the DWP: having a pot of Government money from the Treasury and then spending it by making benefit payments to various people…I do not have a closed mind, but I want to ensure that any change that might be brought about does not cause disruption.[103]

4.2 Review of Scheme Assets – the 'Young Review'

At the same time as announcing the increase in public funding for the FAS in March 2007, it was announced that a review was being set up to look at making the best use of assets within the pension schemes. The Secretary of State for Work and Pensions said that:

> Having now settled the public expenditure support for these schemes, I have today set up a review to:
>
> - examine how we make best use of the assets in pension schemes that are winding up under funded with an insolvent employer;
>
> - determine if these sources of funding could be used to increase assistance for affected scheme members;
>
> - consider any suggestions from interested and concerned parties.
>
> The review will be conducted by the Department for Work and Pensions and advised by a panel of technical experts. Due to the complexity of the issues involved the review will be informed by advice from the Government Actuary Department. This will commence immediately and the review will report by the end of the year.
>
> Let me be clear that the 80 per cent. level of support we have committed is from the taxpayer, and it is not contingent on the release of any other funding source.[104]

Further details of the objectives of the review were announced on 23 April 2007.[105] The review was to look not just at how better use can be made of assets in schemes winding up but also at "other sources of non-public funding, which have not already been allocated, could boost assistance levels further." In addition, it would look at whether there were other

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[101] Public Administration Select Committee, *The Pensions Bill and the FAS: An Update: Government Response to the Committee's Eighth Report of Session 2006-07,* HC 1-48

[102] *Trustees' cooperation vital to FAS payment drive – O'Brien, DWP Press Release, 20 September 2007*

[103] Pensions bill committee, 19 February 2008, c523

[104] HC Deb, 28 March 2007, c113WS

[105] http://webarchive.nationalarchives.gov.uk/+/http://www.dwp.gov.uk/lifeevent/penret/penreform/fas/jamespurnellletter23-04-07.pdf

solvent employer schemes, in addition to those with a compromise agreement in place which should be considered for eligibility. [106]

Interim Report

The Review Team published its interim report on 17 July 2007. This concentrated on:

- the value of assets in FAS schemes, their ownership and stewardship;
- potential alternative ways of using these assets and whether there are options to increase value;
- other non-tax sources of funding; and
- the key issues related to pension schemes with solvent employers.[107]

The review found that previously there had been no informed estimate of the quantity of assets in FAS schemes. However, commentators had generally suggested "it was at least £1 billion. The review team estimated that the level of assets was higher than this, at around £1.7 billion:

> 1.7 These scheme level returns suggest that there are assets of around £1.7 billion in assets available, with approximately £1.3 billion of assets in schemes that have not committed any assets, and around £0.4 billion remaining in schemes that have started to commit assets to pay current or future pensioners. The vast majority of these assets are held in gilts and fixed interest assets.[108]

The review team found that the current arrangements were unlikely to be the most effect way of using the residual assets:

> In particular this report concludes that the current arrangements (where each scheme uses their assets to purchase annuities in order to secure as much of the scheme pension as possible and Government then tops this up to a prespecified level) are unlikely to be the most effective way of using the estimated £1.7 billion in residual scheme assets. The Review team believe that additional value could be generated solely by increased scale of the annuitisation process and with scope to make further additions coming from risk sharing and alternative management of assets and liabilities.[109]

Each of the potential alternative options, however, was considered to raise "complicated legal and operational questions which require additional consideration before the Review team is able to settle on a preferred solution."[110]

Regarding other possible funding sources, the review team did not consider "unclaimed bank and building society assets as these are already being considered within a separate HM Treasury exercise."[111] It did identify a number of other potential non-tax funding sources. However, it considered that these raised complex legal and operational issues and that was at present "little evidence on how much additional funding they might provide":

[106] DWP Press Release, 23 April 2007*, 'Purnell announces review panel and issues call for evidence'*
[107] Financial Assistance Scheme. *Review of Scheme Assets. Interim Report.* July 2007
[108] Ibid, para 1.7
[109] Ibid, foreword
[110] Ibid, para 1.14
[111] Ibid, para 1.15

> 1.16 These sources raise complex legal and operational issues, and at present there is little evidence of how much additional funding they might provide. Hence the Review team believes there is a need to conduct further investigation, involving Government and industry as required, to determine the viability of some of these options.
>
> 1.17 We do not, however, believe that any voluntary contributions, 'windfall' taxes on profits of organisations who might be thought to have been responsible for the level of underfunding or insolvency, an extension of the Pension Protection Fund (PPF) or Pensions Regulator (tPR) levies, the National Insurance Fund 'surplus' or NS&I 'unclaimed assets' are credible alternative funding sources and will not be investigating these areas further. Some of these options also fall outside of the scope of this Review.
>
> 1.18 Unclaimed personal pensions and life assurance policies might theoretically provide a new source of funding. However, there would be substantial legislative and administrative barriers to establishing such a scheme, with a very uncertain income.[112]

The review team concluded that there was insufficient information to enable it to make a recommendation on whether the FAS should be extended to cover schemes that wound up under-funded but where the sponsoring employer remained solvent.

Overall, the review team concluded that it had identified sufficient assets and potential options to justify further investigation in a number of areas before producing its final report:

> **Next steps**
>
> 7.2 The Review team feels that we have identified sufficient assets and potential options to justify further investigation in a number of areas. These are:
>
> • Deciding between alternatives to the current FAS model. This will require further consideration of the legal, legislative, administrative and operational aspects of each option. The Review team will work with Government and industry to take this forwards in time for our final report;
>
> • Whether it is possible to supplement the committed Government funding, and any additional revenue generated by better management of assets and liabilities, with viable alternative non-tax sources of funding. The Review team will again need to consider legal, legislative and operational aspects of the remaining options;
>
> • The circumstances of those pension schemes where the sponsoring employer has not either undergone an insolvency event or compromised their debts, to determine whether there is a case for the Review team recommending the Secretary of State for Work and Pensions includes them in FAS.
>
> 7.3 We also plan to hold further focussed consultation with key stakeholders and experts in the coming months and will be providing a final report before the end of 2007. In the meantime the Review team would welcome comments on any aspects of this report or our programme of future work more generally; our contact details are provided below.

On 17 July, the then Minister of State for Pensions Reform, Mike O'Brien, issued a statement in response to the Review Team's Interim Report. This said that "while it is too early to say

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[112] Ibid, paras 1.16-17

with any certainty that the Review will lead to a means of improving FAS above the promised 80% level (subject to the cap), it is hopeful that this is the case":

> The Assets Review has made considerable progress in identifying the value of assets remaining in pension schemes that qualify for FAS and has stated that the current process of annuitisation on a scheme by scheme basis may not offer the best use of these assets. It concludes that it is probable that additional value for money could be secured through a number of different methods and the team will focus on investigating the feasibility of these options before it delivers its final conclusions later in the year. I welcome these interim findings and am hopeful that the work that the Review team is to continue over the summer will enable us to increase the value of assistance that FAS is able to offer without further calls on public funds.
>
> The potential for any increase will, of course, depend on the value of assets available. While it is too early to say with any certainty that the Review will lead to a means of improving FAS above the promised 80% level (subject to the cap), it is hopeful that this is the case. In the meantime the Government's position has always been (and remains) that trustees must act in the best interests of their members but, trustees may wish to take into account the effect that the decisions they take about winding-up their scheme may have on the amount of assets potentially available to increase assistance levels.[113]

In debate on *The Pensions Bill 2006-07* on 17 July Mike O'Brien announced that the Government would provide additional "match funding".[114] He said that the key point raised by the Young Review was that bringing together the assets in the failed pension schemes would give "greater purchasing power in terms of the market".[115] In the House of Lords, following an amendment tabled by Opposition Work and Pensions Spokesperson, Lord Skelmersdale, the Pensions Bill was amended to enable a temporary restriction to be placed on the purchase of annuities. The *Explanatory Notes to the Pensions Act 2007* say:

> 358. Section 19 requires the Secretary of State to make regulations to temporarily prevent the purchase of annuities by trustees of relevant pension schemes except where they have entered into a binding commitment or where the FAS scheme manager considers such purchase to be appropriate.[116]

The *Financial Assistance Scheme (Halting Annuitisation) Regulations 2007*, (SI 2007 No. 2533) were laid before Parliament on 4 September 2007 and come into force on 26 September.[117]

4.3 Final report

The final report of the Young Review was published in December 2007.[118] The report made a number of conclusions and recommendations. The interim report had estimated that there were around £1.7 billion of assets remaining uncommitted in FAS schemes yet to complete wind up.[119] Its final report summarises its conclusions on the key issues as follows:

> The **optimal use of scheme assets**, where we find:

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[113] HC Deb, 17 July 2007, c20WS
[114] HC Deb, 17 July 2007, c194-5
[115] Ibid, c198
[116] Explanatory Notes to the Pensions Act 2007
[117] http://www.legislation.gov.uk/uksi/2007/2533/contents/made
[118] Financial Assistance Scheme *(FAS) Review of Assets, Final Report,* December 2007
[119] Financial Assistance Scheme *Review of Scheme Assets, Interim Report,* July 2007, p6, para 1.7;

- that the most appropriate use of assets depends on the appropriate level of guarantee for assistance levels:
  - if guaranteed assistance levels are appropriate then we recommend that Government takes in the assets and pays the amounts to all FAS beneficiaries as they fall due. Government has indicated that they do not feel taking on investment risk represents value for money for the public sector;
  - however, if some element of risk sharing is appropriate then managed use of the assets in a fund based option, with appropriate investment risk, is the best way forward.
- any risk sharing should be structured in order to guarantee assistance levels to those closest to retirement and provide those further from retirement with a reasonable expectation (subject to fund performance) of assistance at similar levels;
- both options generate broadly equivalent 'economic value' since any additional financial value involved where investment risk is taken just represents a risk return trade off, where either members or the taxpayer hold the uncertainty of investment performance;
- while risk sharing potentially reduces costs, it does so at the expense of certainty to the members.

The **costs of FAS**, where the Review team finds that, under the Budget 2007 extension (80 per cent expected core pension for all, removal of the de minimis, increasing the cap to £26,000 and including schemes with a compromise agreement), Government faces a cost of around £2 billion NPV (or a cash cost of around £8.6 billion) over the next 70 years or so.

Potential **alternative sources of funding**, where we note Government may want to undertake further investigation with regard to:

- unclaimed personal pensions and insurance policies;
- lost shareholdings;
- customer payments;
- unclaimed assets within collective investment companies; and
- unclaimed winnings from gambling.

Out of the many other alternative sources of funding that we have identified most are either outside the scope of the Review (for a variety of reasons such as they would necessitate raising taxation e.g. the NIF 'surplus', or are already utilised e.g. unclaimed National Lottery prizes) or are not credible (for example voluntary contributions).

We wish to make clear that it is not the role of the Review to recommend whether Government should choose to legislate to access these funds or whether, if they do, such monies raised should go to support FAS; rather it is our role to identify the existence of these alterative sources of funds. We also note that there are complicated legislative and operational issues that would need to be resolved before Government could access these funds and the amounts that could be raised are uncertain.

Solvent employers, where our views are:

- that there is, in general, no material distinction between:
  - those schemes which have wound up underfunded with a solvent employer where a compromise agreement is in place, without which the employer would have gone insolvent; and
  - those schemes where no compromise agreement has been reached.

- scheme members are likely to have lost pensions in both cases and whilst it is clearly regrettable that some employers have not fulfilled their moral responsibility to their employees, they have fulfilled their legal duty;
- employees have no legal recourse to recover their lost pensions; and
- employers are unlikely, even when they are able to, to provide any further voluntary support for these schemes.

However, we wish to make clear that it is not the role of the Review to recommend whether these schemes should be included in FAS; that remains a matter for Government.[120]

A full list of the conclusions and recommendations can be found on page 24 of the report.

4.4 Government's response

In response to the report, the Secretary of State for Work and Pension announced a further extension of the FAS as follows:

> **The Secretary of State for Work and Pensions (Rt Hon Peter Hain)**: The Prime Minister announced last week that the Government would make a statement on the review of pension scheme assets undertaken by Andrew Young. The Prime Minister said that as a result of the review the Government would be able to announce that assistance from the Financial Assistance Scheme (FAS) would be guaranteed to 90%.
>
> Andrew Young's report is published today and I am very pleased that we are able to announce a settlement that helps the 130,000 people already eligible for FAS – and an additional 11,000 people in some schemes with solvent employers. These have suffered losses, through no fault of their own, as a result of their pension schemes winding up under funded between 1st January 1997 and 5th April 2005, before the introduction of the Pension Protection Fund.
>
> In his interim report published in July, Andrew Young identified that there was approximately £1.7 billion in assets in affected pension schemes that had not been used for annuity purchase. He concluded that the current system of annuitisation was not the best use of these assets. He said alternative solutions could provide the basis for higher assistance for members.
>
> The Government recognised in July that more needed to be done to help those who lost their pensions. Following the publication of Andrew Young's interim report, we therefore committed to match the extra value identified by the Review with the goal of moving towards 90% assistance. We also introduced regulations to protect the £1.7 billion, placing a temporary halt on the purchase of annuities.
>
> Since July, Andrew Young has been considering how much additional value might be generated by alternative treatment of the assets. These are complex issues and I thank him for the clarity of the final conclusions in his report.
>
> He has concluded that, to provide a guaranteed benefit level, the best value will come from Government absorbing all the residual assets in the schemes and then making the associated payments as they fall due. He has also said that members of schemes wound up by solvent employers are in similar circumstances to those in schemes wound up by insolvent employers.
>
> Since receiving a draft of the report ten days ago, I have been working closely with the Chancellor to finalise the details of the Government response.

[120] Financial Assistance Scheme (FAS) *Review of Assets, Final Report*, December 2007, Foreword

I can announce today the following extensions to the Financial Assistance Scheme:

• All scheme members will be guaranteed 90% of their accrued pension at the date of commencement of wind up, revalued to their retirement date.

• This will be subject to a cap of £26,000, the value of which will be protected.

• Payment of assistance derived from post-1997 service will be increased in line with inflation (subject to a 2.5% limit).

• Assistance will be paid from the scheme's normal retirement age, subject to a lower age limit of 60.(people who are unable to work due to ill health will also be able to apply for early access to their payments from the age of 60, subject to actuarial reduction).

• Where their share of scheme funds allows, members will be able to commute some portion of their pension to a lump sum.

• Assistance will be extended to members of schemes which wound up under-funded (after 1st January 1997 and before the employer was required to meet the full buy-out cost) where the employer is still solvent.

The final details of these proposals will be confirmed in the New Year, when we will outline the legislation necessary to give effect to this package. We will do this as quickly as possible and call on all parties involved to work with the Government to ensure this commitment results in increased payments in the fastest possible time. Our priority will be to ensure that people who have already reached their scheme pension age receive payment at 90%.

The additional costs of this package will be £935 million in Net Present Value (NPV) terms. This will be on top of the £2.0 billon NPV we have already committed – £8.6 billion in cash terms. This will take the total commitment to £2.9 billion NPV, or £12.5 billion in cash terms.

This exceeds the Government's commitment to match the additional value identified by Andrew Young.

The Government recognises the difficulties experienced by those who lost their pensions through no fault of their own. We believe that the revised Scheme we have announced today represents a generous and appropriate final settlement.[121]

5 Debates on FAS

From its inception, it was argued that the FAS should be more generous. The Government's response to the consultation on the first extension in May 2006 to include those within fifteen years of pension age, indicated that many respondents still felt it did not go far enough:

> Many comments were on the broad scope of the scheme rather than the new regulations, covering topics such as the position of solvent employers, the full restoration of pension benefits, the application of a cap and the non-indexation of FAS payments. …..The phased approach to the level of assistance for new members brought into the scheme by the extension was also criticised as being unfair.[122]

[121] HC Deb, 17 December 2007, c100WS

[122] *Financial Assistance Scheme (Miscellaneous Amendment) Regulations 2006. Government response to the consultation*. November 2006

Following a further extension announced in Budget 2007, arguments focused on whether FAS should provide PPF level benefits and whether schemes with solvent employers should be included.

5.1 Should the FAS provide PPF level benefits?

The Government made it clear at the start that FAS assistance would be less than the PPF level of compensation,[123] (i.e. 90% of promised benefits), but the intention was that it should be a "significant proportion of their pension rights".[124] It had also indicated that there might be differential provision with those who were nearest retirement and/or who had the longest service and/or who had suffered the greatest losses getting more.[125]

Even after the extension to the FAS announced in the Budget 2007, so that it would provide 80% of "expected core pension". The concept of "expected core pension" has come under criticism.[126] In a letter to Lord Oakeshott on 17 December 2007, Lord McKenzie explained that the term was used:

> To indicate that the FAS provides a contribution towards the replacement of retirement income and is not designed to replicate every detail of people's pension schemes or what they expected from those schemes. In particular, FAS standardises those ancillary benefits that may have been payable to survivors.[127]

Prior to the announcement on 17 December, the FAS was criticised for being less generous than the PPF. The difference between the two schemes at that point are summarised in the final report of the Financial Assistance Scheme, Review of Scheme Assets.[128]

In response to arguments that FAS should provide PPF level benefits, Pension Reform Minister, James Purnell, said that whereas the PPF is funded through a levy on pension scheme members, all the money for the FAS to date had come from the taxpayer.[129]

However, following the final report of the Review of Scheme Assets, the Government announced a third extension of the FAS, making it "broadly comparable to the compensation paid by the Pension Protection Fund".[130] However, it appears that some differences remain. For example, PPF compensation is payable from the scheme's normal pension age.[131] It can be claimed earlier than this, from age 50 (rising to 55 by 2010), but payment will be actuarially reduced to reflect the fact that it will be in payment for longer.[132] FAS payments will in future be made:

123 Malcolm Wicks, HC Deb 19 May 2004, cc 990-991, and HC Deb 2 December 2004, cc 64-66WS
124 Malcolm Wicks, HC Deb 19 May 2004, c 988
125 See, eg, Baroness Hollis, HL Deb 13 October 2004, c GC 119. HC Deb 2 December 2004, cc 64-66WS says Government is "minded to gear assistance levels with reference to the number of years an individual is from their retirement"
126 See for example, Ros Altmann Press Release, 12 December 2007, 90% of what? Is Gordon hoping to get away with more spin, or is this for real?
127 DEP 2008-0002 Lords
128 Financial Assistance Scheme (FAS) *Review of Assets, Final Report*, December 2007, p144;
129 HC Deb, 18 April 2007, c330
130 Pensions Bill Deb, 19 February 2008, c507-08
131 Pensions Act 2004, Schedule 7, para 11 (1) and15 (1)
132 http://web.archive.org/web/20070721010036/http://www.ppfonline.org.uk/web.chi/ppfstatic.html

From the scheme's normal retirement age, subject to a lower age limit of 60 (people who are unable to work due to ill health will also be able to apply for early access to their payments from the age of 60, subject to actuarial reduction).[133]

5.2 Should the FAS cover solvent employer schemes?

The Ombudsman included in her report four representative complainants. In two of these cases, the employer remained solvent. In the case of Mr G:

> 2.13. His employer decided to wind up the pension scheme in February 2002. It was 101% funded on the MFR basis at that time. He was subsequently advised that, as the scheme was not able to meet its liabilities in full, he would be likely to receive a pension that was only about 24% of his accrued rights and that this would reflect only approximately 75% of his Guaranteed Minimum Pension.

In the case of Mr D:

> 2.21 After a change in ownership in 2000, the company – whose current owners are still trading – decided to close the pension scheme and commence wind-up. The scheme was under-funded and trustees had obtained a court order to establish that the sponsoring employer had to pay to the scheme approximately £2.5 million over no more than ten years.[134]

The Ombudsman's recommendations cover schemes where the employer has not experienced an insolvency event.[135] The Government has said that it has not been able the estimate to cost of including such schemes in the FAS because of the limited data available:

> 13. There is very limited data on the numbers and circumstances of schemes with solvent employers which have wound up underfunded. Therefore it is not possible to estimate the costs of including these schemes with any certainty. The issue of schemes with solvent employers is complex, as many members of such schemes will have suffered small losses, if any loss at all (for example, where wind up is due to a merger of schemes and members are transferred to a different scheme providing the same benefits). Indicative estimates are that allowing for schemes with solvent employers could increase the costs by up to 25 per cent.
>
> 14. However, given the high level of uncertainties already inherent in the assumptions underlying the base costings, and the different circumstances of schemes winding up with solvent employers (e.g. possibly higher funding levels), simply enhancing the base costing by 25 per cent would lead to an estimate with a very high degree of variability. The costs of covering schemes with solvent employers have therefore not been included in these estimates. These costings are thus likely to be an underestimate of the true cost.[136]

The question of whether any schemes where the employer remained solvent could be included in the FAS was discussed when the *Pensions Bill 2003-04* went through Parliament. On 13 October 2004, then Parliamentary Under-Secretary of State, Baroness Hollis of Heigham, said that the Government had not at that time decided whether solvent employers should be included. It was in the process of "acquiring relevant information to see what the

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[133] HC Deb, 17 December 2007, c100WS

[134] Parliamentary and Health Service Ombudsman, *Trusting in the pensions promise*, March 2006,

[135] *Guide to the Parliamentary Ombudsman's Report:: 'Trusting in the Pensions Promise',* Office of the Parliamentary and Health Service Ombudsman, 2006

[136] DWP, *Response to the Report by the Parliamentary Ombudsman – "Trusting in the pensions promise",* June 2006

liabilities and consequences might be" and "seeking views on this in consultation."[137] At a later stage of the debate, the Minister explained that the Government was trying to determine whether it could draw "workable distinctions" in regulations between employers in different circumstances. There was also a concern that an early announcement that solvent employer schemes would be admitted into the FAS (but not PPF) would encourage schemes to wind up underfunded and compromise the debt at artificially low levels:

> We are aware that the blanket term "solvent employer" covers an enormous variety of different circumstances. The purpose of our ongoing consultation and research is to understand what these are and whether and to what extent there may be sensible, workable distinctions to be drawn in the detail of the regulations while protecting the principle that neither the taxpayer nor the levy payer should stand behind an employer's voluntary pension promise.
>
> Now that we have announced—this refers back to our previous discussion—that there will be no gap between FAS and PPF, the principle is even more important. Let us consider the position of a solvent employer and pension scheme trustees, tomorrow, who are negotiating a compromise agreement relating to an underfunded pension scheme. Let us assume that they believe they could find 70 or 60 per cent. If they know that FAS will include schemes with solvent employers up until April 2005, the trustees will have less incentive to press for a high level of employer contribution and the employer has less incentive to agree to a high level. Therefore, instead of settling at 50, 60 or 70 per cent, they might very well compromise at a much lower level, expecting FAS to take up the strain.[138]

On 18 April 2007 Pensions Reform Minister, James Purnell, announced an extension of the FAS to cover schemes where a compromise agreement was entered into to prevent the employer being forced into insolvency:

> We can announce today that we will further extend the FAS to cover members of schemes that began winding up between 1 January 1997 and 5 April 2005...when a compromise agreement is in place and when enforcing the debt against the employer would have forced the employer into insolvency. We estimate that that will benefit an additional 8,000 members of some 15 schemes.[139]

It was also announced that the Financial Assistance Scheme Review of Assets would also have as one of its objectives:

> To determine whether there are other pension schemes (in addition to those with compromise agreements) where although the sponsoring employer did not undergo an insolvency event, it would not be reasonable to expect the employer to have a continuing responsibility for supporting an under funded scheme.[140]

The extension to the scheme does not cover all schemes which wound up under-funded where the employer remains solvent. The Minister explained that:

> We are trying to create a separation between schemes that decided to put in place a compromise agreement before the introduction of the FAS and schemes that did not do so. The danger of creating a procedure as set out in new clause 25 is that perfectly

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137 HL Deb, 13 October 2004, c131
138 HL Deb, 15 November 2004, c1243
139 HC Deb, 18 April 2007, c326
140 MGP 0/1456

viable companies could dump their pension commitments on the taxpayer, which would not be right.[141]

In answer to a further WPQ, the Minister said:

> Ongoing solvent employers have a clear moral duty to support their pension schemes and to provide the benefits that members were expecting. The taxpayer should not be expected to step in and make up such shortfalls in scheme funding levels where there is a sponsoring solvent employer. However, we recognise the complexity of this issue, and one element of the financial assistance scheme review of scheme assets is to examine whether—in addition to those with compromise agreements—there are other pension schemes where it would not be reasonable to expect the employer to have a continuing responsibility for supporting an underfunded scheme.[142]

Dr Ros Altmann commented that:

> There was a welcome concession from the Government today, with the inclusion of some (but not all) of the solvent employer scheme members in the FAS. Unfortunately, however, there will still be people left out and we do not know who they are.[143]

On 3 May 2007, the Pensions Action Group wrote to DWP to notify it of its intention to apply for Judicial Review of the recent extensions of the FAS. One of its arguments was that the decision to include some solvent employer schemes, while excluding others, is "irrational, discriminatory and unlawful."[144]

On 11 May 2007, the Public Administration Select Committee published a report which recommended that solvent employer schemes should be included in the FAS. The Committee said:

> Those who have lost their pension entitlements through scheme wind up by solvent companies face losses, as well as those whose employers became insolvent. Their plight is the result of the inadequate regulatory framework in place between 1997 and 2005 (and, in particular, before June 2003). They, too, lacked clear information about the risks they ran, and had limited opportunities to avoid such losses. They can only be helped by the taxpayer.
>
> 21. The Government has said that it will ask the team reviewing the FAS, which is to report later this year, to consider the position of solvent employer schemes. That is not good enough. We urge the Government to take the opportunity offered by the Pensions Bill, and ensure that the FAS covers members of schemes wound up by solvent employers before the Pension Protection Fund came into operation. [145]

The Government's response to the Committee's recommendations (published on 13 July 2007) said the following regarding the possible inclusion of 'solvent employer schemes' in the FAS:

> Conclusion

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[141] HC Deb, 18 April 2007, c326

[142] HC Deb, 4 June 2007,c10

[143] Dr Ros Altmann, Press release, 18 April 2007, Government wins narrow victory in the commons – but may still face defeat in the Lords.

[144] Dr Ros Altmann, Press Release, 3 May 2007, *Government pensions policy fiasco continues –Hutton faces new Judicial Review*

[145] Public Administration Select Committee, *Pensions Bill: Government Undertakings relating to the Financial Assistance Scheme*, Fifth Report of Session 2006-07, HC 523

Those who have lost their pension entitlements through scheme wind up by solvent companies face losses, as well as those whose employers became insolvent. Their plight is the result of the inadequate regulatory framework in place between 1997 and 2005 (and, in particular, before June 2003). They, too, lacked clear information about the risks they ran, and had limited opportunities to avoid such losses. They can only be helped by the taxpayer. (Paragraph 20 of the report)

27. Solvent employers, who may well be trading profitably, must have a moral obligation for making good their pension promises to scheme members. It can not be right, as the Committee asserts, that responsibility should rest solely with the taxpayer.

28. In setting up the FAS the Government has sought to maintain a balance between defining insolvency as widely as possible in order to bring schemes and their members into FAS and not absolving ongoing solvent employers, who could themselves make up losses to members, of their responsibilities. There is also a moral hazard issue at stake—trustees may be negotiating settlements with solvent employers as part of the wind-up process. We must be careful that we do not make these negotiations irrelevant and remove any incentive for an employer to meet their moral obligation by including these schemes within FAS without proper investigation of their circumstances.

Recommendation

The Government has said that it will ask the team reviewing the FAS, which is to report later this year, to consider the position of solvent employer schemes. That is not good enough. We urge the Government to take the opportunity offered by the Pensions Bill, and ensure that the FAS covers members of schemes wound up by solvent employers before the Pension Protection Fund came into operation. (Paragraph 21 of the report)

29. This is a very complex area and the Government is not yet fully apprised of the circumstances and situations of all schemes which may seek to contend that they are in a closely analogous position to schemes with compromise agreements or otherwise contend that their members should be eligible under the FAS. Any pension scheme members who fall outside of the current FAS rules and who are faced with significant pension losses are advised to make representations to the review team as quickly as possible.

30. The review team will publish their interim report before the end of July and their final report before the end of the year. As outlined above, the Government would not require primary legislation to further extend pension scheme eligibility for FAS. This can be amended through affirmative regulations, so is not dependent on the current Pensions Bill.[146]

As explained above, the Financial Assistance Scheme: Review of Scheme Assets, was asked to look at whether there were solvent employer schemes (other than those with a compromise agreement in place) that it would be reasonable to include in the FAS. The final report of the review, published in December 2007 explained that the funding rules in place before June 2003 meant that an employer could wind up a scheme, meeting its legal debt to it, but still leave the scheme with insufficient assets to pay its members benefits in full:

46….In particular where the debt payable by the employer was set at the Minimum Funding Requirement level, there was a great likelihood that members would suffer financial losses as it was not designed to provide sufficient pension assets within schemes to meet the full costs of securing member benefits for deferred members.

[146] Public Administration Select Committee, *The Pensions Bill and the FAS: An Update. Including the Government Response to the Fifth Report of Session 2006-07*, Eighth Report of Session 2006-07, p 16

> 47. The impact of the MFR on scheme funding was highlighted by the Parliamentary Commissioner for Administration, in her report published last year, which found, in relation to the MFR, that "….where an employer discharged in full its legal liabilities in relation to scheme funding this might still have led to significant – but lawful – shortfalls."
>
> 48. In its response to the House of Commons Public Administration Select Committee the Government has acknowledged that it was legal for employers to close a pension scheme funded to Minimum Funding Requirement levels, even if the benefits promised by the scheme could not be secured "The MFR was not … designed to ensure …that those benefits would be secured in full if the scheme wound up."
>
> 49. Government also acknowledged that trustees and members have no legal means by which they might ensure full benefits are paid – "No legal recourse would be available in relation to the employer debt legislation for pre 11 June 2003 wind ups, if solvent employers had met their legal obligation to pay the debt calculated in accordance with the legislation."
>
> 50. So, although it is clear that employers acted within the parameters of the regulatory framework in place at the time and met their legal obligations, a consequence of this is that some pension scheme members have lost part of the pensions they were expecting. In these circumstances, scheme members have no legal grounds on which to pursue the employer to make good any loss of expected benefits.[147]

The review team concluded there was in general no material distinction between:

> - those schemes which have wound up underfunded with a solvent employer where a compromise agreement is in place, without which the employer would have gone insolvent; and
>
> - those schemes where no compromise agreement has been reached but any debt paid by the employer was insufficient to enable full benefits to be provided to the members.[148]

On 17 December 2--7, the Secretary of State announced that FAS would be extended to members of schemes which wound up under-funded (after 1st January 1997 and before the employer was required to meet the full buy-out cost) where the employer is still solvent."[149]

5.3 Debate on the *Pensions Bill 2006-07*

During the course of the current *Pensions Bill* there have been sustained attempts to further improve the compensation for FAS eligible recipients through the establishment of a 'lifeboat fund'.

An amendment tabled at Report by a cross party group of MPs[150] proposed the establishment of a 'Pension Protection Fund Lifeboat' (New Clause 41), which would make supplementary payments to those eligible for the FAS, taking their level of compensation up to PPF levels. One of the ways in which this proposal is distinct from the Pensions(Unclaimed Assets) Bill is that it was proposed that the Lifeboat Fund would be funded initially by government loans,

[147] *FAS Review of Scheme Assets – Final Report'*, p119
[148] '*FAS Review of Scheme Assets – Final Report'*, p20
[149] HC Deb, 17 December 2007, c100WS
[150] New clauses 39-47, David Cameron, Sir Menzies Campbell, Mr Frank Field, Mr George Osborne, Mr Philip Hammond, Alan Simpson

and in the longer term with unclaimed assets from bank and building society accounts.[151] Philip Hammond MP, the then Shadow Work and Pensions spokesperson, explained that:

> The scheme that we have set out, involving a lifeboat fund, in no way precludes using the assets that the Minister hopes to find in his review, including, possibly, the residual assets in the schemes; those could go into the lifeboat fund. The difference between the Government's approach and the approach that we are setting out in this group of amendments is that we are proposing to create that structure immediately, and by the means of a modest loan, we would be able to start delivering immediately to a group of people who need help now, not at some point in the future.[152]

He provided an estimate of the costs involved:

> The initial cost will be approximately £30 million in the first year, and that will be funded by a Treasury loan of £30 million, which is way below the rounding error in any of the accounts that his Department produces.[153]

In response, then Minister of State for Pensions Reform, James Purnell, said that:

> The Conservatives' proposal for a lifeboat fund is just another uncosted policy. They propose to make a loan from the Treasury. What is a loan from the Treasury other than public expenditure? It is a bit like going to a bank and saying, "Give me a mortgage. I am going to find someone round the corner to pay it back[154]

The Government has established a review to "examine how we make best use of the assets" in affected pension schemes[155] and whether "these or other sources of non-public expenditure funding (that have not already been allocated) could be used to increase assistance for affected scheme members." [156] The Minister said that such issues should be considered as part of that review:

> we will consider all suggestions that people put forward—we look forward to his submission. All that we are saying is that this needs to be based on proper work by experts, rather than amendments that, with great respect, the hon. Gentleman does not know are workable.[157]

The Minister explained that if additional resources were identified through this review, this could supplement the 80% levels of compensation being provided by the taxpayer, bringing the total nearer to 90%:

> The Government amendment will guarantee that FAS members will get at least 80 per cent. of their core pension, but through the review we are making a firm commitment to consider other sources of funding. We understand the aspiration of Community and Amicus to achieve PPF-level pensions for their members, but there is still no certainty about the funds available in the failed pension schemes, and until the review is completed it is not possible to give a guarantee, which is what the Tory Front Bench team is trying to do. However, we will consult Community and Amicus throughout the

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[151] HC Deb, 18 April 2007, c319-20,325
[152] Ibid, c336
[153] Ibid, c337
[154] HC Deb, 18 April 2007, c 329
[155] HC Deb, 28 March 2007, c113WS
[156] DEP 07/908
[157] HC Deb, 18 April 2007, c324

process to ensure that the funds that are available are applied to supplementing FAS to get nearer to 90 per cent.[158]

New clause 41 was negatived on division by 282 votes to 260. [159]

A similar set of amendments were, however, introduced in the House of Lords. The then Opposition spokesperson, Lord Skelmersdale, explained that:

> Amendment No. 70 is the longest and most important of the group, which all together would set up a pension protection lifeboat fund. The fund would have several objectives: not only would it be run by the Pension Protection Fund, but it would make supplementary payments to eligible pensioners from their normal retirement age under their pension scheme, with no compulsory annuitising. That would be paid for in the first instance as loans by the Secretary of State and repaid under Amendments Nos. 70 to 74, which would set up an unclaimed assets recovery fund, the functions of which would be to ascertain whether non-governmental assets were available and then transfer them to the lifeboat fund.[160]

Liberal Democrat spokesperson, Lord Oakeshott of Seagrove Bay said:

> The key point for Liberal Democrats is that the PPF benefits should be guaranteed and the pensioners who have suffered for so long should know that they are going to get them.[161]

There was not, however, universal support for the amendments. Some peers argued that any assistance would most likely result in eventual contributions from taxpayers. Cross-Bench Peer, Lord Turnbull, referring to the unclaimed assets of insurance companies, argued that:

> The concept of unclaimed assets proposed by the noble Lord, Lord Skelmersdale, is a fiction. These are not bona vacantia where ownership is unknown. There is clear ownership of with-profits funds – 90 per cent is owned by the policyholder and 10 per cent by the shareholder…..If Parliament decides that it must do more for disappointed pensioners, it must place the burden on some broader backs: taxpayers at large.[162]

Labour Peer, Baroness Hollis of Heigham, said:

> I understand that there is a review of unclaimed assets in lieu, which should report in July. If there are any such unclaimed assets, or if the industry voluntarily wishes to contribute to FAS, as the 2004 legislation made clear it should be encouraged to do, that would be fine. But, in practice, a lifeboat scheme would turn out to be a government loan, interest free, without, I suspect, much possibility of repayment—in other words, a covert taxpayers' additional contribution to FAS. That is what is being proposed here, and we should face up to that.[163]

Responding for the Government, Lord McKenzie of Luton said:

> The review of pension scheme assets announced by the Secretary of State for Work and Pensions on 28 March has already started work. By the end of summer, it will provide the Secretary of State with initial findings. It will provide a full report on the availability of assets within relevant failed pension schemes and what might be done

[158] HC Deb, 18 April 2007, c333
[159] Ibid, c363
[160] HL Deb, 6 June 2007, c 1162
[161] Ibid, c1164
[162] Ibid, c1168-9
[163] Ibid, c1172

with them by the end of the year. We may reflect on what the so-called orphan assets are that seem to be floating around on which the Conservatives and Liberal Democrats base their claim to change the FAS scheme provided for in Clause 18. We have heard from the noble Lord, Lord Turnbull, about the issue of assets of long-term with-profits funds of life companies. As he rightly said, they are not free assets. I ask the noble Lord, Lord Skelmersdale, whether he sees assets of that nature as being fair game for the agency that he seeks to establish. Are those assets that he believes can be garnered to support his proposed scheme, or does he accept that those assets are not available and not free?

On banking assets, is the noble Lord saying that we should revisit the proposition already advanced and consulted on that unclaimed banking assets should be made available for community use, especially youth projects? Is part of his proposition to redirect some of those funds? Is he saying that there are free assets in defined benefit occupational schemes written under trust? We are entitled to know, because that goes to the heart of whether his amendment is real or a fiction.

The Government are fully engaged in exploring the potential of unclaimed assets within relevant failed pension schemes. We will, if it would make a real difference to members and not present an unacceptable risk to the taxpayer, use them to supplement FAS payments. It is not sensible to pre-empt the findings of the review, it is not desirable to set up an organisation paralleling the core business of the review, and it is not fair to further raise the expectations of members about the level of assets that might be out there.[164]

Lord Skelmersdale's amendments to the Bill, including the amalgamation of the management of the FAS with the PPF; the extension of the FAS to schemes where the employer remains solvent; the proposal for a Pension Protection Lifeboat Fund which would enable additional payments to FAS recipients; the establishment of a Pensions Unclaimed Assets Recovery Agency (and, within a year, the transfer of unclaimed assets to this agency) were agreed to.[165]

Explanatory Notes on the *Lords Amendments the Pensions Bill*, published on 13 July 2007 explained the effect of the amendments as follows.[166] It also included estimated costings of the Lords amendments:

64. The Financial Assistance Scheme ("the FAS") provides help to those people who have lost significant amounts of their final salary pension when their pension scheme started winding up between 1st January 1997 and 5th April 2005 as a result of employer insolvency. In its current form, the FAS provides help only to those qualifying members of qualifying pension schemes who were within 15 years of their scheme's normal retirement age ("NRA"), or above, as at 14th May 2004. Payments are also made to surviving spouses or civil partners of those qualifying members on their death.

65. Assistance to qualifying members is currently tapered depending on the proximity of the member to their NRA on 14th May 2004. FAS payments are also subject to a cap of £12,000 and a de minimis rule which means that assistance is not provided where it is calculated to be worth less than £520 a year (£260 a year in the case of survivors). The costs of providing FAS assistance as currently configured are estimated to be £2.4 billion cash (£830 million Net Present Value ("NPV")).

164 Ibid, c 1181
165 Ibid, c1186-1191
166 *Pensions Bill, Explanatory Notes on Lords Amendments*, Bill 146-EN

66. The financial effect of clause 18 (inserted at the Report stage in the Commons), which provides that the Secretary of State must make provision for assistance at not less than 80% of expected core pension to all qualifying members (and for proportional help to their survivors), would depend on the precise rate of assistance that was set down in regulations. If assistance were provided at 80% of expected core pension then costs are estimated to be £6.9 billion cash (£1.6 billion NPV) on top of the current costs indicated above.

67. The financial effect of Lords Amendments 17 and 24, which would insert new clauses providing, in essence, that payments under the FAS should be made at the same level as under the Pension Protection Fund ("the PPF"), is estimated at £3 billion cash (£0.7 billion NPV) (on top of the costs of providing 80% of expected core pension to all qualifying members indicated in relation to clause 18 above). Some of these costs might be offset by the use of unclaimed assets. However there is no information available about the amount of any such assets.

68. The financial effect of Lords Amendment 16, which would insert a new clause extending the provision of FAS assistance at PPF levels to all relevant schemes regardless of whether or not an insolvency event has occurred to the relevant employer, is estimated to be in the range of £950 million to £2.5 billion cash (£220 million to £580 million NPV). The wide range of this estimate reflects the limited information available on such schemes.

69. Lords Amendment 18 provides for the establishment of the Pension Unclaimed Assets Recovery Agency. It would provide for members to be appointed to the Agency, for such members to be paid by the Secretary of State, and for their expenses and any other expenses of the Agency to be paid. The precise financial effect of the amendment would depend on the number of members appointed, the amount they were paid, the costs of support staff that may be employed and the costs of implementing and operating the Agency. Such costs are likely to be significant.

70. Lords Amendment 23 would provide that the Secretary of State must make regulations to require trustees to make on account payments at a rate equivalent to the Pension Protection Fund to certain members of schemes that qualify for the FAS. The amendment allows the Secretary of State to make such loans as necessary to fund such payments and provides for the repayment of any on account payments by the FAS or by the Lifeboat Fund. The precise financial effect of the amendment cannot be estimated as we have insufficient information on the funds already held by relevant schemes and the details that would enable relevant payments at PPF rates to be calculated. Some costs might be borne by the Lifeboat fund by use of unclaimed assets. However there is no information available about the amount of any such assets. The full cost could thus fall on the Secretary of State (whether by loan or by repayment). That cost would be significant.[167]

The House of Commons debated the Lords amendments on 17 July. The Government's motion to reject that the Lords' amendment establishing a 'Lifeboat Fund' was agreed to by 303 votes to 253.[168] An amendment moved by Tony Wright MP to extend the FAS to cover solvent schemes which began to wind up before 11 June 2003 was negatived on division by 305 votes to 250.[169] The Lords did not insist further on its amendments.[170] However, the Bill was amended to place a temporary restriction on the purchase of annuities by qualifying

[167] Ibid
[168] HC Deb, 17 July 2007, c234
[169] Ibid, c233
[170] HL Deb, 24 July 2007, c710; HC Deb, c997-896

schemes.[171] This is now section 19 of the *Pensions Act 2007*, which was granted Royal Assent on 26 July 2007.

The FAS website provided the following summary of the changes resulting from the *Pensions Act 2007:*

> **Pensions Act 2007 - What this means for FAS**
>
> The Pensions Act 2007 received Royal Assent on 26 July. The Act contains a number of measures relating to the Financial Assistance Scheme (FAS) and other changes were announced prior to and during the Act's passage through Parliament. The key developments are summarised below:
>
> The Government will raise the level to which FAS annual payments top up the 'actual pension' being paid to qualifying members to at least 80% of expected core pension (subject to a raised cap). This will apply to all qualifying members who reach 65, regardless of how far they may be from their normal retirement age now. The Government will also raise the cap from £12,000 to £26,000 and remove the de minimis rule that prevents payments of less than £520 a year. These changes will be introduced by regulations which we hope to come into force by the end of 2007. These regulations will also allow schemes that have entered into compromise agreements to qualify for FAS.
>
> The level to which FAS initial payments will top up any interim pension in payment to a qualifying member of a scheme that is still winding up will rise from 60 to 80% of core expected pension (subject to the cap). This change is effective immediately and the FAS Operational Unit will recalculate the assistance due to members for whom data has been supplied and contact them about any change in their entitlement. Trustees should consider whether the change means that other members may now qualify for FAS initial payments and supply their details.
>
> The Government does not intend to enforce the cut-off date for employer insolvency of 31 August 2007 announced by the then Minister of State for Pensions Reform on 27 February 2007. We will consult on whether there should be a cut-off date for insolvency and bring forward regulations in due course.
>
> The Government will be bringing forward regulations to place a temporary halt on the purchase of annuities by trustees of qualifying schemes that are still winding up. Trustees will be able to purchase annuities with the approval of the FAS scheme manager if he thinks it is appropriate for them to do so. These regulations are expected to be in place by October 2007 and will apply for nine months from the date on which they come into force. It is extremely important, therefore, that trustees keep the FAS Operational Unit informed about the progress of schemes towards completion of wind-up and, in particular, if consideration is being given to purchasing annuities for any members. Although regulations will not be in place until later in the year, the Government expects trustees to consider their approach to annuitisation very carefully and to involve their Customer Account Manager at the FAS Operational Unit in any decision before then.
>
> The Government has also welcomed the interim findings report of the Review of Scheme Assets being led by Andrew Young which were published on 16 July. The Review has given a strong indication that better use can be made of assets remaining in pension schemes that qualify for the FAS and the Government has promised to provide a matching contribution to any extra value identified by the Review with the

[171] HL Deb, 24 July 2007, c711-14; HC Deb; 25 July 207,c887

goal of moving towards a 90% top-up rate. The final report of the Review is due before the end of 2007.[172]

6 Parliamentary Ombudsman's report on occupational pensions

On 16 November 2004, Ann Abraham, the Parliamentary Ombudsman, announced that she would be investigating complaints about occupational pensions against the Department for Work and Pensions, the Occupational Pensions Regulatory Authority, HM Treasury and the National Insurance Contributions Office (part of the Inland Revenue):

> The Ombudsman has received approximately 100 complaints from members and trustees of pension schemes across the United Kingdom. These include former employees of companies which are now insolvent and whose schemes have been wound up; and employees and former employees of companies which are in administration and whose schemes are in doubt. …
>
> Ms Abraham has decided to investigate representative complaints which cover all these situations. Specifically, she will be looking at allegations that:
>
> -Government ministers and officials ignored relevant evidence when taking decisions on whether to warn scheme members of the risks to their pensions should their scheme wind up and
>
> - Information and advice provided by Government bodies to scheme members and trustees was inaccurate.[173]

Her report covers those whose pension schemes started to wind-up between 6 April 1997 and 31 March 2004 and who are therefore not eligible for the Pension Protection Fund. The inquiry was originally expected to be completed by early July 2005,[174] but the Government put back this timetable by asking to submit fresh evidence.[175] On 18 November 2005, Ann Abraham, wrote again to MPs with a progress report on her investigation.[176] She said that she intended to publish her report before the Parliamentary recess on 30 March 2006. It was finally published on 15 March 2006. The report – *Trusting in the pensions promise*[177] – is available on the Ombudsman's website.

The Ombudsman found that official information about the security of final salary occupational pension schemes provided over many years by the Department for Work and Pensions, the Occupational Pensions Regulatory Authority and other government bodies was "inaccurate, incomplete, unclear and inconsistent".[178] She said:

> Government has a unique responsibility in these matters. Government set the pensions policy framework and took upon itself the responsibility of providing information for the public. The maladministration which my investigation has uncovered

[172] *Pensions Act 2007: what this means for FAS,* DWP website, 2007
[173] *Parliamentary Ombudsman to investigate complaints about occupational pensions*, 16 November 2004
[174] "Official records taken in pensions inquiry", *Financial Times*, 22 March 2005
[175] "Government delays report on pension compensation", Independent, 20 July 2005
[176] Parliamentary and Health Service Ombudsman, press release, 18 November 2005, *Occupational pensions investigation timetable announced*
[177] HC 984 2005/06
[178] Parliamentary and Health Service Ombudsman press release, 15 March 2006, *Ombudsman publishes report on occupational pensions investigation*

caused injustice to a large number of people who, as a result, lost the opportunity to make informed choices about their future.[179]

She published a guide to the report which summarised her findings as follows:

> 26. The Ombudsman made the following three findings of maladministration:
>
> – first, that official information - about the security that members of final salary occupational pension schemes could expect from the Minimum Funding Requirement provided by the bodies under investigation - was sometimes inaccurate, often incomplete, largely inconsistent and therefore potentially misleading, which was contrary to the Department for Work and Pensions' own standards and also to principles of good administration (paragraphs 5.36 to 5.74);
>
> – secondly, that the response by the Department for Work and Pensions to the actuarial profession's recommendation that disclosure should be made to pension scheme members of the risks of wind-up – in the light of the fact that scheme members and member-nominated trustees did not know the risks to their accrued pension rights – had no regard to the role that its own deficient information had played in creating the position in which scheme members were unaware of risk, which thereby ignored a relevant consideration (paragraphs 5.82 to 5.94); and
>
> – thirdly, that, in relation to the decision in 2002 by the Department for Work and Pensions to approve a change to the Minimum Funding Requirement basis, there was insufficient documentary evidence to explain the rationale for that decision - and that the Department for Work and Pensions appeared to have relied on professional advice which could not be sufficient in itself to enable the Department to come to a decision, as it should have done, that took account of all relevant considerations and which ignored irrelevant ones (paragraphs 5.95 to 5.150).
>
> 27. The Ombudsman found no evidence that the decision in 1998 to change the Minimum Funding Requirement basis had been taken with maladministration (paragraphs 5.77 to 5.81). Furthermore, while she found that the time taken to windup final salary schemes was routinely very lengthy, these delays could not be laid at the door of the National Insurance Contributions Office alone (paragraphs 5.151 to 5.163).[180]

She made five recommendations covering those individuals:

> (i) who are or were a member of a final salary scheme which commenced wind-up from 6 April 1997 to 31 March 2004; where
>
> (ii) their scheme wound-up with insufficient assets to secure pensions in payment and to pay cash equivalent transfer values in respect of full accrued pension rights to all non-pensioner members or to secure the full liabilities for each non-pensioner in other ways; and where
>
> (iii) the scheme is not eligible for the statutory pensions compensation scheme - because it has not suffered losses wholly attributable to fraud or other unlawful behaviour; and where
>
> (iv) the individual has incurred an actual financial loss because of a shortfall in the pension promised in respect of any or all of the following:

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[179] Ibid

[180] Guide to the Parliamentary Ombudsman's Report: Trusting in the Pensions Promise

– the contributions made by them and/or their employer to the scheme (that is, the scheme pension); and/or

– contracted-out national insurance contributions that were rebated to the scheme (that is the 'Guaranteed Minimum Pension' and similar provision – which, despite its different provenance, was due to be paid with the scheme pension); and/or

– other benefits due (such as survivor benefits and life cover).[181]

Her recommendations were:

– that the Government should consider whether it should make arrangements for the restoration of the core pension and non-core benefits to those scheme members covered by her recommendations - by whichever means is most appropriate, including if necessary by payment from public funds, to replace the full amount lost (paragraphs 6.14 to 6.22);

– that the Government should consider whether it should provide for the payment of consolatory payments to scheme members covered by her recommendations as a tangible recognition of the outrage, distress, inconvenience and uncertainty that they have endured (paragraph 6.24);

– that the Government should consider whether it should apologise to scheme trustees for the distress that they have suffered due to its maladministration (paragraphs 6.25-6);

– that the Government should consider whether those who have lost a significant proportion of their expected pensions - but whose scheme began wind-up between 1 April 2004 and 31 March 2005 and who are thus not fully covered by the Ombudsman's recommendations - should be treated in the same manner as those fully covered by the Ombudsman's recommendations (paragraphs 6.27 to 6.32); and

– that the Government should conduct a review – with the pensions industry and other key stakeholders - to establish what can be done to improve the time taken to wind up final salary schemes (paragraphs 6.33 to 6.37).[182]

6.1 The Government's response

The Government rejected the Ombudsman's findings of maladministration and accepted only the recommendation that there should be a review of the time taken to wind up schemes. In a written statement on March 2006, the Pensions Minister, Stephen Timms, said:

In her report published today, the Parliamentary Ombudsman has found that some of the information issued by the Department for Work and Pensions and the then Department of Social Security on the security of occupational pensions amounts to maladministration. She has made a similar finding with regard to a decision made in 2002 on the calculation of the Minimum Funding Requirement for salary related occupational pension schemes. The Government do not accept these findings.

The Government recognise the hardship and distress faced by those people who have lost all or part of their pension when their pension schemes have, or are being, wound up. That is why we have set up the Financial Assistance Scheme, with £400 million of public money. But, having carefully considered the Ombudsman's report, the

[181] Ibid
[182] Ibid

> Government do not believe that it makes a sustainable case that maladministration occurred or that these losses were the responsibility of Government. In the Government's view the responsibility for the schemes rested with the companies whose schemes have, or are being, wound up and with the trustees who, with the benefit of professional advice, were responsible for protecting members' interests.
>
> In respect of the Ombudsman's specific findings the Government do not consider that any of the named leaflets or quoted statements could have formed a proper basis for scheme members, still less trustees who were professionally advised, to assess the security of their individual pension schemes. The leaflets were general and introductory in nature. They were not a full statement of the law. They made both those points clear. In addition, the Government believe that the report fails to demonstrate that decisions taken by individual scheme members were influenced by the information which the Government did, or did not, make available.
>
> As far as the 2002 decision on the Minimum Funding Requirement is concerned, the Government believe that we acted wholly responsibly in implementing the recommendation of the actuarial profession which had received the backing of the Government Actuary's Department.
>
> Against this background, the Government have considered carefully the Ombudsman's first four recommendations—which involve considering whether to restore the lost pension rights of affected scheme members, making consolatory payments and apologising to scheme trustees. As the Government are unable to accept the findings on which those recommendations are based and do not consider that it would be in the wider public interest for tax payers to fund all lost pension benefits we do not believe that it would be appropriate to take the action suggested.
>
> The Government do, however, accept the Ombudsman's fifth recommendation with regard to reviewing the time it takes to wind up a defined benefit pension scheme. Work is already underway in this area.[183]

However, the report may have prompted a speedier review of the FAS. In answer to a question from Sir Menzies Campbell at Prime Minister’s Questions on 15 March 2006, the Prime Minister said:

> although of course we must and do treat seriously the ombudsman's findings, we are being asked as a consequence of them to give, on behalf of general taxpayers £15 billion-worth of commitment. We simply cannot do that. There is a review of the financial assistance scheme, which may be able to help some people, and we will expedite that review and do it as quickly as we possibly can, but it has to be understood that, in the end, if we were to stand liable for the whole of that loss, it would set a precedent of extraordinary financial proportions for this Government and any other. [184]

On 6 June 2006, the DWP published its full response to the Ombudsman’s report. This continued to reject the findings of maladministration. The Ombudsman asked the Government to consider whether it should make arrangements for the restoration of core pension and non-core benefits to those covered by her recommendations. For the purpose of estimating the cost of doing so, DWP assumed that core benefits meant the monthly payments individuals would have received on retirement if they had become deferred members of an on-going scheme at the point of wind up. Non-core benefits were assumed to

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[183] HC Deb15 March 2006, c100-102WS
[184] HC Deb 15 March 2006, c 1450

include the ability to take part of the pension fund as a lump sum, (more generous) survivor's benefits, and ill-health benefits. DWP estimated the cost of implementing the recommendations as being "between £13 billion and £17 billion over 60 years in cash terms."[185]

6.2 The Public Administration Committee Reports

The Public Administration Select Committee (PASC) published its report on the Ombudsman's report - *The Ombudsman in Question: the Ombudsman's report on pensions and its constitutional implications* – on 30 July 2006.[186]

The PASC report supported the Ombudsman's finding of maladministration and her recommendation of more generous recompense than that provided by the FAS:

> We agree with the Ombudsman that maladministration occurred. Government information about pensions was deficient and reasonable people would have been misled. Moreover, the Government should have considered the Ombudsman's recommendations properly, rather than immediately assuming that they would place large burdens on the public purse.
>
> This is the second time in less than 12 months that the Ombudsman has reported to Parliament that she has found injustice that has not been, or will not be, remedied. Only four such reports have ever been made. The system established by the Parliamentary Commissioner Act 1967 will only work if there is a common understanding between the Ombudsman, Parliament and Government as to what constitutes maladministration, and who has authority in identifying it. The Government has been far too ready to dismiss the Ombudsman's findings of maladministration.
>
> Our investigations have shown that these findings were sound. It would be extremely unfortunate if Government became accustomed simply to reject findings of maladministration, especially if an investigation on this Committee proved there was indeed a case to answer.
>
> At the heart of every case of maladministration is someone who has suffered injustice. By concentrating its energy on denying findings of maladministration, rather than on considering what remedies might be practical and proportionate, the Government has caused further distress to complainants. It has delayed any resolution of their problems.
>
> We consider the Government should arrange more generous recompense than that provided by the Financial Assistance Scheme, and should do so speedily. In future, we hope that the Government will engage with the Ombudsman positively, and start from the presumption that it is her job to determine whether or not maladministration has occurred, not its own. This is what Parliament intended when it established the office some forty years ago.[187]

However, the Government maintained its position, and in their response to the PASC Report, merely proposed giving wider publicity to the deemed buyback option:

> The Government agree with the Committee that there should be a significant package of support and believes that the financial assistance scheme, as extended, constitutes such a package. The Government have, however, looked again, in the light of the

[185] DWP, *Response to the report by the Parliamentary Ombudsman, 'Trusting in the pensions promise'*, June 2006,
[186] Sixth Report 2005-06, 30 July 2006, HC 1081.
[187] Ibid Summary.

Committee's report, at what extra support can be made available within the existing framework. One option, which is not being widely taken up currently, is deemed buy-back. This is a facility that, provided certain conditions are met, reinstates a member of an under funded contracted-out pension scheme into the state additional pension for the period they were in an under-funded scheme, at less than cost.

Deemed buy-back needs to be carefully considered on an individual basis but, despite this, we believe that this facility could provide useful help. While the pensions industry should already be aware of deemed buy-back, the Government are planning to publicise these arrangements more widely and propose to work with interested parties to investigate what more should be done in this respect. We also intend to examine whether the Department can produce a tailored forecast for each person who qualifies for deemed buy-back of the additional pension they could receive.

We note and accept the Committee's view that the Government's response should not be defensive and we have approached the Committee's report in that spirit. However, we continue to believe that the information issued by the Government was not misleading and that the Government are not responsible for the losses in question.

Copies of the Government's response are available in the Vote Office and the Printed Paper Office.

The Government have accepted the Ombudsman's recommendation to review the time taken to wind up a final-salary pension scheme. I have also placed today in both Libraries a report “Speeding Up Winding Up of Occupational Pension Schemes” setting out our belief that it is reasonable to expect a scheme—in the normal course of events—to complete the key activities of winding up in two years; and containing proposals for a series of measures—legislative, regulatory and administrative—to help schemes achieve this target.[188]

In debate in the House of Commons on 7 December 2006, the then Pensions Minister, James Purnell, said:

I want to make it clear that the Government respect the role played by the ombudsman, and we will continue to do so. The case we have been discussing is exceptional. The Committee asked us to explain whether it was a new policy or a new approach. The case is exceptional. We shall continue our approach, which is to respect the ombudsman. In fact, in 39 years, this is the first time that my Department has not responded positively to an ombudsman’s findings…..…we have two duties to Parliament: first, to take proper account of the ombudsman’s findings and, secondly, properly to account for the use of public money. It is not our money, it is taxpayers’ money. We have been trying to strike a balance between those two duties—our respect for the ombudsman and the proper use of public money.[189]

He referred to the fact that the scope of the Financial Assistance Scheme had recently been extended:

We have tried to respond to the Public Administration Committee’s report as constructively as possible. We are implementing several of its recommendations. For example, there will now be a two-year wind-up. We have also made it clear that survivors will be paid and that people can be paid from the age of 65. It is true that the

[188] James Purnell, Written Ministerial Statement, 2 November 2006, HC Deb cc 25-16WS. The full Government response is published as Cm 6961

[189] HC Deb 7 December 2006, c543

> support that we have put in place continues to be less than what it asked for. It is worth saying that the scheme has been extended to 40,000 people since the ombudsman first published her report. We took that report into account when we made the extension, and I think that the House has welcomed our action.…[190]

The Public Administration Select Committee (PASC) produced a further report on 11 May 2007 – *Pensions Bill: Government Undertakings relating to the Financial Assistance Scheme.*[191] The Government's response and a further report were published on 13 July 2007.[192] This further report made a recommendation to Parliament in connection with amendments to the *Pensions Bill 2006-07* passed by the House of Lords:

> Primary legislation is the only way Parliament can be sure of security assistance for those whose schemes were wound up by solvent employers. The House should consider any Government assurances extremely carefully before it gives up this weapon.[193]

It made the following recommendation to the Government:

> Whatever the generosity of the scheme, and whatever the reasons for delay, the FAS will not help if it takes years to reach those who need it. We recommend the Government find ways of speeding up payment as a matter of urgency.[194]

The Government's response to this report was published on 17 October said that there was "significant uncertainty over how many people are actually eligible for payment now."[195] This outlined "the arrangements for making payments of FAS, the operational difficulties we face and the steps being taken to address them."

7 Legal challenges

7.1 Judicial Review of Government's response to Ombudsman's report

Four members of the Pensions Action Group (Henry Bradley, Robin Duncan, Andrew Parr and Thomas Waugh) applied for judicial review of the Government's response to the Ombudsman's report. As stated above, the Ombudsman made three findings and five recommendations. The Government rejected the findings and all the recommendations, with the exception of recommendation five (regarding a review of the time taken to wind up final salary schemes.) The applicants challenged the Government's decision in respect to the first and third findings and the first recommendation. The first and third findings are:

> – first, that official information - about the security that members of final salary occupational pension schemes could expect from the Minimum Funding Requirement provided by the bodies under investigation - was sometimes inaccurate, often incomplete, largely inconsistent and therefore potentially misleading, which was contrary to the Department for Work and Pensions' own standards and also to principles of good administration (paragraphs 5.36 to 5.74); and

190 HC Deb 7 December 2006, c544

191 Public Administration Select Committee, *Pensions Bill: Government Undertakings relating to the Financial Assistance Scheme,* Fifth Report of Session 2006-07, HC 523, 11 May 2007

192 Public Administration Select Committee, *The Pensions Bill and the FAS: An Update. Including the Government Response to the Fifth Report of Session 2006-07.* 13 July 2007. HC 922

193 Ibid, para 9

194 Ibid, para 12

195 Public Administration Select Committee, *The Pensions Bill and the FAS: An Update: Government Response to the Committee's Eighth Report of Session 2006-07,* Second Special Report of Session 2006-07. HC 1048.

– that, in relation to the decision in 2002 by the Department for Work and Pensions to approve a change to the Minimum Funding Requirement basis, there was insufficient documentary evidence to explain the rationale for that decision – and that the Department for Work and Pensions appeared to have relied on professional advice which could not be sufficient in itself to enable the Department to come to a decision, as it should have done, that took account of all relevant considerations and which ignored irrelevant ones (paragraphs 5.95 to 5.150).

The first recommendation was:

– that the Government should consider whether it should make arrangements for the restoration of the core pension and non-core benefits to those scheme members covered by her recommendations - by whichever means is most appropriate, including if necessary by payment from public funds, to replace the full amount lost (paragraphs 6.14 to 6.22).[196]

As the High Court explained, this recommendation fully covered those individuals who:

(1) who were members of final salary schemes which commenced wind-up from 6 April 1997 to 31 March 2004; where

(2) the scheme wound up with insufficient assets to secure pensions in payment and to pay cash equivalent transfer values in respect of fully accrued pension rights to all non-pensioner members or to secure the full liabilities for each non-pensioner in other ways; and where

(3) the scheme is not eligible for the pensions compensation scheme, because it had not suffered losses wholly attributable to fraud or other unlawful behaviour; and where

(4) the individual has incurred an actual financial loss because of the shortfall in the pension promised in respect of, inter alia, the contributions made by them and/or their employer to the scheme. The number of people within this definition is estimated by the parties to be between 75,000 and 125,000.[197]

In questions in the House of Commons on 5 February, the Secretary of State said that the Government will 'argue our case very strongly with regard to the way in which we have responded to the Ombudsman's report':

Mr. David Laws (Yeovil) (LD): So far the Government have, as we have heard, ignored the conclusions of the ombudsman and the recommendations of the Select Committee, and they have now been criticised by the European Court of Justice. Can the Secretary of State give us a promise that if, in the upcoming judicial review, the courts in this country find that the Government have acted unlawfully in rejecting the recommendations and the findings of the ombudsman, it will be time for the Government to do the decent thing and bring forward a fair compensation package for the individuals in question? Will he give us that guarantee?

Mr. Hutton: Of course the Government—any Government—will follow the obligations imposed on them by the courts and the due legal process. There is no question of our doing otherwise. On Wednesday in the High Court we will argue our case very strongly with regard to the way in which we have responded to the ombudsman's report. In relation to the European Court of Justice case, it is worth reminding ourselves that the case is still continuing before the High Court in England. There is therefore an obvious

[196] *Guide to the Parliamentary Ombudsman's Report, 'Trusting in the Pensions Promise: Government Bodies and the Security of Final Salary Occupational Pensions',*

[197] Ibid, para 22

> limitation on what I can say today about how we might respond to any subsequent ruling by the Court.[198]

The Hon Mr Justice Bean delivered his judgement on 21 February 2007. His conclusions in summary were that:

> (a) The Secretary of State's rejection of the Ombudsman's First Finding of maladministration (consisting of the provision of misleading official information) is quashed;
>
> (b) The Secretary of State's rejection of the Ombudsman's First Finding, in so far as it went on to conclude that the maladministration which she had identified had caused injustice to all those individuals who had suffered losses on the winding-up of their occupational schemes during the relevant period, is upheld;
>
> (c) The Secretary of State's rejection of the Ombudsman's Third Finding of maladministration (relating to the change in the Minimum Funding Requirement in 2002) is upheld;
>
> (d) The free-standing claim under Article 1 of the First Protocol to the European Convention on Human Rights is dismissed;
>
> (e) The Secretary of State is directed to reconsider the Ombudsman's First Recommendation in the light of this decision.[199]

In other words, the High Court quashed the Government's rejection of the Ombudsman's first finding (that official information on the minimum funding requirement was "inaccurate and potentially misleading and therefore amounted to maladministration") and directed the Secretary of State to reconsider her first recommendation (that the Government should consider whether "it should make arrangements for the restoration of the core pension and non-core benefits to those scheme members covered by her recommendations."). The Times Law Report commented that:

> MR JUSTICE BEAN said that the claimants submitted that unless subsequently found by a court to be flawed in law or Wednesbury unreasonable ((1948) 1 KB 223), a finding by the ombudsman that maladministration had occurred and had caused injustice was binding on the public authority against which it was made.
>
> The secretary of state had drawn a contrast between planning inspectors and immigration judges on the one hand and the ombudsman on the other.
>
> The inspector and the judge exercised adjudicative functions following an oral adversarial hearing whereas the ombudsman was an investigative officer and not an adjudicative tribunal. It was true that the ombudsman did not generally conduct her investigation as though it were a tribunal hearing.
>
> She might allow any person or public body to be legally represented as she though fit. She might require witnesses to attend and be examined on oath. She had powers, more extensive than those of the courts, to compel production of documents.
>
> All of that provided a substantial degree of due process. A public adversarial hearing was not the only fair way of finding facts and it was not the way that Parliament had required to be followed.

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198 HC Deb 5 February 2007, c 554

199 *R v Secretary of State for Work and Pensions ex parte Bradley and Others* [2007] EWHC 242 (Admin), para 92.

> Nevertheless, it was clear that findings of fact by the Local Government Ombudsman were binding on local authorities, subject to exceptions, namely where the findings were objectively shown to be flawed or irrational, or peripheral, or there was genuine fresh evidence to be considered.
>
> The same, in his Lordship's opinion, applied to findings of the Parliamentary Ombudsman.
>
> The rejection of the ombudsman's first finding of maladministration was quashed. The secretary of state's rejection of the ombudsman's first finding as it concluded that the maladministration identified had caused injustice to all those who had suffered losses was upheld. His rejection of the ombudsman's third finding of maladministration was upheld.[200]

The Parliamentary and Health Service Ombudsman said:

> We have seen the judgment handed down this morning at the High Court in the case relating to our report on occupational pensions (Trusting in the Pensions Promise).
>
> We note:
>
> - that the Court has quashed the decision of the Secretary of State for Work and Pensions to reject the Ombudsman's finding that official information on the security of pensions was misleading; and has directed the Secretary of State to reconsider the Ombudsman's recommendation that the Government consider making arrangements for pension restoration in the light of the finding that the misleading official information constituted maladministration and in the light of the court's ruling; and
>
> - that the Court has held that, unless the findings made in one of the Ombudsman's reports 'are objectively shown to be flawed or irrational, or peripheral, or there is genuine fresh evidence to be considered', those findings are binding on the parties to complaints.
>
> We are currently considering the judgment, which we know is to be the subject of an appeal, and can make no further comment at present.[201]

In a statement to the House on 22 February, the Secretary of State explained the position the Government had reached in the light of both the High Court ruling and the decision of the European Court of Justice on the implementation of the Insolvency Directive (see page below.) He said that both sides had:

> Sought and been granted permission to appeal. We have not yet decided the precise grounds for such an appeal, but it is absolutely right and proper that we take time to study the judgement and consider its implications in detail.[202]

He confirmed that the Government would 'meet the costs of the applicants in this case so far, together with the costs associated with our appeal.'[203] He explained that the Government was already reviewing the financial assistance scheme in the light of the decision of the European Court of Justice and would aim to:

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[200] 'Ombudsman's findings of fact are binding on ministers', Times, 27 February 2007
[201] Parliamentary and Health Service Ombudsman Press Release, 21 February 2007, 'Occupational Pensions – Judicial Review'
[202] HC Deb, 22 February 2007, c420
[203] Ibid

> return to the House with our conclusions and our proposals for how we should proceed, and to do that before the conclusion of proceedings on the Pensions Bill.[204]

An announcement regarding the further extension of the FAS was made in Budget 2007 (see below).

The decision of the Court of Appeal in *R ex p Bradley v Secretary of State for Work and Pensions* was announced on 7 February 2008.[205]

The *Financial Times* reported that:

> Some 130,000 victims of collapsed occupational pension schemes claimed a moral victory yesterday after the Court of Appeal ruled that ministers were wrong to reject damning findings about how the schemes were administered.
>
> The decision will not increase the compensation the government has agreed to pay to workers who lost their pensions when their companies went bust. But campaigners said they hoped the ruling would prompt ministers to accept responsibility and apologise to people who suffered distress.[206]

Minister for Pensions Reform, Mike O'Brien told the Public Bill Committee on the Pensions Bill on 19 February 2008, that the Government was considering whether to appeal to the House of Lords:

> The big issue in the case was the comments of the High Court that there were restrictions on a Minister's ability to reject a finding of the ombudsman. That was an entirely new area of law as far as we were concerned, although, of course, all judges argue that any judgment is not a new area of law, but that they are simply stating the law that already exists, which just happens not to have been stated before. That being the case, we were somewhat concerned by the statement of the lower courts and took the matter to the Court of Appeal, which has now set out its view.
>
> We are considering whether to appeal further to the House of Lords on the position of the ombudsman and Ministers. We have made it clear that, broadly, we do not seek to press an appeal of a substantive or primary nature on other matters, which may well be secondary to the argument about the ombudsman's report.[207]

8 European Insolvency Directive

The trade unions, Community (formerly the ISTC and KFAT) and Amicus, have issued a High Court claim on behalf of pension scheme members of Allied Steel and Wire Ltd (ASW) from Cardiff and Sheerness. The claimants, Carol Marilyn Robbins and 835 others, were former employees of ASW Ltd which was placed in insolvent liquidation in April 2003. The pension schemes sponsored by the company were terminated in 2002 and were being wound up. The claimants brought an action for compensation against the UK Government, in the person

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204 Ibid
205 [2008] EWCA Civ 36
206 'Moral win for victims of pensions collapse', Financial Times, 8 February 2008
207 Pensions Bill Committee Deb, 19 February 2008, c520

of the Secretary of State. They argued that the legislation in force in the UK did not provide them with the level of protection prescribed by Article 8 of the Directive.[208]

> Article 8 provides:
>
> Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary company or inter-company pension schemes outside the national statutory social security schemes.[209]

The Advocate-General gave her Opinion on 13 July 2006. Amicus consider that the Opinion is in their favour as it states that the directive requires 100% compensation for pension loss on the insolvency of an employer.[210] On the other hand, much of the press comment presented the case as a defeat for the unions because the Advocate General considered that the UK Government did not commit a sufficiently serious breach of EU law to attract liability in damages when its implementation of the directive failed to achieve this.[211] The three questions posed by the High Court were:

> (1) Is Article 8 of [the Directive] to be interpreted as requiring Member States to ensure, by whatever means necessary, that employees' accrued rights under supplementary company or inter-company final salary pension schemes are fully funded by Member States in the event that the employees' private employer becomes insolvent and the assets of their schemes are insufficient to fund those benefits?
>
> (2) If the answer to Question 1 is "no", are the requirements of Article 8 sufficiently implemented by legislation such as that in force in the United Kingdom as described above?
>
> (3) If the United Kingdom legislative provisions fail to comply with Article 8, what test should be applied by the national court in considering whether the consequent infringement of Community law is sufficiently serious to attract liability in damages? In particular, is the mere infringement enough to establish the existence of a sufficiently serious breach, or must there also have been a manifest and grave disregard by the Member States for the limits on its rule-making powers, or is some other test to be applied and if so which?[212]

The decision of the European Court of Justice (ECJ) in Carol Marilyn Robins and Others v Secretary of State for Work and Pensions was delivered on 25 January 2007. The accompanying press release explained it as follows:

> **Judgment of the Court of Justice in Case C-278/05**
>
> **Carol Marilyn Robins and Others v Secretary of State for Work and Pensions**

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[208] *Judgement of European Court of Justice In Case C-278-05, Caroly Marilyn Robbins and Others* v Secretary of State for Work and Pensions

[209] Ibid

[210] Amicus press release, 13 July 2006, *"ECJ court opinion says directive requires 100% pension compensation",*

[211] See, eg, "*Court blow for Allied workers*", Financial Times, 14 July 2006

[212] *Judgement of the European Court of Justice in Case C-278/05, Carol Marilyn Robins and Others v Secretary of State for Work and Pensions*,

THE MEMBER STATES ARE NOT REQUIRED TO FINANCE RIGHTS TO OLD-AGE BENEFITS UNDER SUPPLEMENTARY PENSION SCHEMES THEMSELVES IN THE EVENT OF THE EMPLOYER'S INSOLVENCY

Nevertheless, a level of protection of those rights such as that afforded by the United Kingdom system is inadequate

In accordance with a directive on the protection of workers in the event of the employer's insolvency, the Member States are to ensure that the necessary measures are taken to protect the interests of employees and former employees in the event of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits under supplementary occupational pension schemes.

Ms Robins and 835 other claimants are former employees of the company ASW Limited, which went into liquidation in April 2003. They were members of final-salary pension schemes funded by ASW.

The schemes were terminated in July 2002 and are in the process of being wound up. According to actuarial valuations, there will be insufficient assets to cover all the benefits of all members, and the benefits of non-pensioners will therefore be reduced.

Under the legislation in force in the United Kingdom, the claimants will not receive all the benefits to which they were entitled. Two of the claimants will receive only 20% and 49% respectively of those benefits.

Taking the view that the United Kingdom legislation did not provide them with the level of protection called for by the directive, the claimants brought an action against the Government of the United Kingdom for compensation for the loss suffered. Hearing the case, the High Court has referred three questions to the Court for a preliminary ruling: (i) are the Member States required to fund themselves the rights to old-age benefits and if so to fund them in full? (ii) is the United Kingdom legislation compatible with the directive? and (iii) what is the liability of the Member State in the case of incorrect transposition of the directive?

The funding of rights to benefits by the Member States themselves

The Court finds that the directive does not oblige the Member States themselves to fund the rights to old-age benefits. Inasmuch as it states in a general manner that the Member States 'shall ensure that the necessary measures are taken', the directive leaves the Member States some latitude as to the means to be adopted to ensure protection. A Member State may therefore impose, for example, an obligation on employers to insure or provide for the setting up of a guarantee institution in respect of which it will lay down the detailed rules for funding, rather than provide for funding by the public authorities.

Furthermore, the Court considers that the directive cannot be interpreted as demanding a full guarantee of the rights in question. In so far as it does no more than prescribe in general terms the adoption of the measures necessary to 'protect the interests' of the persons concerned, the directive gives the Member States, in relation to the level of protection, considerable latitude which excludes an obligation to guarantee in full.

Compatibility of the United Kingdom legislation with the directive

The Court notes that in 2004, according to figures communicated by the United Kingdom, about 65 000 members of pension schemes suffered the loss of more than

20% of expected benefits and some 35 000 of those suffered losses exceeding 50% of those benefits.

Even if no provision of the directive contains elements which make it possible to establish with any precision the minimum level of protection required, a system that may, in certain cases, lead to a guarantee of benefits limited to 20 or 49% of the expected entitlement, that is to say, of less than half of that entitlement, cannot be considered to fall within the definition of the word 'protect' used in the directive. A system of protection such as the United Kingdom system is therefore incompatible with Community law.

Liability of the Member State in the case of incorrect transposition

The Court considers that, given the general nature of the wording of the directive and the considerable discretion left to the Member States, the liability of a Member State by reason of incorrect transposition of that directive is conditional on a finding of manifest and serious disregard by that State for the limits set on its discretion.

In order to determine whether that condition is satisfied, the national court must take account of all the factors which characterise the situation put before it. In the present case, those factors include the lack of clarity and precision of the directive with regard to the level of protection required, and a Commission report of 1995 concerning the transposition of the directive by the Member States, in which the Commission had concluded that 'the above mentioned rules [adopted by the United Kingdom] appear to meet the requirements [of the Directive]', which may have reinforced the United Kingdom's position with regard to the transposition of the directive into domestic law.[213]

8.1 Government's response to court rulings

In a Written Ministerial Statement on 26 January 2007, following the decision of the European Court of Justice, the Secretary of State for Work and Pensions said:

The Secretary of State for Work and Pensions (Mr. John Hutton): The European Court of Justice has yesterday given its ruling in the case brought by former employees of the Allied Steel and Wire Company, who lost pension entitlements when the company became insolvent. We shall of course be studying the judgment of the Court carefully.

The Court considered whether UK legislation in place before the 2004 Pensions Act sufficiently implemented Article 8 of the Insolvency Directive. The UK's position has always been that the directive does not oblige member states to ensure such pensions are guaranteed in full, nor does it require the taxpayer to underwrite them. The Court has supported the UK's view.

On the question of damages, we note that the Court appears to have given a steer that damages may not be payable. But this is now a matter for the High Court to decide. It would be inappropriate for us to comment further on the case at this stage. We have every sympathy for those who have lost their pensions and understand the distress this has caused to them and their families. It is in recognition of this that we introduced not only the pension protection fund, but also the financial assistance scheme, which we recently extended substantially.[214]

On 22 February 2007, following the decision of the High Court, the Secretary of State made an oral to statement to inform the House on the position the Government had reached both in

[213] PRESS RELEASE No 08/07, 25 January 2007, Judgment of the Court of Justice in Case C-278/05 Carol Marilyn Robins and Others v Secretary of State for Work and Pensions.
[214] HC Deb, 26 January 2007, c 76WS

the light of the ruling of the High Court and the decision of the European Court of Justice. He explained that:

> **The Secretary of State for Work and Pensions (Mr. John Hutton):** With permission, Mr. Speaker, I want to make a statement on yesterday's judgment on the Government's response to the ombudsman's report concerning the security of final salary occupational pension schemes. Given the importance of the issue to many right hon. and hon. Members, I want to inform the House of the position that we have reached both in the light of that particular ruling and the decision last month of the European Court of Justice on the implementation of the insolvency directive.
>
> The High Court yesterday made five rulings in its judgment. I want to take each in turn. Its first ruling was that the ombudsman was entitled, on the evidence available to her, to reach the conclusion that official information published on the minimum funding requirement for pension schemes was inaccurate and potentially misleading, and therefore amounted to maladministration. The Court particularly criticised the then Government's guide to the Pensions Act 1995, which was published in 1996. This, it concluded, gave the clear impression that following enactment of the new law, scheme members could be reassured that their pensions were safe whatever happened.
>
> The Government had, in good faith and acting on proper advice, taken a different view from that of the ombudsman, on the basis that the leaflets concerned were not a full statement of the law and were for general guidance only. However, we clearly now need to study the Court's ruling very carefully. In particular, we need to consider the possible implications across government of the Court's significant proposition, on which this ruling was based, that findings of fact made by the ombudsman are binding, unless they are flawed, irrational or peripheral, or unless there is fresh evidence.
>
> The Court's second ruling related to the important issue of causation. The ombudsman had found that maladministration was a significant contributory factor in the creation of the financial losses suffered by individuals. She went on to argue that everyone who between 1997 and 2004 suffered losses on the winding up of their pension scheme was the victim of injustice because of maladministration. The Government had argued that that was not well founded. The Court found in favour of the Government on this point, describing that aspect of the ombudsman's report as "logically flawed and unreasonable."
>
> The Court's third ruling rejected the ombudsman's finding that the Government were guilty of maladministration when they made changes to the pension scheme funding rules in 2002. It decided that the ombudsman's finding was not logically sound. In its fourth ruling, the Court also dismissed the claim that the Government's refusal fully to restore the pension entitlements of all affected scheme members was in breach of the European convention on human rights. The Court's fifth and final ruling concluded that I should reconsider the ombudsman's recommendation that the Government should consider making arrangements to restore fully the pension losses of the people concerned when their employers became insolvent.
>
> In a clear sign of both the complexity and, yes, the importance of these matters, both sides have sought and been granted permission to appeal. We have not yet decided the precise grounds for such an appeal, but it is absolutely right and proper that we take time to study the judgment and consider its implications in detail.
>
> The judgment of the European Court of Justice in January on the implementation of the insolvency directive has an important bearing on the issue of financial redress for those who have lost some or all of their pension entitlement. The decision of the European Court of Justice effectively requires the Government to reconsider whether the present

> arrangements offer sufficient protection for people's pensions when their employer becomes insolvent. The European Court of Justice has ruled that the system of protection that was in place before 2004 did not comply with the terms of the directive, even taking account of the subsequent introduction of the financial assistance scheme, albeit before its 2006 extension. We are already reviewing the financial assistance scheme with that finding in mind. It is now for the High Court to be asked to decide whether damages for breach of the directive should be paid, taking account of the steer apparently given by the European Court of Justice that damages may not be payable.
>
> The Government have already acted to provide substantial financial assistance to people who lost pension rights when their employers became insolvent. The financial assistance scheme, supported by £2.3 billion of public money, has been set up precisely for that purpose. Throughout, we have always sought to ensure that those who have suffered the most should receive financial assistance to mitigate their loss. At the same time, we have sought to strike a balance with the interests of taxpayers, who cannot be asked to accept responsibility for effectively underwriting the total value of pension savings.
>
> In considering the right way forward, we are always prepared to consider practical proposals from both sides of the House. I can confirm also that, so as not to add to their financial difficulty, we will meet the costs of the applicants in this case so far, together with the costs associated with our appeal.
>
> People who have lost their pension rights in these circumstances have suffered a great deal. My aim will be to return to the House with our conclusions and our proposals for how we should proceed, and to do that before the conclusion of proceedings on the Pensions Bill.[215]

In Budget 2007, it was announced that:

> 5.65 The Financial Assistance Scheme was established in 2004 to assist those who lost significant amounts when their pension schemes started winding up between 1 January 1997 and 5 April 2005 as a result of the sponsoring employer becoming insolvent. Budget 2007 announces that the Government will now extend the Financial Assistance Scheme further so that all members of affected pension schemes receive assistance of 80 per cent of the core pension rights accrued in their scheme. The cap on maximum assistance will be increased to £26,000 and the de minimis rule that excludes those whose FAS payment would be £10 or less a week will be removed. This includes an additional 85,000, ensuring all 125,000 who lost their pensions will benefit, bringing total long-term expenditure to £8 billion. The Secretary of State for Work and Pensions will set up a review to look at making best use of assets within these schemes, which will report later this year.[216]

The Secretary of State for Work and Pensions made a Written Statement on 28 March 2007. He said that:

> The Chancellor in his Budget statement on 21 March announced our decision to significantly extend the help provided by the Financial Assistance Scheme (FAS). This announcement was the result of my reflection on the implications of the High Court ruling in the judicial review of the Government's decision to reject the Parliamentary Ombudsman's findings of maladministration by the DWP My reflections have also been

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[215] HC Deb, 22 February 2007, c 419
[216] HM Treasury, *Building Britain's long-term future: Prosperity and Fairness for Families*, Budget 2007, para 5.65

informed by the judgment of the ECJ in the Robins case. In that judgment, given on 25 January, the European Court indicated that the level of protection provided to some members of the ASW pension scheme fell short of the level required by article 8 of the Insolvency Directive. But the ECJ also said the directive did not require a guarantee of pension rights in full, and it gave a strong steer that damages would not be payable for breach of the directive earlier than the judgment date. Having carefully considered the terms of the ECJ ruling, the Government believe that the enhanced FAS package announced last week offers a level of protection that is compliant with that judgment.

In its judgment in the judicial review relating to the ombudsman's report, the High Court directed me to reconsider my response to the ombudsman's first recommendation on the basis that maladministration had occurred. I have undertaken my reconsideration on that basis. As a result of that reconsideration we have made this extended FAS package available for all those who suffered losses as a result of their employer's insolvency, and have considered it appropriate to set the assistance at the same level as the protection offered in compliance with the ECJ judgment.

This announcement is not affected by our appeal against one of the High Court's decisions in the ombudsman case. That appeal has been mounted because the judgment raises important legal and constitutional issues, in particular on the relationship between the ombudsman and the Government, and those issues need to be resolved. This extension to FAS will stand, regardless of the result of our appeal against the finding of maladministration.

The extended scheme will now provide assistance to ensure that the pensions of all members of affected pension schemes are topped up to 80 per cent. of the core pension rights accrued in their scheme. We will more than double the cap on assistance payments to £26,000, and in recognition of the significant difference that £10 a week can make to some pensioners, we will end the de minimis rule that excludes those whose FAS payment would be £10 or less a week. Although FAS payments commence at age 65, they will remain 'inflation proof' up to age 65.

In total an estimated 100,000 will benefit from this extension. 85,000 scheme members will be eligible for assistance for the first time. Around 15,000 people who stood to benefit from FAS under the current scheme will receive more assistance due to the extension.

As a result we expect that all the estimated 125,000 people with losses will be helped. This increases the taxpayer's commitment from £2.3 billion in cumulative cash terms, to £8 billion. This equates to more than doubling the scheme in present value terms, from £830 million to £1.9 billion.

Having now settled the public expenditure support for these schemes, I have today set up a review to:

- examine how we make best use of the assets in pension schemes that are winding up under funded with an insolvent employer;

- determine if these sources of funding could be used to increase assistance for affected scheme members;

- consider any suggestions from interested and concerned parties.

The review will be conducted by the Department for Work and Pensions and advised by a panel of technical experts. Due to the complexity of the issues involved the review will be informed by advice from the Government Actuary Department. This will commence immediately and the review will report by the end of the year. Let me be

> clear that the 80 per cent. level of support we have committed is from the taxpayer, and it is not contingent on the release of any other funding source.
>
> Regardless of the review, it continues to be important to the interests of all members of affected pension scheme that schemes are wound up as quickly as possible. Should the review identify an alternative way of using scheme assets we will ensure that no scheme members lose out because their pension scheme has completed the wind up process.
>
> It is also important that trustees continue to apply on behalf of members to the Financial Assistance Scheme for payments and provide member data. Failure to do so will mean that people who could be receiving payments will lose out on the substantial help that is now available.[217]

In debate, the Minister explained that the extra money announced for the FAS was not a pot of money to be found in departmental accounts, but a government guarantee that the benefits would be paid.[218]

On 25 July 2007, the Financial Times reported that the Court of Appeal had started to hear the Government's appeal against the High Court's decision on the Judicial Review of its response to the Ombudsman's Report.[219]

8.2 Application for Judicial Review of the extension of the FAS

On 3 May 2007, the Pensions Action Group wrote to notify DWP of its intention to apply for Judicial Review of the recent decisions to extend the Financial Assistance Scheme (FAS) and said that this would cover two main points – firstly, that the extensions to the FAS do not comply with the High Court ruling against the Secretary of State in the earlier Judicial Review and secondly the decision to include only some solvent employer schemes while excluding others, was irrational, discriminatory and unlawful.[220] Dr Ros Altmann argued that:

> It is inconsistent and irrational for the Secretary of State to maintain an appeal claiming the finding of maladministration is flawed, whilst at the same time announcing that the extension to the FAS actually accepts that maladministration did occour.[221]

In addition, she said that the Court would be asked to look at the position of solvent employer schemes:

> Despite the fact that the Parliament Ombudsman, PASC [Public Administration Select Committee] and High Court made no distinction between different employer sponsors, the DWP's decision to include only some of these schemes is arbitrary, discriminatory and irrational and may also breach Section 6 of Human Rights Acts 1998.[222]

9 Other forms of redress

9.1 Pensions Regulator: contribution notices

The *Pensions Act 2004* replaced the Occupational Pensions Regulatory Authority (Opra) with a new Pensions Regulator from 6 April 2005. The Regulator has stronger powers than Opra.

[217] HC Deb, 28 March 2007, c113-4WS
[218] HC Deb, 18 April 2007, c331
[219] Financial Times, 26 July 2007, 'Government and pensioners clash'
[220] Ibid
[221] Dr Ros Altmann, Press Release, 3 May 2007, Government pensions policy fiasco continues – Hutton faces new Judicial Review.
[222] Ibid

One thing he is able to do is to issue a contribution notice to require a person (which can include a company) who has been involved in a deliberate act to avoid pension liabilities, to put money into a pension scheme up to a specified amount. The Pensions Regulator can be found at:

NapierHouse
Trafalgar Place
Brighton
BN1 4DW
Tel: 0870 6063636
Fax: 0870 2411144
Email: customersupport@thepensionsregulator.gov.uk
Website: http://www.thepensionsregulator.gov.uk/[223]

9.2 Deemed buyback

Some members of schemes which were contracted out of the state additional pension – the State Earnings Related Pensions Scheme (SERPS) or its successor the State Second Pension (S2P) - may benefit from the "deemed buyback" provisions of the *Pensions Act 1995*, which would enable them to be re-instated wholly or partially in the state scheme. DWP's factsheet on deemed buy back explains the provision as follows:

> When a person is a member of their employer's contracted-out pension scheme, they do not build up full rights to the Additional State Pension (previously known as the State Earnings Related Pension Scheme (SERPS), now replaced by the State Second Pension). They pay a reduced rate of National Insurance contributions in recognition of the fact that they will not receive full Additional Pension for the time they are a member of the contracted-out scheme.
>
> Deemed buy back is where a member of an underfunded contracted-out pension scheme can join the Additional Pension scheme for the period they were in this scheme. The member does not have to pay the full cost of buying back into the state system. The money left in the scheme is paid to the Government, with the difference deemed (considered) to have been paid (leading to the name 'deemed buy back').[224]

During a debate on the collapsed APW Electronics pension scheme in Westminster Hall on 22 February 2005, Malcolm Wicks, the Pensions Minister, said:

> Let me say something about deemed buyback. If APW's circumstances do not change, it does not necessarily mean that the employees would be left completely high and dry. As we heard, APW employees may qualify for deemed buyback, which is an existing provision that gives certain scheme members the option of having some or all of their state scheme rights restored.
>
> Deemed buyback is one of the more technical areas of pensions legislation and I have no intention of going into all of its complexities today, nor do I have the time to do so. Basically, scheme members who were opted out of the state earnings-related additional pensions are given back those rights in exchange for the limited funds that they have left in the scheme, which is their share of remaining scheme assets. For example, a member could agree that £10,000 of pension scheme rights be paid into the national insurance fund and they could, in return, be reinstated into an additional pension worth, say, £80,000. They will therefore derive some recompense from the state scheme that would mitigate their loss.

[223] retrieved 14 May 2008
[224] DWP Factsheet, 'Deemed buy back.'

Deemed buyback is one of a number of options available to a member for securing their accrued rights. Another approach is that a member could transfer their rights to another scheme. Another option is that the loss in the APW scheme is not sufficient to trigger the deemed buyback process. That would mean that the remaining assets would provide a greater return than could be had from the state scheme. The final decision on which option to use is taken by the member, not by the scheme. I cannot say what would be the best option for APW scheme members. That decision must be based on knowledge of the individual circumstances of each member. However, there is the potential to offer significant help to employees at APW. I will facilitate the process as best I can.

I realise that hon. Members were hoping for a clear outcome. I hope, however, that the possibility of deemed buyback and an assurance that the position of APW will be reconsidered if its solvency status changes will provide some comfort.[225]

Figures provided by government ministers suggest that deemed buyback is a little-used feature of the pensions system. In March 2005, then Pensions Minister, Malcolm Wicks said that:

Of the schemes that have approached the Inland Revenue so far, there are currently around 800 members of underfunded contracted-out pension schemes in wind-up who have had the opportunity to exercise their right to deemed buyback.[226]

He explained that:

We think that only eight individuals have so far taken up the offer. The majority of the rest are still considering their position. I am taking a good deal of interest in the matter so that we can facilitate movement in this area. [227]

The Government has pointed to deemed buyback as one of the options available to compensate people in its response to the Ombudsman's report. Parliamentary Under Secretary of State, Lord Hunt of Kings Heath said, for example:

The Government agree with the committee that there should be a significant package of support and believe that the financial assistance scheme, as extended, constitutes such a package. The Government have, however, looked again in the light of the committee's report at what extra support can be made available within the existing framework. One option, which is not being widely taken up currently, is "deemed buy back". This is a facility which, provided certain conditions are met, reinstates a member of an underfunded contracted-out pension scheme into the state additional pension for the period they were in an underfunded scheme, at less than cost.

"Deemed buy back" needs to be carefully considered on an individual basis but despite this we believe that this facility could provide useful help. While the pensions industry should already be aware of "deemed buy back", the Government are planning to publicise these arrangements more widely and proposes to work with interested parties to investigate what more should be done in this respect. We also intend to examine whether the department can produce a tailored forecast for each person who qualifies for "deemed buy back" of the additional pension they could receive.[228]

[225] HC Deb 22 February 2005, c 23WH
[226] HC Deb, 3 Mar 2005 : c1397W
[227] HC Deb, 22 February 2005, c230
[228] HL Deb, 2 Nov 2006, WS19

DWP produced a deemed buyback factsheet which sets out some of the issues that may need to be considered when deciding whether or not to adopt the option. This is sent by the National Insurance Contributions Office to anyone identified as qualifying for reinstatement. It is emphasised that only organisations registered with the Financial Services Authority are able to give financial advice on the issue.[229]

Dr Ros Altmann has raised concerns about the deemed buyback process, in particular, regarding the fact that Additional Voluntary Contributions (AVCs) are taken into account if a pension scheme member opts for deemed buy back:

> ..the Inland Revenue's demand to confiscate members' Additional Voluntary Contributions on deemed buyback is morally indefensible, but I am afraid that is what is happening. The most recent example I have come across is a couple, both in their 50's, whose independent trustees have taken legal advice on this and refused to allow the members to have their AVCs unless they opt for the annuity rather than deemed buyback. The members wrote to the trustees specifically asking them to secure their AVCs separately and explained that they wanted to take deemed buyback but not in return for their £20,000 worth of AVCs. The trustees insist that their legal advice says the Inland Revenue can take these AVCs for deemed buyback.[230]

She refers to a letter from DWP explaining that its legal advice is that the value of a members AVCs should be included when calculating their share of the pension fund when applying for deemed buyback.[231] The DWP factsheet says that if a person chooses the option of deemed buy back, the trustees will pay the Government the "amount of money which is available for your membership of the scheme":

> 7. If you choose to use this facility, the trustees of your scheme will pay the Government the amount of money which is available for your membership of the scheme. You will then be able to rejoin the Additional State Pension system for either all or some of the period when you were in your employer's scheme. In other words, your Additional State Pension rights will be paid from State Pension age on the same basis as if you had not been contracted-out.[232]

The factsheet goes on to point out that an individual who chooses this option should be aware that they will:

> receive no more payments in relation to your previous rights under your pension scheme. All of the available money will have been used to buy you back into the Additional Pension.[233]

On the other hand, the process does allow a person to buy back Additional Pension rights without paying the full cost.[234]

Asked what estimate has been made of the potential costs to public funds of use of deemed buyback by members of pension schemes which started winding up between 1997 and 2004, the then Pensions Reform Minister, James Purnell, said in February 2007:

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[229] HC Deb, 8 February 2007, 1216W
[230] *Letter from Ros Altmann to Professional Pensions Magazine*, January 2007.
[231] Ibid
[232] DWP, 'Deemed buy-back Factsheet'
[233] Ibid
[234] Ibid

> It is extremely difficult to produce an estimate to reasonable standards of reliability due to the lack of sufficient base data. Such estimates as we have are given in the following table. It must be emphasised that these figures are subject to high levels of uncertainty and therefore can be taken as a guide to potential costs only. The estimates assume, among other things, all those who qualify for deemed buyback will take up the option. They show a short-term increase in the funds being paid into the national insurance fund, followed by rising costs as the higher state benefit is paid out.[235]

The answer included an estimate of the costs of deemed buyback from 2007/08 until 2045/46.

The final report of the Financial Assistance Scheme Review of Scheme Assets suggested that one way of simplifying the FAS might be to remove access to deemed buy back for FAS beneficiaries. This would be consistent with PPF policy and should also lead to a simpler wind up process:[236]

> 10. The interaction between Deemed Buy Back and FAS is complex and in some cases could result in a small number of scheme members receiving over 100 per cent of their scheme pension. DWP will need to consider the likely impact of this when developing any new scheme. However, simplifying the treatment of DBB payments in a re-designed Financial Assistance Scheme would undoubtedly be welcomed and could help speed up scheme wind up.
>
> 11. In practice, it is the scheme trustee who chooses whether or not to express an interest in taking up DBB for the scheme's members. Once the trustee is made aware of the scheme members who are likely to qualify those members are then offered access to DBB payments. This arrangement is not replicated in the operation of the PPF as members are not offered the option of taking up DBB.
>
> 12. One potential simplification measure might, therefore, be to remove access to DBB altogether for FAS beneficiaries. However, further work would be required to explore the financial impact and the legal implications of making any changes against a background of low reinstatement rates back into S2P or SERPS.
>
> 13.To add some context, the numbers who both qualify and opt for DBB are low. Since April 1997, when the legislation to establish DBB was introduced, a total of 164 people have opted for DBB at a total cost of around £2.3 million.[237]

Further details of deemed buy-back are contained in Library Standard Note SN 3410 Deemed buyback (March 2005).[238]

[235] HC Deb, 8 Feb 2007, c1216W
[236] Financial Assistance Scheme Review of Scheme Assets, *Final Report*, December 2007, p17
[237] Ibid, p71
[238] Link to Parliamentary intranet only