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Under the heading **'Summary'** at the end of his letter to the Treasurer, the Board Chairman says that it is important for the rules administered by the Board to be valid but this statement is at odds with the Board's reluctance to take any steps itself to determine their validity. One must assume that the Board will accept that the rules are valid if the Treasurer tells them this and regardless of any evidence there might be to the contrary.

The Board chairman says in the last sentence of his letter that 'the Board was not responsible for the relevant rule amendments made by the Treasurer…'. This raises the question of whether or not the Chairman (who was appointed in March 2002) was aware of the existence of the letter of 7 June 2002 sent to the Under-treasurer. This letter advised that the Board 'supports and recommends' the rule changes that were developed by Mr Allan Archer. If the Chairman was aware of the existence of the letter this is inconsistent with his claim that the Board had no responsibility for the rule changes. If he was not aware of the existence of the letter this would be strong evidence that it is misleading in its claim that the Board 'supports and recommends' the rule changes.

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Ombudsman Inquiry into EISS taxed-source pensions
S.A. Superannuants submission

Attachment 5

Attachment 15

page 9 AR

Subject letter from EISS to the State Treasurer about EISS member concerns

Refer submission page 14

2 August 2007

Hon Kevin Foley MP
Treasurer
Government of South Australia
GPO Box 2264
ADELAIDE SA 5001

Dear Mr Foley

The Board of the Electricity Industry Superannuation Scheme is writing to notify you that it has received claims from a number of members who are of the view that changes to the Scheme rules made by the then Treasurer in 2002 do not comply with the law. The purpose of this letter is to bring these issues to your attention and to seek your response with respect to the validity of the rules.

The members' views as expressed in this letter are the Board's interpretation of those views. By writing this letter, the Board does not wish to indicate that it necessarily agrees or disagrees with those views.

Background to the Rule changes in question

On 29 June 2002, the then Treasurer wrote to the Board inserting Part XV of Division 1 of the Rules of the Scheme. The relevant rule amendments and the accompanying explanatory memorandum are enclosed with this letter.

The Treasurer had the power under clause 11 of Schedule 1 of the Electricity Corporations Act 1994 (the Act), as amended by the Electricity Corporations (Restructuring and Disposal) Act 1999, to make these rule amendments.

These rules had the effect of requiring the Board to implement a formula to reduce gross benefits in a way that would allow for cost increases as a consequence of the change in the Scheme's taxation status when constitutional protection was removed with effect from 1 July 2000.

Issues raised by members

Some members of the Scheme contend that the rules inserted in Part XV of Division 1 do not comply with clause 11 of Schedule 1 of the Act in respect of pension benefits.

They contend that there are two tests in clause 11 that the rules should satisfy:

Test 1) that benefits may be reduced in order to 'avoid or reduce an increase in employer costs ... as a result of the Scheme's loss of constitutional protection'.

That is, employer costs could be higher after the Scheme became taxed, but not lower.

Test 2) that the net benefit to which a member is entitled after the change in tax status must not be less than the net benefit to which the member would be entitled had the change in tax status not occurred.

That is, members can't be worse off in that their net benefits after tax cannot be reduced. This test is subject to a number of assumptions.

The Board understands that members are generally satisfied that the rules in Part XV satisfy Test 2. That is, members' net benefits after tax are not reduced by the changes.

However, the Board understands that members believe that the rule amendments did not satisfy Test 1 – particularly in relation to the application of the reduction formula to pension benefits. That is, some members have reported to the Board that they feel that the rules inserted in Part XV have in fact operated to reduce employer costs rather than minimise any increase in employer costs caused by the loss of the Scheme's constitutional protection.

The main ground upon which these members base their claim is that the loss of constitutional protection imposed a 15% tax on employer contributions and investment income. However, the formula applied pursuant to Rule 29 of Division 1 of the Scheme rules operates in a way that provides in most cases for pensions to be reduced by more than 15%, depending on the amount of the pension. In these cases it is the view of these members that because pension benefits have been reduced by more than the amount of increased tax on the Scheme, Test 1 above cannot have been satisfied.

Summary

As the Board must operate the Scheme in accordance with the Scheme Rules it is important that any rules which the Board applies are valid. As the Board was not responsible for the relevant rule amendments made by the Treasurer, the Board considers it prudent to seek a review by the Treasurer as to the validity of the rule amendments made in June 2002.

Yours sincerely

Mark Day
Chairman

encl: