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Notes: clause 11 (2) highlighted in blue is of crucial importance for the position held by SA Superannuants, Richard Vear and Barry Foster. This position is that the Treasurer was forbidden, by the words ‘in order to avoid or reduce an increase in employer costs caused by the changes in the incidence of taxation as a result of the Scheme’s loss of constitutional protection’ in 11(2), from inserting a rule that reduced employer costs.

Clause 11(3) highlighted in orange allowed member benefits after tax to be greater as long as this did not see employer costs increased. But the rule 29 parts (4) and (5) inserted by the Treasurer did not allow member benefits to be increased in after-tax value.

Clause 11 (4) highlighted in red refers to a now-defunct tax rule having nothing to do with the loss of constitutional protection.

Clause 11 of Schedule 1 to the Electricity Corporations Act provides:

11—Treasurer may vary Rules in relation to taxation

(1) The Treasurer may, after consultation with the trustee of the Scheme, insert into the Rules a rule or rules relating to changes in benefits for members and employer costs in relation to those benefits, following the Scheme's loss of constitutional protection.

(2) A rule inserted by the Treasurer may—
(a) prescribe a decrease in the level of gross benefits; or
(b) require benefits to be paid on an untaxed basis or partly on an untaxed basis; or
(c) make provisions of the kind referred to in both paragraphs (a) and (b),
in order to avoid or reduce an increase in employer costs caused by changes in the incidence of taxation as a result of the Scheme's loss of constitutional protection.

(3) Subject to subclause (4), the change in benefits effected by a rule made under this clause must not result in the level of net benefits to which a member, or a person in respect of a member, is entitled being less than the level of net benefits to which he or she would have been entitled if the Scheme had not lost constitutional protection.

(4) The level of net benefits to which a member, or a person in respect of a member, is entitled may be reduced below the level permitted by subclause (3) to avoid or reduce an increase in employer costs attributable to tax under the Superannuation Contributions Tax (Assessment and Collection) Act 1997 of the Commonwealth in relation to the member.

(5) A rule made under this clause may operate differently in relation to—
(a) different classes of members;
(b) different classes of benefits;
(c) different classes of components of benefits.

(6) A rule made under this clause—

(a) must be made by notice in writing given to the trustee of the Scheme before the relevant day;

(b) may be varied or revoked by the Treasurer by notice in writing to the trustee before that day;

(c) is not subject to the Subordinate Legislation Act 1978.

(7) The trustee of the Scheme may vary or replace a rule inserted in the Rules under this clause in the same manner as it can vary or replace any of the other rules of the Scheme.

(8) In this clause—

level of gross benefits in relation to a member means the amount of the benefits to which the member, or another person in respect of the member, is entitled under the Scheme before tax attributable to those benefits has been paid or allowed for;

level of net benefits in relation to a member means the amount of the benefits to which the member, or another person in respect of the member, is entitled after tax attributable to those benefits has been paid or allowed for using the tax rates applicable on the day on which the Scheme loses constitutional protection and based on the assumption that the member has reached the age of 55 years;

the relevant day means the day on which the approval of the Treasurer ceases to be required for the variation or replacement of the Rules.

(9) For the purposes of this clause—

(a) benefits are paid on an untaxed basis where the trustee of the Scheme has made an election under the Income Tax Assessment Act 1936 of the Commonwealth as a result of which the person receiving the benefits is liable for a higher rate of tax in relation to them;

(b) the Scheme loses constitutional protection when it ceases to be a constitutionally protected fund for the purposes of the Income Tax Assessment Act 1936 of the Commonwealth.