OmbudsmanSA

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REPORT

DEPARTMENT OF TREASURY AND FINANCE
ELECTRICITY INDUSTRY SUPERANNUATION SCHEME

This document is an adaptation of the above-named report. The adaptations made are:
1. Hyperlinks have been inserted into the report and the location of each is indicated in a small text box on the left-hand side of the page.

2. Each hyperlink will take a reader to comments about that section of the report. At the end of the comments on each section there is a hyperlink that returns the reader to their previous position in the report.

A copy of the original, unchanged report is also posted on this website.

June 2014

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Report

Parliamentary referral - Ombudsman Act 1972

Relevant government agencies	Department of Treasury and Finance Electricity Industry Superannuation Scheme
Ombudsman reference	2013/03747
Date of referral	25 September 2013
Issues	1. Whether any administrative error occurred in connection with the changes to the scheme rules made on 28 June 2002; and the preparation of an explanatory memorandum dated 27 June 2002 2. Whether the department misled the Crown Solicitor in seeking legal advice in 2007 3. Whether since 2002 the department or the EISS Board has provided misleading advice in connection with the Treasurer's decision on the method used by EISS to calculate its taxed-source pensions

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Preliminary matters

A. Jurisdiction

The parliamentary referral

On 25 September 2013, the Legislative Council of South Australia passed a resolution which, inter alia, referred a number of matters and their associated administrative acts to the Ombudsman pursuant to section 14 of the Ombudsman Act 1972 for investigation (the parliamentary referral). The parliamentary referral followed representations made by the South Australian Government Superannuated Employees Association Inc. (SA Superannuants).

The parliamentary referral was in the following terms:

> That this council—
>
> 1. Notes the concern of pension scheme members regarding the Electricity Industry Superannuation Scheme (EISS) and the set of documents providing the basis of that concern provided to members of parliament by the organisation SA Superannuants and Mr Richard Vear, a pensioner of EISS;
>
> 2. Refers the following matters and their associated administrative acts to the Ombudsman, pursuant to section 14 of the Ombudsman Act 1972, for investigation and report on the EISS method for calculating its taxed-source pensions and compliance of that method with the Electricity Corporations Act 1994 (as modified by the Electricity Corporations (Restructuring and Disposal) Act 1999) —
>   (a) probity of processes resulting in a letter dated 7 June 2002 addressed to the then under treasurer being received by the Department of Treasury and Finance and accepted as coming from the EISS board to advise that the board supported and recommended rule changes for EISS developed by the financial services firm Mercer;
>   (b) probity of processes resulting in receipt by the Department of Treasury and Finance of the Mercer explanatory memorandum dated 27 June 2002, which is a document that has been cited as providing evidence that the method for calculating EISS taxed-source pensions had no effect on employer costs;
>   (c) inconsistency between the claim made in the Mercer explanatory memorandum of 27 June 2002 that EISS rule changes would have no effect on employer costs and analyses contained in the Mercer reports of 1998 and 2004 showing that the rule now being used by EISS to calculate its taxed-source pensions would reduce employer costs if applied to pensions of the state pension scheme;
>   (d) probity of the decision to provide only the explanatory memorandum of 2002 and not the Mercer reports of 1998 and 2004 to the Crown Solicitor when advice was sought on compliance of the method with the Electricity Corporations Act 1994;
>   (e) probity of advice and recommendations of the Department of Treasury and Finance to the EISS board and the then treasurer, Kevin Foley, in connection with his authorisation of use of the method in June 2002 and to both Mr Foley and the Minister for Finance, Hon. Michael O'Brien MP, in connection with representations about the validity of the method that have been made by SA Superannuants and Mr Richard Vear;
>   (f) whether the method used to calculate EISS taxed-source pensions has reduced employer costs for those pensions compared to what the cost would be if the pensions had continued as untaxed-source pensions;
>   (g) whether the method complies with the Electricity Corporations Act 1994 including schedule 1, part F, clause 11: Treasurer may vary rules in relation to taxation, subclauses (1) and (2); and
>   (h) any other relevant matter.
>
> 3. Resolves that, in all the circumstances of the case, administrative acts associated with these matters warrant investigation by the Ombudsman despite the availability of any alternative appeal, reference, review or remedy of the passage of time since SA Superannuants and Mr Richard Vear had notice of the administrative acts.

Section 14(1) of the Ombudsman Act permits either House of Parliament, or a committee of Parliament, to refer to the Ombudsman for investigation 'any matter that is within the jurisdiction of the Ombudsman and which that House or committee considers should be investigated by the Ombudsman'.

Link1>

I held concerns about my jurisdiction to investigate some of the matters contained in the parliamentary referral, in particular:

- whether the Electricity Industry Superannuation Scheme (the EISS) is an 'agency' to which the Ombudsman Act applies
- that the principal complaint was about the method for calculating EISS taxed-source pensions and therefore the relevant administrative act was a policy decision over which the Ombudsman has no jurisdiction (see City of Salisbury v Biganovsky (1990) 54 SASR 117)
- that the principal complaint about the method for calculating EISS taxed-source pensions relates to a decision that was made by the Treasurer, and the Ombudsman has no jurisdiction to investigate ministerial decisions
- whether the Ombudsman could satisfactorily complete an investigation of the matters concerning the Crown Solicitor because acts done by a person in the capacity of legal adviser to the Crown are excluded from the definition of 'administrative act' in section 3 of the Ombudsman Act.

Consequently I sought a legal opinion from Mr Stephen McDonald of Hanson Chambers.

Following receipt and consideration of Mr McDonald's advice, I determined that I would investigate certain of the matters referred to me by the Legislative Council, but not others.

First, Mr McDonald advised me that the better view is that the EISS Board is a body 'continued in existence for a public purpose by an Act' and is, therefore, an agency to which the Ombudsman Act applies. Mr McDonald also advised that it would seem that the individual members of the Board are agencies to which the Ombudsman Act applies. To the extent that the referred matters relate to administrative acts of the EISS, they are therefore within my jurisdiction.

Second, based on Mr McDonald's advice I determined to proceed as follows with respect to each of the substantive terms of the Legislative Council resolution:

(a) Probity of processes resulting in a letter dated 7 June 2002 addressed to the then-Under-Treasurer being received by the Department of Treasury and Finance and accepted as coming from the EISS Board to advise that the Board supported and recommended rule changes for EISS developed by the financial services firm Mercer;

I determined to investigate this matter, but only insofar as it relates to administrative acts by persons other than the Treasurer.

(b) Probity of processes resulting in receipt by the Department of Treasury and Finance of the Mercer Explanatory Memorandum dated 27 June 2002 which is a document that has been cited as providing evidence that the method for calculating EISS taxed-source pensions had no effect on employer costs;

I determined to investigate this matter, but only insofar as it relates to administrative acts by persons other than the Treasurer.

(c) Inconsistency between the claim made in the Mercer Explanatory Memorandum of 27 June 2002 that EISS rule changes would have no effect on employer costs, and analyses contained in the Mercer Reports of 1998 and 2004 showing that the rule now being used by EISS to calculate its taxed-source pensions would reduce employer costs if applied to pensions of the State Pension scheme;

The administrative acts associated with this paragraph are the preparation of the Mercer explanatory memorandum and the Mercer reports. These are the acts of Mercer LLC (Mercer), a global non-government company. In order to exercise jurisdiction in relation to these acts I need to be satisfied that they were done 'in the performance of functions conferred under a contract of services with the Crown or an agency to which [the Ombudsman] Act applies'.[1]

Link2>

I am so satisfied, and I have considered this issue. However, for the reasons set out in this report I am not persuaded that the assumption which underlies this paragraph is correct. I do not consider that there is a reasonable basis for comparing the 2002 explanatory memorandum with the 1998 and 2004 reports, and accordingly I determined not to investigate this matter any further.

(d) Probity of the decision to provide only the Explanatory Memorandum of 2002, and not the Mercer Reports of 1998 and 2004, to the Crown Solicitor when advice was sought on compliance of the method with the Electricity Corporations Act 1994;

I determined to investigate this matter. However, I advised the parties that depending upon the particular factual circumstances, it may become apparent that the administrative acts to which this paragraph relates were acts done by a person acting in the capacity of legal adviser to the Crown, in which case it would then be apparent that I do not have jurisdiction to investigate it. If that occurs, I would desist from investigating it.

(e) Probity of advice and recommendations from the Department of Treasury and Finance to the EISS Board and the then Treasurer Kevin Foley in connection with his authorisation of use of the method in June 2002, and to both Mr Foley and the Minister for Finance, Hon Michael O'Brien MP, in connection with representations about the validity of the method that have since been made by S.A. Superannuants and Mr Richard Vear;[2]

I determined to investigate the process leading up to the Treasurer's decision, but only insofar as it relates to administrative acts by persons other than the Treasurer.

(f) Whether the method used to calculate EISS taxed-source pensions has reduced employer costs for those pensions compared to what the cost would be if the pensions had continued as untaxed-source pensions;

Link3>

This matter is beyond my jurisdiction and I determined not to investigate it.

Mr McDonald advised me that the paragraph is framed in the abstract, as a pure question of law, and there is no administrative act associated with it. Further, even if the question posed in the paragraph could be connected with a particular act, it addresses the content of the ultimate decision, the decision of the Treasurer, which is not within the jurisdiction of the Ombudsman.

(g) Whether the method complies with the Electricity Corporations Act 1994 including Schedule 1, Part F, clause 11: Treasurer may vary rules in relation to taxation, sub-clauses (1) and (2); and

Link4>

This matter is beyond my jurisdiction, for the same reasons as for paragraph (f), and I determined not to investigate it.

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[1] See paragraph (b) of the definition of 'administrative act' in section 3 of the Ombudsman Act.

[2] SA Superannuants is an organisation which represents the interests of some members of the South Australian State Pension Scheme. Mr Richard Vear is a member of the EISS who raised concerns about its operation, and who previously complained to this office about the matter. For ease of reading in this report I have used the term 'SA Superannuants" to include both the organisation and Mr Vear.

(h) any other relevant matter.

In course of my investigation I did not discover any other relevant matters which in my view required investigation.

In light of Mr McDonald's advice, I determined that I would investigate the four issues outlined above.

The Mercer 2002 memorandum

Paragraph (b) of the definition of 'administrative act' in section 3 of the Ombudsman Act specifies that such an act includes 'an act done in the performance of functions conferred under a contract for services with the Crown or an agency to which this Act applies'.

I have invoked this definition to consider the actions of Mercer, notably in relation to the preparation of the explanatory memorandum signed by Mr Allan Archer, Principal, and dated 27 June 2002 (the 2002 memorandum). It is my understanding that at the relevant times, Mercer were engaged to provide administration and actuarial advice to the EISS Board on the operation of the EISS.[3]

Link5>

Allegation of apprehended bias

In response to my provisional report, SA Superannuants stated by letter dated 25 March 2014 that it held a reasonable apprehension of bias in the conduct of my investigation. In support of their contention, they referred to:

- the content of a paragraph in my provisional report, and an email which I sent to Dr Ray Hickman, a representative of SA Superannuants, on 18 March 2014 explaining the reasoning supporting that paragraph
- the fact that I described the department as having authorised the release of legal advice, rather than having relied on my legal powers to require the release
- a footnote outlining my interpretation of some legal advice
- my handling of evidence given by a former officer of the department, Mr Deane Prior
- the fact that the scope of my investigation largely reflects my previously suggested own initiative investigation
- the fact that whilst I stated that I have no power to investigate the advice given by Crown Law officers, I commented on the content of some legal advice
- the fact that they consider that I have not investigated the acts of persons who briefed legal advisers.

Because this allegation may raise a potential issue of maladministration in the office of the Ombudsman, I considered that I had an obligation to report it to the Office of Public Integrity (OPI). I did so on 31 March 2014, and provided my files in support of the report.

Link6> On 5 June 2014, the Independent Commissioner Against Corruption advised me that he did not consider that my conduct had 'enlivened any reporting obligations under the Directions and Guidelines'.

On 10 June 2014 he authorised me to publish the above statement in this report.

I therefore determined to finalise my investigation notwithstanding the allegation made by SA Superannuants.

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3 Letter dated 4 December 2001 written by the Director, Superannuation (Policy) in the department to Mr Allan Archer of Mercer. See also the submission from the EISS Board, 2012 Ombudsman's inquiry into certain aspects of the Electricity Industry Superannuation Scheme (EISS), 15 November 2012 (the EISS Board submission) paragraph 26.

B. Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in Briginshaw v Briginshaw (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.[4] It is best summed up in the decision as follows:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved … .[5]

4 This decision was applied more recently in Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

5 Briginshaw v Briginshaw at pp361-362, per Dixon J.

Investigation

My investigation has involved:

- assessing the information provided by SA Superannuants in submissions dated 19 November 2012 (the first SA Superannuants submission) and 13 January 2014 (the second SA Superannuants submission).[6] I note that the first SA Superannuants submission was provided in relation to an earlier Parliamentary reference which lapsed, but in my view it contains relevant information for the purposes of this investigation. I note also that in response to a specific request from me, the second SA Superannuants submission included a separate document entitled An argument against the proposition that Clause 11 does not preclude a reduction in employer costs
- assessing the information provided by EISS in a submission dated 15 November 2012 (the EISS Board submission)
- considering a brief to counsel prepared on behalf of the EISS Board by DMAW Lawyers dated 1 November 2007; and the subsequent memorandum of advice from P A McNamara QC dated 7 December 2007
- considering clause 11 of Schedule 1 to the Electricity Corporations Act 1994 (clause 11)
- considering clause 5 of the Electricity Industry Superannuation Scheme Trust Deed (the Trust Deed), set out in Schedule 1 to the Electricity Corporations Act[7]
- considering Rules 29-31 of the Rules of the Electricity Industry Superannuation Scheme operating in accordance with Schedule 1 of the Electricity Corporations Act and the Trust Deed established in accordance with that Act (the scheme rules)
- considering the Heads of Government Agreement on Superannuation (HOGAS)
- considering a departmental minute dated 26 June 2002 provided to the Treasurer to assist his decision-making on the 2002 changes to the scheme rules (the departmental advice)
- considering the 2002 memorandum
- considering legal advice provided to the department by the Crown Solicitor, dated 25 January 2006 and 26 November 2007
- considering legal opinions dated 29 August 2005 provided by DMAW Lawyers; and 7 December 2007 provided by P A McNamara QC
- Link7> interviewing Mr Prior. I did not consider it necessary to conduct this interview on oath
- interviewing Mr Jon Holbrook, EISS Board Chief Executive Officer, on oath[8]
- interviewing Mr Patrick McAvaney, Director, Policy and Governance, Super SA and Ms Alannah Pearce, Senior Policy Officer, Super SA on oath
- preparing a provisional report and sending it to the department; the EISS; Mr Prior; and SA Superannuants for comment
- considering the responses received
- reporting the matter to OPI and considering the response of the Independent Commissioner Against Corruption
- interviewing Dr Hickman and Mr Barry Foster (a member of SA Superannuants) on oath
- preparing this final report.

[6] SA Superannuants provided an earlier version of this submission on 9 December 2013, but it did not include the relevant attachments.

[7] The Trust Deed is set out in Schedule 1 to the Act. Whilst Clause 13 of the Schedule and Clause 1 of the Trust Deed permits the separation of the Trust Deed from the Schedule, I understand that this has not occurred.

[8] At interview, which was conducted on 16 January 2014, Mr Holbrook was accompanied by Ms Suzanne Mackenzie from DMAW Lawyers, who acts for the EISS Board.

Responses to my provisional report

I published my provisional report to the department; the EISS; Mr Prior; and SA Superannuants on 4 February 2014.

On 28 February 2014, Mr McAvaney advised me that the department had no further comment to make.

By letter dated 28 February 2014, the EISS Board advised me that it had no issue with the conclusions reached, but there were some minor matters which required clarification or correction. I have noted these corrections as appropriate in this report.

By letter dated 26 February 2014 Mr Prior commented that:

- SA Superannuants is not recognised by the EISS Board as the representative body of their members including retired members, and is better described as a body that on this matter purports to represent the interests of some members of the EISS scheme

Link8>

- he attended several of the EISS Board meetings held in 2002 to consider the matter. It was his impression that the Board had difficulty understanding the actuarial explanations provided; that the Board recognised that the Treasurer would accept the advice of the actuarial adviser; and that consequently the Board agreed it should endorse the proposed formula adjustment

Link9>

- a copy of the Mercer worksheets were provided as background material that went to the Treasurer to assist his decision-making in June 2002. Mr Prior noted that he had retained a copy of the worksheets, and had shown them to me at his interview with me.

By letter dated 26 February 2014 SA Superannuants commented on my provisional report, and made 14 requests of me. The matters it raised were:

- this investigation is essentially the own initiative investigation which I proposed in 2012 and which it rejected
- it maintains that I have not followed my own advice not to construe clause 11 to advance a position which a proponent may hold
- it is confident that I am wrong in my views that:
    - clause 11 does not preclude a reduction in employer costs
    - HOGAS has as one of its intentions, a reduction in employer costs for public sector superannuation schemes
    - a superannuation fund trustee is under no obligation to defend the interests of its beneficiaries in the circumstances applying to the rule changes made by the Treasurer in June 2002
    - there are differences between the State Pension Scheme and EISS that make the 1998 Mercer Report not relevant to EISS
- it seeks further detail on why some elements of the reference are outside my jurisdiction. It believes I should have exercised my power under section 28 of the Ombudsman Act to approach the Supreme Court for a ruling on my jurisdiction, and it considers that there is a lack of procedural fairness in my failure to provide reasons for matters being outside my jurisdiction. I have provided further explanations in this report
- it seeks clarification of my comments regarding the scope of Mr Clive Brooks' application to the department under the Freedom of Information Act 1991
- it seeks:
    - a copy of the letter dated 4 December 2001 written by the Director, Superannuation (Policy) in the department to Mr Allan Archer (the 4 December 2001 letter). I provided representatives of SA Superannuants with a copy of this letter on 17 June 2014
    - a statement in my final report that the 4 December 2001 letter should have been provided in response to Mr Brooks' FOI application
    - an explanation of why it was not so provided

  - a statement in my final report outlining what else was in the 4 December 2001 letter
  - clarification of whether there was any response by the department to the 4 December 2001 letter
  - that I should establish whether the department has documentation of the remuneration received by Mr Archer for the service described in the 4 December 2001 letter
  - confirmation that an invoice dated 10 September 2002 referred to the work done in response to the 4 December 2001 letter, and an explanation of why the department paid this invoice when it was addressed to the EISS Board
- clarification of the amount of the tax savings to the EISS Board of the pre-July 1988 Funding Credits; and a reconciliation of advice given to my investigation with the EISS Board's 2005 Annual Report
- clarification of its response to my suggestion that it should ask the Crown Solicitor whether he considers that he was misled by the department when it provided instructions for the purposes of seeking legal advice. It considers that the Crown Solicitor's response addressed a different piece of advice, and foreshadowed its intention to again raise the matter with the Crown Solicitor
- it requested that I should interview Dr Hickman, Mr Brooks and Mr Foster on oath.

I subsequently sought clarification from the department as to why the 4 December 2001 letter was not discovered when the FOI application was made by Mr Brooks. On 27 June 2014, the department advised me as follows:

> … we are not able to provide a definitive explanation as to why the document was not produced as part of the FOI application made on 15 February 2012. However, an examination of the history of the matter reveals that the search appeared to be conducted under the assumption that the relevant document was held by the "Electricity Reform and Sales Unit" (which I understand to have been established as a division of DTF).[9]

Link10> In my view this is not an unreasonable response.

I also sought clarification from the EISS Board about the amount of tax savings arising from the pre-July 1988 Funding Credits. I have included its response in this report.

On 10 March 2014, I wrote to Dr Hickman, Mr Brooks and Mr Foster proposing an opportunity for them to be interviewed about their submissions. However, on 17 March 2014, Dr Hickman on behalf of SA Superannuants sent an email to me alleging apprehended bias in my investigation. I have noted above that on 25 March 2014 SA Superannuants wrote to me detailing its reasons in support of this allegation.

After I dealt with that allegation in the manner outlined above, I again invited Dr Hickman, and Mr Foster to be interviewed. I interviewed them on oath on 17 June 2014. At that interview I outlined my response to SA Superannuants' requests. In particular, I advised them that I did Link11> not intend to further investigate the circumstances of the 2001 contract between the department and Mercers, as evidenced by the letter dated 4 December 2001.

[9] Email from a departmental officer, 27 June 2014. Mr Brooks' application under the FOI Act sought access to the following:
(a) The documents by which the Department of Treasury and Finance commissioned the document entitled: "Explanatory Memorandum," prepared by MERCER Human Resources Consulting, dated 27 June 2002, and signed by Allan Archer, Principal,
(b) The invoice relating to the aforesaid Explanatory Memorandum provided to the Department of Treasury and Finance.
It appears to me that the 4 December 2001 letter was caught by this application, and should have been disclosed in response to it. I have commented on sufficiency of search issues in my recent report 'An audit state government departments' implementation of the Freedom of Information Act 1991(SA)', and made a series of recommendations designed to improve agencies' performance in this regard: see http://www.ombudsman.sa.gov.au/wp-content/uploads/An-audit-of-state-goverment-departments-implementation-of-the-Freedom-of-Information-Act-1991-SA.pdf, recommendations 13-16.

I have considered the above comments made by the parties, and where I consider it appropriate I have amended this report in response.

Background

1. The EISS is a superannuation scheme governed by Schedule 1 of the Electricity Corporations Act, for the benefit of former employees of the Electricity Trust of South Australia (ETSA). Members of the EISS are classified by the section of the scheme rules (known as 'Divisions') in which their benefits are specified. This investigation relates to the pension scheme, which is covered by Division 3 of the scheme rules.

2. The EISS Board has described the operation of the scheme as follows:

> 17. The Scheme's history is generally split into pre-privatisation and post privatisation (of the Electricity Trust of South Australia, or ETSA).
>
> 18. Before privatisation of ETSA (in 2000) the Scheme was an unfunded, constitutionally protected, exempt public sector scheme. Most members were provided with defined benefits, and ETSA only paid contributions in to the Scheme when a benefit was payable (i.e. the money came in, and then went straight out again). Members contributed from their salaries, and this money was invested by the EISS Board. The EISS was not a taxpaying fund, which meant that members paid a higher rate of tax on their benefits than members of tax-paying superannuation funds.
>
> 19. After privatisation, the Scheme became a funded, taxed industry fund, but continued as an exempt public sector scheme. There was an unfunded liability, which the new employers (being the private sector companies that acquired the privatised assets of ETSA) were required to pay off over five years (this was completed in 2005). Employer contributions and investment earnings became taxed (in accordance with most funds) and the tax on benefits was reduced (and is now in line with most funds).
>
> 20. The tax offset rules were introduced at this point. In light of the tax changes outlined above, if there were no corresponding adjustment to members' gross benefits, the employers would be required to cover the tax payable from the fund and members would receive the same benefits – with the application of a lower tax rate (this has generally been referred to as a potential for a "windfall gain" for members).
>
> 21. As an exempt public sector scheme, the Scheme remains exempt from the Commonwealth prudential regulatory framework, known as the Superannuation Industry (Supervision) legislation (or 'SIS'), which applies to most private sector funds. However, the EISS Board complies with SIS as far as practicable.[10]

3. The EISS still attracts new members into its Accumulation Division, but two of the defined benefit divisions (including the pension scheme) were closed to new entrants in or around 1988. SA Superannuants represent some of the beneficiaries of the scheme, both existing pension-holders and current employees who expect to receive pensions from the scheme in due course. There are about 400 pension beneficiaries under Division 3 of the scheme, approximately 160 of whom are still in employment. Most of those are in their 50s with the youngest being 42 years of age.[11] The retired scheme members are mostly in their 60s.

Constitutional protection[12]

4. Before 1 July 1988 superannuation funds paid no tax on the money received as contributions or on the earnings of assets they held. On 1 July 1988 a 15% contributions tax was introduced on contributions made from pre-tax income of members and/or employers and a tax rate of up to 15% became payable on the earnings of assets.

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[10] EISS Board submission, paragraphs 17-21.
[11] He was 17 years of age when the scheme was closed off in 1988.
[12] This section draws heavily on the first submission from SA Superannuants.

5. However, constitutional limitations on the taxation power of the Commonwealth allowed state governments to continue running superannuation funds that were not subject to the new taxation regime applying from 1 July 1988. By the mid-1990s all state governments other than South Australia and Western Australia had opted to allow many of their funds to become subject to the new regime.[13] SA Superannuants attributes the reason for these decisions as being because they provided substantial net benefits to most members of the pension schemes without significant additional cost to government employers.

6. The government funds which were not subject to the taxation arrangements introduced on 1 July 1988 are called constitutionally protected and/or untaxed funds. Pensions paid from those funds are referred to as untaxed-source pensions. Where funds are subject to the taxation arrangements introduced on 1 July 1988 they are called taxed funds, and the pensions are called taxed-source pensions.

7. The effect of the taxes on fund income introduced on 1 July 1988 was to reduce the assets of each taxed fund, compared to what those assets would have been if it had continued as an untaxed fund. Consequently, the same level of employer contributions paid into a taxed fund on the one hand and an untaxed fund on the other hand, would have produced smaller pensions paid from a taxed fund.

8. In order to overcome this effect, the Commonwealth government reduced personal income tax on the resulting pensions. This was achieved by permitting a 15% tax offset claimable by recipients aged 55 and over, calculated on the entire taxable amount of the pension. By contrast, only the fraction of the pension accruing after 1 July 1988, and funded by employers, was reduced by 15% due to the new taxation arrangements. This situation gave rise to the Pre July 1988 Funding Credit (PJFC) discussed below.

9. By regulation made by the Commonwealth on 29 May 2002, the EISS lost its constitutional protection with effect from 1 July 2000. The EISS therefore became a taxed complying superannuation fund from that date.[14]

Variation of the EISS Rules

10. This investigation arises from a decision made by the Treasurer on 28 June 2002 to vary the rules of the EISS. The variation was achieved by the making of new rules purporting to be in accordance with clause 11. They took retrospective effect from 1 July 2000, when the EISS lost its constitutional protection.

11. Whilst the EISS remained constitutionally protected (i.e. for the period prior to 1 July 2000) the contributions to the EISS and income earned on assets in the scheme were not subject to taxation. Accordingly:
   - employer contributions and investment income were not taxable, as compared to a taxed fund where employer contributions and investment income are taxed at 15%
   - taxable lump sum benefits were taxed when paid to members at a higher rate (i.e. 30%) than for benefits paid from a taxed scheme (i.e. 15%)
   - the taxable portion of pension benefits were not entitled to a 15% rebate which was available to pension benefits paid from a taxed scheme.[15]

Link12> 12. The EISS Board has commented to my investigation on the implications of the change to the constitutional status of the EISS as follows:

> 36. If the rules of the Scheme had not been varied in response to the Scheme becoming a taxed Scheme after privatisation there would have been significant cost implications for

[13] However, Schedule 4 of the Income Tax Assessment Regulations 1997 shows constitutionally protected funds in all States.
[14] Explanatory memorandum, p1.
[15] EISS Board submission, paragraph 35.

employers participating in the Scheme and significant net or after tax benefit improvements for members.

37. As a defined benefit scheme, the employers bear the risk of funding the benefits. Accordingly, when employer contributions commenced to be taxed in the Scheme from 1 July 2000, the cost of funding the gross benefits payable to members also increased – so without rule amendments to reduce members' gross benefits employers would have borne the cost of taxation payable by the Scheme. The EC Act allowed the Treasurer to introduce rules to minimise the extra cost to employers.

38. Also, without rule amendments to reduce members' gross benefits, members would have generally received a significant benefit improvement after tax – i.e. they would have been entitled to the same gross benefit from the Scheme, but would have been treated more favourably in relation to the tax payable on their benefits:
- the lower tax rate of 15% would have applied in the case of lump sums; and
- the 15% rebate would have been available in the case of pensions.[16]

13. SA Superannuants does not dispute that the Treasurer's decision to vary the EISS rules complied with one essential obligation under clause 11, namely that after tax benefits for existing members were not lower than would have applied if the scheme remained untaxed. However, SA Superannuants asserts that the decision did not comply with another obligation imposed by clause 11, namely that the costs to employers should not reduce as a result of a variation of the rules. For the reasons explained below, I do not agree that such an obligation in fact existed.

Link13>

14. The consequence of the position put by SA Superannuants is that the existing members missed out on the 'windfall' gain that could have accrued to them, because employer costs were in fact decreased. In this respect, SA Superannuants contends that the members of EISS were treated less favourably than comparable schemes in other jurisdictions, and less favourably than should be the case for members of the state pension scheme if a similar adjustment is made to that scheme.

15. I understand that SA Superannuants is concerned about the precedent that has apparently been established. It fears that, should the government decide to move the broader state pension scheme into a taxed environment, it may seek to use a similar process to that adopted in the case of the EISS to reduce the gross benefits of pensions paid to retired public servants.

16. However, it is a question of policy - and hence outside my jurisdiction - as to whether in the case of EISS it was preferable for the 'windfall' gain to accrue to the existing members, or to the employers to reduce the cost of the scheme.

17. For the reasons explained above under the heading 'Jurisdiction', this investigation has been limited to a consideration of various administrative acts surrounding the Treasurer's decision to vary the scheme rules.

16 EISS Board submission, paragraphs 36-38.

Relevant law/policies

18. The EISS Scheme is governed by Schedule 1 of the Electricity Corporations Act. It is administered by the EISS Board in accordance with the provisions of the Trust Deed[17] and the scheme rules.

Link14>

19. Clause 5 of the Trust Deed provides as follows:

5–Reduction in benefits on changes in taxation

(1) Subject to subclause (3), where the cost to employers of maintaining the existing level of benefits is increased by a change in the incidence of taxation occurring after the Scheme loses its status as a constitutionally protected fund under the Income Tax Assessment Act 1936 of the Commonwealth, the level of benefits is reduced to the extent necessary to avoid an increase in that cost.

(2) The extent of the reduction in the level of benefits under subclause (1) must be determined by the Trustee on the advice of an actuary.

(3) If the Trustee and all the employers agree that subclause (1) will operate to reduce the level of benefits to a lesser extent than is provided by that subclause, the subclause will operate in accordance with the agreement.

20. 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;

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[17] The Trust Deed is set out in Schedule 1 to the Act. Whilst Clause 13 of the Schedule and Clause 1 of the Trust Deed permits the separation of the Trust Deed from the Schedule, I understand that this has not occurred.

(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.

21. Rule 29 of Division 1 of the scheme rules provides as follows:

Taxation Reduction of Benefits

29.(1) This Rule does not apply to a benefit or part thereof payable under the Rules that is either -
(a) a lump sum paid where the taxable component of the superannuation benefit consists wholly of an element untaxed in the fund;[18] or
(b) a pension paid where the taxable component of the superannuation income stream consists wholly of an element untaxed in the fund;[19] or
(c) a benefit derived from Additional Voluntary Contributions, or
(d) a benefit payable under Division 5 of these Rules after 1 July 2002.

(2) Notwithstanding any other provision of the Rules, each benefit or part thereof payable under the Rules (other than a benefit or part thereof listed in sub-rule (1) of this Rule) will be reduced in accordance with a formula determined by the Superannuation Board on the advice of the Actuary.

(3) In the case of a benefit or part thereof paid as a lump sum, the formula determined in accordance with sub-rule (2) of this Rule shall be such as to ensure that:

(a) the amount of the reduced benefit or part thereof which would be received after tax, assuming that taxation at the tax rates set out in column B of Schedule 1A of Division I of these Rules is applied to the reduced benefit or part thereof
equals

(b) the amount of the benefit or part thereof prior to its reduction by the formula which would be received after tax, assuming that taxation at the tax rates set out in column C of Schedule 1A is applied to the benefit or part thereof prior to its reduction by the formulae,

[18] This paragraph was replaced in June 2007.
[19] This paragraph was replaced in June 2007.

PROVIDED THAT in the case of a Member who was employed by a Consenting Employer immediately prior to becoming entitled to the payment of a lump sum benefit, if such formula causes the reduction in that part of the taxed element of the post June 83 component (which did not arise from a taxed rollover into the Scheme) to exceed 15% of that part, the reduction on that part must be 15%. In the application of this proviso it must be assumed that the taxation laws that applied on 1 July 2000 continue to apply.[20]

In determining whether the formula determined in accordance with sub rule (2) of this Rule satisfies the condition set out under this sub rule (3) it must be assumed in respect of each of paragraphs (a) and (b) of this sub rule (3) that the lump sum is taxed using the tax rates set out under Schedule IA as if the provisions relating to the taxation of superannuation lump sums (including from a taxed source and from an untaxed source, as applicable) under the taxation laws that applied before 1 July 2007 continued to apply.[21]

(4) In the case of a benefit paid as a pension, the formula determined in June 2007 in accordance with sub-rule (2) of this Rule shall be such as to ensure that:

(a) the amount of the reduced pension from a taxed source which would be received after tax and after taking into account a taxation rebate on pension payments at the rate of 15%;[22]

equals

(b) the amount of the pension prior to its reduction which would be received after tax assuming that it is paid as a pension from an untaxed source.[23]

(5) The formula for calculating the amounts received after tax, in accordance with paragraphs (a) and (b) of sub rule (4) of this Rule, shall:

(a) take into account the personal income tax scale applicable at the time the pension commences and shall assumed that the pensioner receives no taxable income other than the pension;

(b) in respect of the period from 1 July 2007, assume the pension is taxed as if the provisions relating to the taxation of pensions (including from a taxed source and from an untaxed source, as applicable) under the taxation laws that applied before 1 July 2007 continued to apply.[24]

(6) Where a member contribution in respect of any period after 1 July 2002 (other than an Additional Voluntary Contribution) has been paid by a Member and has not been paid by an employer in accordance with Rule 8A, the reduced benefit determined in accordance with sub-rule (2) of this Rule shall be increased by an amount calculated in accordance with a formula determined by the Superannuation Board on the advice of the Actuary to reflect the excess (if any) of-

(a) 15% of such member contributions after 1 July 2002, accumulated with interest at the Declared Rate,

over

(b) 15% of those member contributions without interest.

[20] This paragraph was inserted 29 August 2008.
[21] This paragraph was inserted in June 2007.
[22] This paragraph was amended in June 2007.
[23] This paragraph was amended in June 2007.
[24] This subrule was substituted in June 2007.

Whether any administrative error occurred in connection with the changes to the scheme rules made on 28 June 2002; and the preparation of an explanatory memorandum dated 27 June 2002

22. SA Superannuants asserts in essence that in providing advice to the Treasurer about the making of the rules, the department and/or the EISS Board did not properly explain that the 'windfall' gain occasioned by the change to the scheme's tax status would accrue to employers to reduce the cost of the scheme; rather than being paid to members of the scheme through a favourable adjustment to the calculation of their revised benefits.

23. I have considered seven questions relevant to this issue. In formulating these questions I have endeavoured to summarise the various assertions of administrative deficiency made by SA Superannuants.

Link15> Was there any requirement that employer costs should not be reduced?

24. A threshold question is whether the relevant provisions in the EISS framework, including clause 11 and the scheme rules, required that employer costs should not be reduced. In my view, many of the submissions made by SA Superannuants assume that clause 11 prevents the making of rules which have the effect of reducing employer costs.

25. However, having considered the terms of clause 11 and the rules, I see no grounds to support an assertion that any variation of the rules should not have reduced employer costs. I appreciate that SA Superannuants has put the view firmly to me that clause 11(2) does operate to preclude a reduction in employer costs. I do not agree.

26. In my view, clause 11(2) simply permitted the Treasurer to make rules which decreased member benefits, so as to avoid an increase in employer costs resulting from changes in the incidence of taxation following from the EISS's loss of constitutional protection. Its introductory words specify that the Treasurer 'may' make such a rule. I imagine that the framers of the clause considered it to be necessary because it is unusual for member benefits in a superannuation scheme to be reduced. But clause 11(2) did not prevent a 'windfall' gain being used to reduce employer costs: indeed, it says nothing about such an occurrence.

Link16> 27. I am conscious that my views about this issue have a significant impact on the contentions advanced by SA Superannuants. As a result, I provided it with an opportunity to address this issue specifically, which it did by letter dated 8 January 2014; and in its second submission. I set out below my views on the matters which SA Superannuants raised.

Prior consistent statements

Link17> 28. First, SA Superannuants states that I am the first person to say to it that the rule for reducing pensions can be valid even if it reduces employer costs.[25] I do not agree that this is so. The Acting Treasurer advised SA Superannuants in a letter dated 12 October 2006 as follows:

> In your letter you state that the legislation covering the EISS provides that any rule inserted following the move of the fund into the taxed environment may reduce gross benefits "but only to the extent needed to avoid or reduce an increase in employer costs arising from a change in

[25] SA Superannuants, An argument against the proposition does not preclude a reduction in employer costs, 14 January 2014, p1.

the incidence of taxation". The quote used in your letter is not a correct reflection of the provisions of the Act.[26]

29. I consider that this is an early indication to SA Superannuants that its interpretation of the effect of clause 11 is misconceived. In my view it is consistent with the conclusion which I have reached, namely that the legislative scheme does not prevent the reduction of employer costs in circumstances such as those which occurred. However, since that time SA Superannuants has continued to maintain that clause 11 should be interpreted in the way it proposes. In response to my provisional report it advised me that it considers that it is significant that the Acting Treasurer's letter quoted in the preceding paragraph was written before formal legal advice was obtained from Mr Stephen McDonald of the Office of the Crown Solicitor.[27]

Other possible wordings of clause 11

30. Second, SA Superannuants suggests that if it had been the intention of clause 11 to permit the possibility that employer costs may reduce, it would have been worded differently. It provides several possible alternatives to the existing wording of clause 11 seeking to demonstrate this contention.

31. With respect to the position advanced SA Superannuants, I consider that approach to be speculative. In my view the words of clause 11 must be interpreted according to their plain meaning, not construed to advance a position which a proponent may hold.

Other legal opinions

32. I advised SA Superannuants that I consider that my view is consistent with other legal opinions provided on related topics. SA Superannuants stated in response that those other opinions have not directly addressed the topic, and so cannot be considered relevant.[28]

33. It is true that the legal opinions have not directly addressed the topic of whether clause 11 operated to prevent the making of a rule which permits a 'windfall' gain being used to reduce employer costs. However, I consider that the opinions can provide some illumination on the question of whether clause 11 operated in that way; and in my view there is nothing in those opinions which renders that construction wrong. I set out below a summary of these opinions.

Link18>

Link19>

34. First, there is advice provided by Mr Chad Jacobi of the Crown Solicitor's Office on 25 January 2006. The department has provided me with a copy of that advice, and authorised me to disclose its substance. The advice notes that some EISS members had argued that clause 11 provides a guarantee that the level of net benefits to which a member is entitled will not be less than the net benefits to which he or she would have been entitled if the EISS had not lost constitutional protection; and that the state had an obligation in effect to 'make up the difference'. The advice concludes that the state has no such obligation.

Link20>

35. Second, there is advice provided by Mr Stephen McDonald of the Crown Solicitor's Office on 28 November 2007.[29] The department has provided me with a copy of that

[26] Letter from Hon Paul Holloway MLC, Acting Deputy Premier and Acting Treasurer to Mr Vic Potticary, SA Superannuants, 12 October 2006.

[27] The nature of this advice is outlined in paragraph 35. I note that the Acting Treasurer's letter post-dates the advice provided by Mr Chad Jacobi (outlined in paragraph 34).

[28] SA Superannuants, An argument against the proposition does not preclude a reduction in employer costs, 14 January 2014, pp 3-5.

[29] Mr McDonald's previous involvement in the matter was not known to me when I sought his advice on the Ombudsman jurisdictional questions arising under the Parliamentary referral. This is a different legal question from that upon which he provided advice to the department in 2007. He has also advised me that until it was brought to his attention on 3 February 2014, he had not remembered and was not aware that he had provided the advice to the department.

advice also, and has authorised me to disclose its substance. The advice includes the following statement:

> The purpose of the power granted to the Treasurer by clause 11 was to enable the reduction or complete avoidance of an increase in employer costs (ie, an increase in employer contributions to the fund) which would have otherwise resulted from the shortfall created by the imposition of a significant tax liability on the fund. The power in clause 11 did not extend to the making of a rule that provided for a total reduction in gross benefits which was greater than that which is required to avoid an increase in employer costs. Put another way, the power in clause 11 could not be used to insert a rule which had the effect of decreasing employer costs.[30]

36. Mr McDonald's advice concludes that 'on the assumption that the actuarial calculations can be justified, so that it could be demonstrated, if necessary, that the level of reduction in gross benefits effected by the insertion of Part XV into the Rules did have the effect of reducing or avoiding an increase in employer contributions and did not go beyond what was necessary to achieve that purpose … the insertion into the Rules of Part XV by the Treasurer is not invalid'. In support of this conclusion, he noted that:

> The extent of the reduction in gross benefits resulting from the insertion of the new rules has been justified actuarily in the Explanatory Memorandum which has been provided to me. I am not in a position to provide advice as to the accuracy of the actuarial calculations underlying the assertions in that Explanatory Memorandum. However, assuming that the assertions are correct, it appears that, had the Treasurer determined to insert a rule providing for a lesser reduction in gross benefits, that rule would have resulted in a shortfall in the fund such that, in order for the benefits to be paid to members, it would have become necessary to increase employer contributions to the fund. It follows that the rules which the Treasurer did insert were rules which had the effect of reducing or avoiding an increase in employer costs, as required by clause 11.

37. Mr McDonald's advice also explains the effect of the 25 January 2006 advice provided earlier by Mr Jacobi as follows:

> Mr Jacobi's advice did not directly state that the variations to the Rules made on 28 June 2002 were legal. Mr Jacobi advised more generally that, where factors other than a change to the Rules (factors such as reductions in Commonwealth Income Tax or expansions of Income Tax brackets) produce the result that members of the EISS are entitled to lower net benefits, clause 11 of Schedule 1 does not require the Treasurer or the State to compensate those members for any reduction in benefits. Clause 11(3) does not operate as a general guarantee that the net level of benefits to which a member is entitled cannot fall below that to which the member would have been entitled had the Scheme not lost constitutional protection: it merely restricts the effect of rules made under clause 11(1) so that those rules could not themselves have that effect.

Link21>

38. Third, I consider that my conclusion is consistent with advice provided to the EISS Board by DMAW Lawyers in 2005.[31] This advice was provided in response to a question concerning which marginal tax rate of a pensioner the EISS Board should apply in calculating a benefit reduction. The advice relevantly concluded that whilst a net pension benefit 'may in some cases be less than is required by the calculation under clause 11 [this] will not invalidate rule 29 in its entirety, but will only cause it to be construed in those cases so that the higher net benefit applies'.

30 I acknowledge that the last sentence in this extract on its face provides support for the construction which SA Superannuants would urge, namely that the power in clause 11 could not be used to insert a rule which had the effect of decreasing employer costs. However, I consider that this statement is not consistent with the general tenor of the preceding sentences in this extract, and of the advice in total. In any event this is a different question to whether the clause prevented the making of a rule which had the effect of applying a windfall gain to reduce employer costs.

31 Letter of advice dated 29 August 2005 (Attachment 9 to the brief to counsel dated 1 November 2007).

Link22> 39. Fourth, my conclusion is also consistent with advice provided to the EISS Board by P A McNamara QC in 2007.[32] In this case, the principal question upon which advice was sought was whether rule 29(3) is invalid because it does not satisfy the 'no worse off' test for the Treasurer's power to vary the rules under clause 11(3).

40. The McNamara advice confirmed that clause 11(2) is a spent force; does not bind the Board; and is not now relevant to the correct interpretation of sub-rule 29(4).[33] The advice also concluded that 'sub-clause 11(3) does not bind the Board, and cannot be taken into account in construing sub-rule 29(3)'.[34] This position applies because:

> Clause 11 required that particular rules be inserted having a particular effect on the day on which the Scheme lost its constitutional protection. That day has come and gone. At the same time, the Treasurer's powers under Clause 11 have expired.[35]

Alleged subsequent departmental acknowledgement

41. SA Superannuants contends that the department has since acknowledged that the variation of the scheme rules 'were forbidden … to have the effect of reducing employer costs'.[36] They quote in support the following comment from the Minister for Finance:

> The formula that reduced gross pensions was determined actuarially in order to comply with the provisions of Clause 11(2) Part F of Schedule 1 Superannuation of the Electricity Corporations Act 1994. It was determined in a manner to avoid or reduce an increase in employer costs, but not reduce existing employer costs. It also satisfied the Act by ensuring that members received a net benefit that was not less than their existing net benefit applying before the fund moved into the taxed environment.[37]

42. I do not agree that this statement supports the acknowledgement which SA Superannuants contends has been made, that the rules 'were forbidden' from reducing employer costs. The statement simply outlines the fact that the intention of the rules was not to reduce employer costs, and in my view is consistent with the explanation of the purpose of the variation of the scheme rules as contained in the 2002 memorandum.

43. In any event, whether the department has previously made an acknowledgement is not determinative of the proper construction of clause 11.

Link23> The Heads of Government Agreement on Superannuation

44. SA Superannuants asserts that HOGAS 'placed an obligation on the State Government to ensure that tax outcomes for EISS members were the same as occurred in the other Australian jurisdictions'.[38] It quotes the following Paragraph from HOGAS:

> The Commonwealth and the State and Territory Governments recognise the need to apply national standards to certain aspects of superannuation without distinguishing between employees of the public and private sector. For example, it is important that members' accrued benefits are securely protected, and there is consistency of taxation outcomes for members' superannuation benefits.

45. In my view, the quoted extract does not support a suggestion that there should be equity as amongst members of public sector schemes in Australia. It states that

32 Advice provided to the EISS Board by P A McNamara QC, 7 December 2007, paragraph 234.
33 Advice provided to the EISS Board by P A McNamara QC, 7 December 2007, paragraph 228.4-228.5.
34 Advice provided to the EISS Board by P A McNamara QC, 7 December 2007, paragraph 238.
35 Advice provided to the EISS Board by P A McNamara QC, 7 December 2007, paragraph 46.
36 Second SA Superannuants submission, p25.
37 Second SA Superannuants submission, p24. I understand that the quoted extract is a response given by the Minister for Finance to a question asked by Hon Iain Evans MP in a letter to the Minister dated 25 May 2012.
38 SA Superannuants, An argument against the proposition does not preclude a reduction in employer costs, 14 January 2014, pp 5-6.

national standards should apply, without distinguishing between public and private sector schemes.

'Members' interests to be paramount'

46. SA Superannuants asserts that:

> Where an action being contemplated by a superannuation scheme trustee could deliver an advantage either to members or to some other party, such as an employer, and there is no specific authority to consider giving the advantage to the other party the advantage must go to scheme members. This is because of the specific obligation of trustees to act in the best interests of its beneficiaries.[39]

Link24>

47. SA Superannuants goes on to suggest that 'instead of inserting the rules 29(4) and 29(5) for reducing pensions the Treasurer might have inserted [a] different rule',[40] which would have had the effect which they seek. As with other possible alternative drafts proposed by SA Superannuants, I consider this speculative and not relevant to a construction of the effect of clause 11. Whilst the Treasurer might have so acted, in the event he chose not to; and my task is to consider clause 11 as it exists, not as SA Superannuants would wish it to be.

48. Whilst I agree that a trustee has an obligation to act in the interests of the beneficiaries of a trust, in this case the EISS Board has an overriding obligation to apply the scheme rules. This obligation cannot be set aside by an expressed wish for the scheme to be administered in a way which delivers additional benefits to members, if administration in that way is not authorised by the scheme rules.

Link 25>

Protections for EISS members

49. Finally, whilst the policy question of whether the variation of the scheme rules should have had the effect of reducing employer costs is beyond my jurisdiction, I note that a number of elements in the legislative scheme were designed to protect the interests of EISS members. In my view these factors are relevant in considering whether clause 11 should be given the interpretation which I have proposed above.

50. The elements are:
    - the protection of the interest of members was afforded by the obligation to ensure that they were no worse off[41]
    - subclause 11(2) explicitly contemplated that a variation could be made to ensure that costs to employers were not increased[42]
    - the 2002 memorandum states that as part of the privatisation process, the Treasurer indicated to the tenderers that he would vary the rules so as to avoid an increase in employer costs, to the extent permitted by the constraint contained in clause 11.[43]

Did the Treasurer properly consult the EISS Board?

51. Under clause 11(1) of Schedule 1 to the Electricity Corporations Act, the Treasurer was obliged to consult with 'the trustee of the scheme' (i.e. the EISS Board) before making rules relating to changes in member benefits etc. following the scheme's loss of

[39] SA Superannuants, An argument against the proposition does not preclude a reduction in employer costs, 14 January 2014, p6.
[40] SA Superannuants, An argument against the proposition does not preclude a reduction in employer costs, 14 January 2014, p6.
[41] See subclause 11(3).
[42] I note that following the making of Rule 29 subclause (2) is a spent force. See advice provided to the EISS Board by P A McNamara QC, 7 December 2007, paras. 228.4 and 249.
[43] 2002 memorandum, p1.

constitutional protection. SA Superannuants asserts that there were administrative errors in this process.

Link26> 52. SA Superannuants' principal contention is that 'the Board was merely a passive recipient of the new rules',[44] and that this was in breach of its obligation to be an active participant in the process leading up to adoption of rules for benefit reductions. SA Superannuants states that the EISS Board lacked 'the assertiveness required to adequately defend the interests of its beneficiaries'.[45]

53. However, I can see no basis for this contention. Under clause 11 the responsibility for making the scheme rules rested on the Treasurer, and before making the rules the Treasurer was obliged to consult with the EISS Board. This is a common legislative formulation to ensure that rules are not made without a relevant party having the opportunity to express a view about a proposal. But in my view it does not cast any obligation on the recipient of the benefit to take advantage of the opportunity. In my view the provision was intended as a limitation on the Treasurer's power.

54. I note also that the EISS Board is the trustee of the scheme. In my view, this role does not extend to 'defending the interests of its beneficiaries'. The EISS Board's role is to administer the scheme pursuant to the Schedule, the Trust Deed and the scheme rules.[46] This should be done in the interests of all parties who have an interest in it, not simply scheme members. This includes employers.

55. In the event, the then Treasurer wrote to the EISS Board on 2 July 2000 to advise that rules would be inserted into the scheme rules to reduce benefits following EISS's move into a taxed environment, and this was supplemented by correspondence from the Undertreasurer on 5 July 2000. On 29 May 2002, the EISS Board established a sub-committee to deal with the matter, but SA Superannuants asserts that at the EISS Board meeting held on 26 June 2002 the Board was still confused as to the workings of the tax reductions to benefits. The Chairman sought a further report to be provided to the July meeting of the EISS Board.[47]

56. Given that these events occurred 12 years ago, it is not now possible to state with any certainty what was in the minds of the EISS Board members at the time. Even if I accept the conclusions proposed by SA Superannuants as to the EISS Board's state of knowledge of the matter, I do not consider that this is evidence of administrative error. Clause 11 makes it clear that it was the Treasurer's responsibility to satisfy himself as to the matters set out there.

Link27> Was the 7 June 2002 letter misleading?

57. A related matter concerns a letter dated 7 June 2002, which appears on EISS Board letterhead, and which states that it is signed with the authority of the Secretary to the

[44] Second SA Superannuants submission, p16.
[45] Second SA Superannuants submission, p17.
[46] Clause 3(1) of Schedule 1 to the Electricity Corporations Act.
[47] In relation to the Board's deliberations at this time, Mr Prior commented to my investigation as follows:

> I feel the need to make comment on this paragraph because I attended several of the EISS Board meetings during the period when the Board was considering the matter how and the extent of the benefit reduction that was to apply to member benefits. I can clearly recall the Board finding it difficult to understand the explanations that Allan Archer, as actuarial adviser to the Treasurer, was providing in justification for the formula reductions that he was recommending to the Treasurer. The Board was having difficulty in understanding the explanations because of the complex actuarial workings. I also clearly remember, the then chair of the Board, Mr Max Bray, making a comment along the lines; 'well whilst several members are still having difficulty In understanding all this, I guess at the end of the day the Treasurer is going to accept the advice of his actuarial adviser and so we as a board should endorse the proposed formula adjustment'. As I stated at our meeting, the Board's records about this time are probably 'a bit lacking' as it is my recollection that the period immediately before the benefit reduction formula was brought into operation, the secretary of the board became seriously Ill and the secretarial role was undertaken by several "stand in persons".

Board. In considering this letter I have accepted that it purports to represent the position of the Board on 'the proposed movement of the fund into the tax environment'.

58. SA Superannuants has asserted that there is no evidence that the EISS Board actually considered this letter; and that certain officers (including the then and current Chairman of the EISS Board, and its Chief Executive Officer) who would have been expected to know of its contents have no recollection of it. SA Superannuants assert that the letter was prepared by an actuary who worked at the time for Mercer; and who is since deceased. They imply that there is no factual basis for the letter's statement that the Board 'supports and recommends the proposed rule changes that have been developed by [the actuary]'.[48]

59. SA Superannuants has also suggested to me that 'there is a reasonable basis for suspecting that the letter is a false document in terms of the Criminal Law Consolidation Act 1935 (Section 140 Dishonest dealings with documents)'. I do not agree that there is any evidence to support a conclusion that there is some criminality attached to the preparation of the document. The offence created by section 140(4) of the Criminal Law Consolidation Act requires (in paragraph (b) of the subsection) proof beyond reasonable doubt of an intention to benefit the creator of a document, or to cause detriment to another. In my view there is simply no evidence of this element of the offence.

60. Further, in my view it does not follow that any doubt surrounding the authenticity of the letter amounts to evidence of an administrative error. In order to make a finding to this effect, I would need to be satisfied to the requisite degree[49] that such an error occurred. Whilst I consider it possible that the letter was sent without the express authorisation of the Board, or at least of a senior officer of the Board, I have no evidence - only conjecture - that the letter misrepresents the EISS Board's position.

61. I note also that even if I were to find an administrative error, that would have no practical effect on the decision made by the Treasurer to adopt the rules. The Treasurer's decision is beyond my jurisdiction, but I consider it likely that the letter written on behalf of the EISS Board was simply one element or factor taken into account by the Treasurer. I am not able to speculate as to its significance in that process.

Link28>

Was the 2002 memorandum misleading?

62. Mercer prepared the 2002 memorandum to assist the Treasurer's consideration of the proposed rule changes. The memorandum states the purpose of the amendments as being:

> … to specify the way in which benefits from the Electricity Industry Superannuation Scheme should be reduced to allow for the Scheme being taxed with effect from I July 2000.
>
> In summary, the reductions to gross benefits payable from the Scheme are such that:
> - benefits after tax received by existing members will not be lower than would have applied had the Scheme remained untaxed;
> - employer costs are not expected to change as a result of the tax changes.

63. SA Superannuants asserts that the memorandum 'was not seen by the EISS Board beforehand'; and that this 'demonstrates s (sic) a lack of probity in the processes associated with its production and subsequent use as the sole basis for claiming that the rule changes would not have an effect on employer costs'.[50] It states that in

48 Second SA Superannuants submission, pp 7-10.
49 In this situation, the Briginshaw principle outlined above applies.
50 Second SA Superannuants submission, p10.

response to an application under the Freedom of Information Act 1991 the department was unable to produce any documents commissioning the work that the memorandum purports to describe.[51]

64. SA Superannuants also asserts that 'there is a possibility that the actuarial adviser wrote an explanatory memorandum to a set of rule changes that Mercer had never been formally authorised to develop'.[52]

65. However, the department has provided me with a copy of a letter dated 4 December 2001, written by the Director, Superannuation (Policy) in the department to Mr Allan Archer, Principal, William M Mercer Pty. Ltd. The letter states:

> The purpose of this letter is to formally advise you that the Treasurer has appointed you to assist in advising the Treasurer in relation to the appropriate rule changes to avoid or reduce an increase in employer costs caused by changes in the incidence of taxation as a result of the EISS scheme's expected future loss of constitutional protection.

The department subsequently paid for the advice.[53]

66. In its response to my provisional report,[54] SA Superannuants questioned whether Mercer had been properly engaged to provide advice to assist the Treasurer. However, in my view, the 4 December 2001 letter demonstrates that Mercer was properly commissioned, and I can see no administrative error in this sequence of events.

67. SA Superannuants also claims that the department should have been aware that the memorandum was misleading in asserting that employer costs would be unaffected; and that the department was 'reckless' in accepting Mercer's conclusions without the evidence of worksheets detailing how they were obtained.[55]

68. In responding to my provisional report, Mr Prior commented as follows:

> This assertion is simply not correct as a copy of Mercer worksheets were provided as background material in the file that went before the Treasurer. … I can assure you that much more than a copy of the 2002 memorandum accompanied the minute that went to the Treasurer. In fact a very detailed copy of the actuary's workings went in the file to the Treasurer. EISS Board files, Treasury files and the ERSU files would (should) have a copy of the Mercer detailed workings, as there many copies produced and distributed as they were produced by a commercial printer.

69. SA Superannuants points to the fact that the departmental advice was dated 26 June 2002, and suggests that the proximity of this date to 28 June 2002, when the Treasurer made his decision to amend the rules, did not allow the Treasurer to reflect on the issues before making his decision. It also makes other criticisms of the content of the 2002 memorandum, which it states 'should have been recognised by Treasury as indicators that employer costs for pensions would be reduced by the method';[56] and which include the fact that the memorandum made no reference to a method or formula used in the other Australian jurisdictions to reduce pensions in response to taxes that became payable on superannuation fund income from 1 July 1988. SA Superannuants concludes that:

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51 I have reviewed the scope of this FOI application, and I consider that the letter dated 4 December 2001 to which I refer below should have been provided in response to the application.

52 Second SA Superannuants submission, p10.

53 The SA Superannuants submission refers at p10 to an invoice which apparently relates to this work. It states that Mercer sent the invoice to the EISS Board , which forwarded it to the department for payment.

54 I acknowledge that their response was prepared before SA Superannuants had an opportunity to consider the terms of the 4 December 2001 letter.

55 Second SA Superannuants submission, p11.

56 Second SA Superannuants submission, p11.

> The circumstances surrounding the production and use of the Explanatory Memorandum provide a reasonable basis for suspecting that Treasury and the actuarial adviser worked together to ensure that the Treasurer would have no opportunity to see the possibility that he was being advised to authorise use of a rule for reduction of pensions that was not valid.[57]

70. The 2002 memorandum was prepared to assist the Treasurer in his decision-making. As with the departmental advice and the 7 June 2002 letter purporting to be from the EISS Board, it was one of the factors which the Treasurer took into account in making his decision. Because the Treasurer's actions are not within my jurisdiction, I am not able to speculate about the significance of the 2002 memorandum in that decision-making process.

71. In summary, I do not see any administrative error in the department's advice to the Treasurer at this time. Mercer was an appropriately qualified body to provide expert advice on superannuation matters, and in my view it was not unreasonable for the department to rely on the expert advice which it commissioned to assist the Treasurer's decision-making. I do not consider that the department was under an obligation to 'second guess' the Mercer advice.

Link29>

Was the effect of the proposed rule changes properly explained to the Treasurer in 2002?

72. The next substantive question is whether the effect of the rule changes was properly explained in the advice provided to the Treasurer by the department and the EISS Board in May 2002 when the new rules were made. In considering this question I have had particular regard to the departmental advice; the 2002 memorandum; and the 7 June 2002 letter purporting to be from the EISS Board.

73. The departmental advice quoted clause 11 in full, and continued:

> The "relevant day" under subclause (6) is defined to be the day on which the approval of the Treasurer ceases to be required for the variation or replacement of the Rules. In terms of a notice already issued by the Treasurer, the "relevant day" is 30 June 2002.
>
> Mr Allan Archer, Principal with Mercer Human Resource Consulting, who was appointed by the former Treasurer to assist in advising the Treasurer in regards to the proposed rules to be inserted under Clause 11, has prepared a set of draft rules which reduce member gross benefits in the Electricity Industry Superannuation Scheme in a manner which provides for member net after tax benefits to remain the same, while at the same time maintaining the same level of employer support to the superannuation scheme.
>
> Both John Barrett (Actuarial Analyst) and myself have had extensive consultation with Mr Archer in relation to these draft rules and we are satisfied that the proposed rules meet the intentions of the legislation and also satisfy the guarantees provided to members by the legislation.
>
> As required by subclause (1) of Clause 11 of Schedule 1 of the Electricity Corporations Act, the trustee of the scheme (the Electricity Industry Superannuation Board) has been extensively consulted in relation to the proposed rule change. The proposed rule change has been "endorsed" by the Board.
>
> It is therefore recommended that in accordance with subclause (6) you issue a notice to the Electricity Industry Superannuation Board the effect of the notice being the insertion into the rules of the Electricity Industry Superannuation Scheme, the Variation to the Rules as set out in the attachment to this minute.
>
> A draft letter, in the form of a notice to the Electricity Industry Superannuation Board has been prepared for your signature.

[57] Second SA Superannuants submission, p12.

It is also recommended that you initial each page of the Variation to the Rules.

[Signed]
D R Prior
DIRECTOR, SUPERANNUATION (POLICY)
26 June 2002

[Approved]
Kevin Foley MP
TREASURER
28 June 2002

74. I have considered whether there is any administrative error in this advice, and in particular in the statement that the new rules 'reduce member gross benefits in the Electricity Industry Superannuation Scheme in a manner which provides for member net after tax benefits to remain the same, while at the same time maintaining the same level of employer support to the superannuation scheme'. I have concluded that, based on the Mercer advice, there were reasonable grounds for the making of that statement.

75. I have also considered the nature of some specific comments in the 2002 memorandum. It states firstly that as from 1 July 2000, benefit payments from the EISS had been 'reduced on account of taxation on an interim basis', and paid out as benefits paid from a taxed source. This action was taken with the knowledge of Commonwealth and state treasuries, and arose from the delay by the Commonwealth in ceasing the constitutional protection while it waited to pass legislation to impose tax at the time of the loss of constitutional protection.[58]

Link30> 76. The 2002 memorandum outlines the assumptions upon which the interim benefit reductions were calculated. It states, and I accept, that these assumptions were conservative, and led to the lowest practical level for the benefit reductions. The 2002 memorandum states that in practice, many members would have ended up with higher net benefits because their individual situations were more favourable than assumed.

77. In relation to employer costs, the 2002 memorandum summarises the actuarial advice and concludes:

> This result indicates that an increase in employer costs will be avoided if the Treasurer reduces benefits to the maximum extent permitted under legislation (given the assumptions above). The outcome for members is that they will receive at least the same benefits after tax as they would have received had the Scheme remained untaxed. The proposed rule amendments provide this outcome.

78. On the face of this documentation, I consider that there were reasonable grounds for the making of these statements, and I can see no shortcomings in this advice. I acknowledge that there is contention as to the subsequent effect of the rules in relation to employer costs, but as I note elsewhere, this fact is not of itself sufficient to demonstrate an administrative error. In my view there is simply not sufficient evidence to substantiate any finding of error based on inadequacy of the 2002 memorandum.

Link31> The 1998 memorandum

79. SA Superannuants asserts[59] that the advice in the 2002 memorandum is inconsistent with advice provided in an earlier memorandum prepared by Mercer dated January

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[58] Explanatory memorandum, p2.
[59] Second SA Superannuants submission, p12.

1998.[60] I have not been provided with a complete copy of this document, but I have had regard to an extract provided by SA Superannuants.[61]

80. I note firstly that the 1998 memorandum refers to the whole state pension scheme, not simply the EISS. It is my understanding that there was significant difference between the two schemes,[62] arising from the taxation treatment of the movement of assets to support existing pensions. At the relevant time there were no existing pensioners for the EISS scheme, as they had all been moved to the wider state scheme.

81. In summary, the extract from the 1998 memorandum states that the PJFC would be available to reduce tax on employer contributions in relation to the pension environment (though not the lump sum environment), through the application of the PJFC to what is known as the pre June 1983 component of a pension. It states that 'the extent of cost reduction across the whole Pension Scheme could be very large'; notes that there are a number of factors which mean that the whole PJFC could not be applied 'straightaway'; and concludes that 'its size is such that multi-million dollar savings to the Government in present value terms may be feasible'.[63]

82. The 1998 memorandum includes the following comment:

> 19.23 The Government may need to cope with demands from members of the Pension Scheme that they, as well as the Government, should share in the gains achieved. An important part of the response would be that these people are still members of schemes which have been closed because of their generosity, and yet their benefits have been continued. Thus they should have little to complain about if the advantage of applying the PJFC is not passed through to them, so long as they are not detrimentally affected. A critical point is that the benefit reductions should be such as to remove the windfall gains, but not to the extent of causing detriment to any members.

83. The 2002 memorandum, which refers only to the EISS not the whole state pension scheme, contains the following statement in relation to the PJFC:

> Pre July 1988 Funding Credit
>
> At the end of May 2002, the Scheme received from APRA confirmation of a Pre-July 1988 Funding Credit, which allows tax credits on account of the unfunded nature of the Scheme when superannuation funds in general become (sic) taxed in July 1988. The extent to which these tax credits can be utilised each year depends upon whether employer contributions paid to the Scheme in that year exceed the sum of the post 1983 part of the taxed benefits paid by the Scheme over the year.
>
> The actuary has estimated that these credits are worth around $25 million (in present value terms) to the Scheme.

84. I do not see any inconsistency between the statement in the 1998 memorandum that the PJFC would be available to reduce tax on employer contributions for the state pension scheme, and the statement in the 2002 memorandum that the PJFC would result in credits to the EISS. It appears to me that the import of the statements in both documents is that the PJFC would be of benefit in reducing the employer funding costs. The 2002 memorandum includes an actuarial estimate of that benefit to the EISS because the extent of the available PJFC had been confirmed by the Australian Prudential Regulation Authority at that time.

60 Department of Treasury and Finance, Study of the Taxation Status of the SA Government Superannuation Funds, Prepared by William M Mercer Pty Ltd, Allan Archer, Principal; Tony Cole Worldwide Partner; John Ward, Principal.
61 Part 19 The Pension Scheme pp. 59-61. See First SA Superannuants submission, p7 and Attachment 2.
62 i.e. apart from the fact that they operate under different legal frameworks.
63 Paragraphs 19.20 to 19.21.

Link32>

The 2004 memorandum

85. SA Superannuants asserts also that the 2002 memorandum is inconsistent with a 2004 memorandum also prepared by Mercer.[64] Again I have relied on an extract from that document provided by SA Superannuants.[65]

86. I infer from the covering letter to the extract of the 2004 memorandum that, like the 1998 memorandum, the 2004 memorandum addresses taxation issues relevant to the broader state superannuation schemes; rather than simply the EISS.

87. In addition, the 2004 memorandum post-dates the 2002 memorandum, and thus it could be expected that it would be able to draw on post-implementation experience in outlining the effects of moving the EISS to a taxed status. SA Superannuants contends that the content of the 2004 memorandum should have alerted the department to the alleged deficiencies in the 2002 memorandum, and the fact that employer costs had been reduced as a result of the variation of the scheme rules.

88. I acknowledge that the extract from the 2004 memorandum does not refer to the 2002 memorandum. In my view this is not surprising given that the two memoranda were dealing with different schemes. Further, the 2004 memorandum in my view is broadly consistent with the statements made in the 1998 and 2002 memoranda. I note in particular the following comment, which is referring to the broader state superannuation schemes rather than the EISS:

> In the Lump Sum/Pension Scheme there is a net tax advantage in moving from an untaxed environment to a taxed environment. These advantages could be used to increase members' benefits and/or reduce employer costs. If members' benefits are maintained at current levels (after allowing for tax effects), then savings of the order of $450 million are estimated for the employer.[66]

89. In summary, I consider that the departmental advice and the 2002 memorandum provided a reasonable explanation upon which the Treasurer could rely in making his decision. I note in particular that:
    - Mercer was at the time acknowledged as an expert adviser in superannuation fund management
    - the 2002 memorandum correctly states the obligations under clause 11; namely to ensure that benefits after tax must not be lower than would have applied had the EISS remained untaxed; and that any rise in employer costs as a consequence of the changes should be avoided
    - it provides apparently authoritative advice on the key issues to be considered
    - it based its advice on conservative and reasonable assumptions to ensure that members were not disadvantaged
    - the assumptions were themselves based on 2 years' experience in operation as interim arrangements
    - consistently with the 1998 memorandum, it acknowledges that the PJFC would result in credits to the EISS
    - it is not inconsistent with the advice provided by Mercer in the 2004 memorandum about taxation issues relevant to the broader state superannuation schemes.

90. It may be that as SA Superannuants asserts, time has proven some of the 2002 memorandum's actuarial predictions not to be fully realised; or to be incorrect. However, any predictive actuarial calculation must of its nature have an element of doubt, and the simple fact that some predictions have not been fulfilled exactly as may

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[64] Department of Treasury and Finance, Review of Taxation Status of the SA Government Superannuation Funds, prepared by Mercer Human Resource Consulting, 23 December 2004.

[65] Page 7, and Appendix A pp. 9-10. See First SA Superannuants submission, p8 and Attachment 5.

[66] Page 7.

have been anticipated does not imply that there is an administrative error in the original advice.

91. I have noted above that I do not see evidence of any administrative error to support SA Superannuants' claim that the department should have been aware that the memorandum was misleading in asserting that employer costs would be unaffected; and that the department was 'reckless' in accepting Mercer's conclusions. I have noted also Mr Prior's clear recollection that the Treasurer was provided with the worksheets detailing how the conclusions were obtained.

Was the Treasury – Mercer relationship inappropriate?

92. SA Superannuants next contends that 'the actuarial adviser and Treasury [worked] together to exploit [the lack of assertiveness] of the EISS Board and put in place a set of rules that should have been subject to much closer scrutiny than they received'.[67] It contends that in the 1998 memorandum,[68] Mercer through the actuarial adviser 'expressed a view that in any shift of the State Pension Scheme to the taxed superannuation environment members should make no gains from the change and the intrinsic advantage of paying the pensions from the taxed environment should be passed to employers'.[69]

93. SA Superannuants contends that there is no legitimate basis for the view expressed in the 1998 memorandum that gains made by members could be regarded as 'windfall gains', which should be removed and transferred to employers. It contends that this is a wrong view because the Australian superannuation system is designed to provide taxation gains to members, not to employers. It contends that this expression of view should have excluded Mercer, and the three authors of the 1998 memorandum, from providing advice to government on the matter of the rule changes.[70]

94. As a matter of administrative law, there is no basis for SA Superannuants' contentions insofar as they relate to the role of Mercer and the actuarial adviser in the decision to vary the scheme rules. This is because questions of apprehended bias can only arise where a decision which affects the legitimate expectations of the person interested is made by a decision-maker. In this case, Mercer and the actuarial adviser were not acting as decision-makers. As I have outlined above, that responsibility sat with the Treasurer.

95. Further, I do not consider that any question of a perceived conflict of interest on the part of Mercer can arise. Whilst I acknowledge that SA Superannuants does not like the views expressed by Mercer, as being inimical to their interests, those views were
Link33> nonetheless legitimate public interest considerations in the decision-making process. The department would have been remiss had such matters not formed a part of the advice given to the Treasurer at the time.

Link34> Have the rule changes resulted in reduced employer costs?

96. Although it is my view that there is nothing in the EISS framework which precludes a reduction in employer costs, it could be argued that a 'windfall' gain such as that which accrued to the scheme as a result of the application of the PJFC should not accrue solely to employers, but should be shared between employers and members.

97. I note also that it appears to me that SA Superannuants may have been given a verbal assurance that net savings arising from the tax status changes would be passed on to

[67] Second SA Superannuants submission, p17.
[68] I quote a relevant section from the 1998 memorandum below.
[69] Second SA Superannuants submission, p18.
[70] Second SA Superannuants submission, p18

members. In a letter dated 31 March 2006, sent to the then Treasurer by the Secretary of SA Superannuants, Mr Vic Potticary, the following passage appears:

> When Association President, Ray Hickman, Vice-President Clive Brooks and I met with you and Mr Deane Prior (a Treasury official) on 1 December, 2005 we reported back to the Association Executive Committee that the Labor Government would only seek to ensure that any change in pension scheme tax status was cost neutral for the Government and that net savings would be passed to members. Our report was based on the notes we made immediately after the meeting.
>
> If the Labor Government supports the principle that net tax savings should pass to members when a pension fund moves to the taxed environment we do not know what to make of the fact that the EISS is passing all tax savings to employers instead. Is this happening without the current Government's knowledge or support? (emphasis in original)

98. On the question of whether employer costs have in fact reduced, SA Superannuants maintains that this is demonstrated by:
    - the 'arithmetic certainty' that EISS assets would have been depleted by much less than 15%
    - the alleged deficiencies in the 2002 memorandum
    - the 1998 and 2004 memoranda
    - the annual taxation experience of EISS between 2000 and 2006
    - a series of reports dated 23 March 2003 provided by Mr Archer to the EISS Board concerning different parts of EISS related to different employers
    - the 30 June 2011 actuarial investigation of EISS
    - the alleged deficiencies in the response given by the Hon Michael O'Brien MP, Minister for Finance, to a question by the Shadow Treasurer, the Hon Iain Evans MP, in 2012.[71]

99. On the same issue, the EISS Board has advised me as follows:

> Pre-July 1988 Funding Credits (PJFCs)
>
> 68. A PJFC is a Pre-July 1988 Funding Credit. This allows employer contributions in respect of the unfunded liability for pre-1988 benefits to be untaxed for a taxed fund. This was a large part of the actuarial analysis on rules 29–31.
>
> 69. The PJFC of $258m shown in the extract from the minutes of May 2002 is far more than would be expected to use (sic). Also, this does not represent the value of the PJFC to the Scheme. This amount allows $258m worth of contributions to be non-taxable. That is, the maximum value of the PJFC to the Scheme is the tax on $258m worth of contributions, or 15% of $258m, i.e. $38m.
>
> 70. The value of PJFCs allowed for in the actuarial analysis in the explanatory memorandum for the tax offset rules is $25m. That is, the Scheme was assumed to claim $166m worth of employer contributions against its PJFC (15% of $166m is $25m).
>
> 71. In 2003-2005, the value of the tax saved by the PJFCs claimed to date was around $20m. In 2005/06 no PJFCs were claimed, and following the 2007 tax changes, the Scheme has stopped claiming PJFCs.
>
> 72. The value therefore to the Scheme of actual PJFCs claimed was less than was estimated in the actuarial analysis for the tax offset rules.
>
> 73. PJFCs have been allowed for on a scheme-wide basis in the calculation of the "employer cost test". The nature of the credit makes it difficult for this amount to be allowed for on an individual member-by-member basis.

[71] See First SA Superannuants submission, pp 6-10.

Summary

74. The tax offset rules were made because the Scheme's loss of constitutional protection imposed a tax liability on the Scheme. This would have increased employer costs and provided a windfall benefit to members without a reduction in gross benefits. The EC Act allowed for this increase in cost to be minimised.

75. The tax offset rules were inserted by the Treasurer into the Scheme rules in June 2002 pursuant to his powers under clause 11 of the EC Act, following consultation with the EISS Board.

76. The rules required that members' net benefits from a taxed fund would be equal to those from an untaxed fund, under three major assumptions regarding the payment of benefits.

77. The actuarial analysis in the explanatory memorandum is that the reductions imposed by the rule changes, as well as the use of the Scheme's PJFC, are sufficient to pay the extra tax liability caused by the Scheme's loss of constitutional protection. That is, on a scheme-wide basis, employer costs were expected to be unchanged.

78. There was significant consultation between Treasury, Mercer and the EISS Board on the tax offset rules between 2000 and 2002.[72]

100. In its response to my provisional report, SA Superannuants questioned the value of the tax savings made by EISS through its use of PJFCs. It commented:

Advice given to you by the EISS Board on the matter of the value of the tax savings made by EISS through its use of pre-July 1988 Funding Credits (PTFCs) was that the value was 'around' $20 million … For this to be true the amount of PJFC utilised has to be 'around' $133 million (15% of$l33 million is $20 million).

In our submission of January 2014 on page 15 we claimed that the tax savings to EISS from its utilization of PJFCs was $36 million. This estimate was obtained by calculating 15% of $238 million which was the total amount of PJFC utilised by EISS up until 30 June 2005. We provided you with Attachment 27: Page from 2005 £155 Financial statement confirming amount of PJFC utililised as proof of the validity of the $238 million figure. $36 million is $11 million more than estimated in the Explanatory memorandum and $16 million more than the EISS Board has advised you was actually achieved.

We request that you refer the EISS Board to its 2005 Annual Report and ask it to reconcile its statement in your numbered point 96 that 'In 2003-2005, the value of the tax saved by the PJFCs claimed to date was around $20 million.' with the amounts of PJFC utilization set out in the 30 June 2005 Annual Report.

101. I put this matter to the EISS Board, which responded as follows:

We refer to your email of 17 June and your question on our submission to your inquiry into aspects of the Electricity Industry Superannuation Scheme.

Our calculation of the value of the tax savings from the use of PJFCs was based on nominal value of the tax credit for the financial years 2003-2005. The value of credits for the financial years 2001 and 2002 was inadvertently left out of our calculation. The total nominal value of the tax credits claimed by the Scheme has been $36m.

We would draw your attention to the statement by the SA Superannuants that "$36m is $11m more than estimated in the Explanatory memorandum" and respectfully suggest that this comparison is not appropriate.

The value of the PJFC tax credits allowed for in the Explanatory Memorandum of $25m is a present value based on actuarial assumptions. We understand that this present value was

[72] EISS Board submission, p11.

calculated as at 1 July 2000. The $36m figure quoted is a nominal value, ie a simple sum of the amounts claimed over 5 financial years.

When the present value at 2000 of the tax credits actually claimed over the 5 years – allowing for the late submission of the 2001 and 2002 tax returns and using a discount rate of 8% - is calculated, the value is approximately $26m.

Whilst slightly higher than the value of $25m in the Explanatory Memorandum, we consider that the difference is not material in the overall context of the Explanatory Memorandum.

We use a discount rate of 8% in this calculation as we understand that this is the untaxed discount rate used for the advice to the Treasurer.[73]

102. In oral evidence given to me, the EISS Board Chief Executive Officer (a qualified actuary) stated that it is not practically possible today to quantify the impact of the 2002 rule changes on employer costs. However, it is his view that there is no doubt that employer costs have risen since 2002, due to a range of factors which include fewer pension commutations; longer life expectancies; fewer resignations; and salary increases being higher than expected. He gave evidence that this view is certainly shared by the employers.

103. In these circumstances, it is not possible for me to reach a concluded view on whether employer costs were actually reduced as a result of the tax offset implementation, without a detailed historical and actuarial analysis; and it is unlikely that such an analysis will produce a clear result. In view of:
- the fact that it is a policy decision as to whether net savings should be passed on to members or used to off-set employer costs
- the preliminary conclusion which I have reached - namely that the legal framework did not preclude a reduction in employer costs
- the time which has elapsed since the original decisions were made

I do not consider that further investigation of this issue by me is warranted.

104. Finally, I note that the EISS Board is now responsible for the scheme rules, and may, by instrument in writing, vary or replace them.[74] However, where an increase in employer costs would result, the approval of the employers is required.[75] It appears to me that it is now a matter for the Board to consider whether it is appropriate to adjust the scheme rules to deal differently with this issue; and I note that in August 2007 it requested employers to consider a cap on the tax offset on pension benefits. This request was rejected.

Opinion

I do not consider that any administrative error occurred in connection with the changes to the scheme rules made on 28 June 2002.

73 Email from the EISS Chief Executive Officer, 27 June 2014.
74 Clause 4(1) of the Trust Deed.
75 Clause 4(4) of the Trust Deed.

Link35>

Whether the department misled the Crown Solicitor in seeking legal advice in 2007

105. For a considerable period of time, SA Superannuants has asserted that the rules do not comply with clause 11 of Schedule 1 to the Electricity Corporations Act. They have raised their concerns in a number of ways, including with the EISS Board. As a consequence of those concerns, the EISS Board Chairman wrote to the Treasurer on 2 August 2007. The department provided advice to the Treasurer in relation to this correspondence in a minute dated 28 November 2007.

106. In order to prepare the 28 November 2007 minute, the department sought advice from the Crown Solicitor on whether the rules complied with clause 11.[76] Through the advice provided by Mr McDonald on 26 November 2007,[77] the Crown Solicitor advised that they did comply. However, SA Superannuants asserts that the Crown Solicitor was misled in forming his opinion, because the department provided only a copy of the 2002 memorandum; and not copies of the 1998 and 2004 memoranda from Mercer on the broader state pension schemes.

107. The Crown Solicitor's advice was sought by Mr Prior by memorandum dated 4 September 2007. The memorandum is as follows:

> On 6 August 2007, the Treasurer received correspondence from the South Australian Government Superannuated Employees Association Incorporated (SA Superannuants), arguing that the rules the Treasurer inserted into the EISS on 28 June 2002, were invalid. A copy of the relevant rules and the explanatory memorandum are attached to this minute.
>
> As background to why SA Superannuants have an interest in this matter when their members are former public servants and not former electricity industry employees, I can advise you that the interest comes from trying to second guess how the government might choose to reduce the gross benefits of pensions paid to retired public servants if the government decided to move the SA Superannuation Fund into the taxed environment. I must advise you the government has no plans at this time to pay pensions from a taxed source. SA Superannuants have been advised on numerous occasions that if a decision were made to pay State Scheme pensions from a taxed source, they should not assume that the reduction in gross pensions to offset the increased cost to the government (from the fund having to pay contributions tax and investment earnings tax) would be undertaken in the same manner. This has not stopped them from arguing that the rule change for the EISS scheme was invalid, as a means of trying to ensure that such an approach not even be considered for the State Scheme. We believe that by stating the rules are 'invalid', they really mean the rules are more 'unfair' than not legal. This is because the rules reduced pensions such that the amount of the net after tax benefit of the pension paid from an untaxed arrangement was the same as the net after tax benefit received from the pension paid from a taxed arrangement. The concern is that tax rates have changed since the rule was introduced.
>
> SA Superannuants argue that the rules inserted in terms of Clause 11 of Schedule 3 of the Electricity Corporations Act 1994 [as inserted by Part 2 of Schedule 3 of the Electricity Corporations (Restructuring and Disposal) Act 1999], are invalid because the new rule reduced member gross benefits under the taxed fund arrangement to the maximum extent permissible in terms of the Electricity Corporations Act, and thereby reduced employer costs of the scheme. The rule inserted into the rules of the scheme ensure that retiring members will have the same net after tax benefit from the taxed fund as the net benefit they would have received if the benefit had been paid from an untaxed source. The legislation guaranteed that member benefits would not be less than this net benefit.
>
> The rule was recommended by the actuary (the late Allan Archer) who was at the time advising the Treasurer, and also recommended by the Trustees and the lawyer advising the Trustees, Ms Suzanne MacKenzie.

[76] I note that the department had previously sought advice on a related issue from the Crown Solicitor. This advice was dated 25 January 2006, and is referred to above.
[77] This advice is described in paragraphs 35-37 above.

[Clause 11 is then quoted in full]

This matter has been raised with Crown Law previously, and I refer to your advice of 25 January 2006, prepared by Mr Chad Jacobi. A copy of this previous advice (reference CSO:0067695) is attached to this minute.

In responding to the recent letters from SA Superannuants, the Treasurer has advised that the rule changes are 'not inconsistent' with the provisions in Part F of Schedule 1 of the Electricity Corporations Act. This position is based on previous interpretation of the powers provided under Clause 11 of Part F, and previous legal commentary from both the lawyer advising the EISS Board and Crown Law.

However, as SA Superannuants have come back again and are still arguing that the rule change was not 'valid', we seek a confirmation of your opinion that the rule changes were legal.

Copies of the recent exchange of letters between SA Superannuants and the Treasurer are also attached.

108. SA Superannuants contends that:

… the Treasury case that the rule changes of 2002 had a sound basis in law has always been flimsy. The quality of the Crown Law advice that all rule changes are entirely valid can be no better than the quality of the calculations used to generate the values contained in the Explanatory Memorandum.[78]

109. I consider that this statement is misconceived. As outlined above, I agree with the Crown Solicitor that the rules were validly made. In my view, there was no legal obligation requiring that the rules should not reduce employer costs.

Link36>

110. SA Superannuants has advised me that on 25 May 2012, the Hon Iain Evans MP sent a letter to the Minister for Finance, in connection with this issue. He asked the following question:

Is the Minister aware that the 1998 and 2004 Mercer reports were not provided to the Crown Solicitor when he was directed to provide his opinion on the validity of the EISS method for calculating taxed-source pensions. He was provided with an Explanatory Memorandum, dated 27 June 2002 and written by a co-author of the 1998 Mercer Report which, in conflict with that report, expressly stated "employer costs are not expected to change as a result of the tax changes." Does the Minister agree that the Crown Solicitor should now be provided with a complete brief?[79]

111. SA Superannuants advises that the Minister responded:

I am advised that (and for the reasons given in the response to the previous question) the 1998 and 2004 Mercer Reports were not relevant. The Explanatory Memorandum relates to the EISS scheme specifically. I am advised that there is no conflict between the statements made in the EISS Explanatory Memorandum, and statements made in the Mercer reports dealing with the main State Superannuation Scheme. The differences in the outcomes in respect of the two schemes can be explained by the following:

- As at the dates that Mercer Investigated the implications associated with the main State Superannuation Scheme moving into the taxed environment, the employer liability in respect of existing pensioners was significantly under funded. Therefore, there would have been significant tax benefits to be gained in funding those employer liabilities in a managed manner over a period of many years to gain the maximum advantage.

78 Second SA Superannuants submission, p23.

79 I have sought copies of this correspondence from SA Superannuants, who advised me that it would be provided to me by Mr Evans' office. At the date of preparing this provisional report, this has not occurred; but I note that the exchange of correspondence was referred to, but not directly quoted, in debate on the Statutes Amendment and Repeal (Superannuation) Bill 2012 - see Hansard, 30 May 2012.

- As at the dates that Mercer investigated the implications associated with the main State Superannuation Scheme moving into the taxed environment, the employer liability in respect of the already accrued but not yet payable pension liabilities was significantly under funded. Therefore, there were tax benefits to be gained over time in finding those past service liabilities.
- Furthermore, there were no existing pensioners in the EISS scheme at the date the scheme moved into the taxed environment, as they had all been transferred to the State Scheme.[80]

112. SA Superannuants, in its second submission to me, acknowledge that these statements are correct, but do not agree that the 1998 and 2004 Mercer memoranda are irrelevant to EISS. It says:

> All three of the dot points above are correct statements but they do not support the position that the Mercer Reports of 1998 and 2004 are irrelevant to EISS. The second dot point outlines a characteristic that EISS shared with the State Pension Scheme. The difference in outcomes of applying the EISS method to the State Pension Scheme, as opposed to EISS, is not that savings were to be made in the first case and not the second. The three dot points taken together mean that savings were to be made in both cases with the only difference being that for EISS, the savings were made from pensions that commenced after the scheme shifted to the taxed superannuation environment. The savings must have been used to reduce employer costs for EISS pensions because members gained nothing.
>
> It does not matter if a pension scheme, at the time of its transfer to the taxed environment, has no pensioners, or has some members who are pensioner, or has all its members who are pensioners, and nor does it matter if the pension scheme is fully funded, or partly funded or entirely unfunded. In all these circumstances the EISS method for calculating pensions, after the transfer, will reduce employer costs for the pensions compared to what the cost would be if the scheme had not moved to the taxed environment. The only qualification that has to be made here is that the pension scheme must have a significant proportion of members with substantial amounts of pre 1 July 1983 service. EISS had a large proportion of its pension division members in this category and whoever provided Mr O'Brien with the answer to Question 7 would know this. (emphasis in original)

113. SA Superannuants also states that in responding to its representations, former Treasurer Foley had not previously asserted that the 1998 and 2004 memoranda were irrelevant, and that all he had done was to suggest that SA Superannuants' 'interpretation of Section 11(2), Part F of Schedule 1 Superannuation of the Electricity Corporations Act 1994 was incorrect'.[81]

114. The Minister's correspondence is beyond my jurisdiction. However, to the extent that it relies on advice provided by the department I consider that it represents a reasonable response to the assertions made by SA Superannuants.

115. Further, I do not see any administrative error in the department choosing not to provide the 1998 and 2004 memoranda to the Crown Solicitor. For the reasons outlined above, I accept that these two memoranda concerned the broader state scheme, and that different considerations applied to the EISS.

Link37>

116. As noted above in relation to my jurisdiction, I am not able to investigate an administrative act done by a person in the capacity of legal adviser to the Crown or an agency to which the Ombudsman Act applies.[82] Consequently I am not able to investigate the advice provided to the department by the Crown Solicitor.

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80 For the reason outlined in the previous footnote, I have not sighted this correspondence, and I rely on SA Superannuants' description of it.
81 Second SA Superannuants submission, p24.
82 See paragraph (d) of the definition of 'administrative act' in section 3 of the Ombudsman Act.

117. Nonetheless, I observe that the assertion by SA Superannuants that the Crown Solicitor was misled suggests that the Crown Solicitor was not able to determine for himself the facts necessary in order to provide the requested advice. Based on my reading of Mr McDonald's advice, I see no reasonable basis for this suggestion.

118. I note also that SA Superannuants has advised me that it took up an earlier proposal which I made to it, that it should ask the Crown Solicitor whether he considers that he was misled. The response to that request[83] indicates that the Crown Solicitor did not consider this to be the case. However, SA Superannuants asserts in its response to my provisional report that it believes this response refers to the advice given on 25 January 2006 by Mr Jacobi about clause 11(3); rather than advice given by Mr McDonald on 28 November 2007 about clause 11(2).

119. I see no reason to interpret the Crown Solicitor's response as being limited in this way. SA Superannuants provided me with a copy of this response. The substance is contained in the following paragraphs:

> I have reviewed the matter and I note your concern that my office was not adequately instructed when it advised the Department about the method of calculating superannuation pensions under the Electricity Corporations Act 1994. As you will appreciate, any advice that was provided was privileged and the Department does not propose to waive that privilege.
>
> I can assure you, however, that I am satisfied that no fraud has been perpetrated upon the Crown Solicitor in relation to this matter. Further, I am of the view that the nub of the Association's concern lies in an interpretation of the effect of clause 7 (sic) of Schedule 1 of the Act. That provision did not have the effect of limiting the Treasurer to the making of rules, in an ambulatory sense, that would result in no net detriment to superannuants. The obligation as properly construed as one that is satisfied at the point in time that the entitlement is calculated. I think that this reveals that the underlying difference between the Association's position and that of the State is one of statutory construction and not of actuarial calculation.

Opinion

I do not consider that the department misled the Crown Solicitor in seeking legal advice in 2007.

83 Letter from the Crown Solicitor to SA Superannuants dated 27 June 2013.

Whether since 2002 the department or the EISS Board has provided misleading advice in connection with the Treasurer's decision on the method used by EISS to calculate its taxed-source pensions

120. The final issue is whether the department or the EISS Board has subsequently provided misleading advice when SA Superannuants has raised its concerns about the effect of the rule changes.

121. At Appendix A is a document provided by the EISS Board which outlines the principal events with which the EISS Board has been involved since concerns were first raised about the tax offset issue in 2004.

122. In addition, SA Superannuants has drawn attention to the issue in other ways, including correspondence with Members of Parliament. At various times it has expressed concern about departmental and EISS Board advice provided in connection with the following matters:

- correspondence between the EISS Board and an EISS member, Mr Barry Foster, including:
    - materials provided to Mr Foster by the EISS Board at the time of his retirement at the end of 2002
    - letters dated 25 March 2006 and 18 May 2006 from Mr Foster to the EISS Board
    - responses from the EISS Board to Mr Foster dated 2 May 2006 and 28 September 2006
- the commissioning and receipt of the 2004 memorandum. I have dealt with this matter above, and concluded that I see no administrative error
- the release in 2006, following an application made under the Freedom of Information Act, of the 2004 memorandum. SA Superannuants contends that the department made a statement on the release of the report which pointed out that it had not been the subject of any consideration by government; and that this caution should be contrasted with the standard applied in the preparation of the 2002 memorandum
- a letter to the Treasurer dated 31 March 2006, and the response from the Acting Treasurer dated 12 October 2006. SA Superannuants criticises this response as being 'a communication of low probity.'[84] It is a Ministerial communication which is beyond my jurisdiction
- a letter and paper dated 6 December 2007 sent to the EISS Chairman, to which SA Superannuants states it received no response
- a letter sent to the EISS Chairman by the Australian Services Union, dated 31 May 2007; and a response dated 1 August 2007 and its attachments
- a letter sent to the Treasurer by the EISS Chairman, dated 2 August 2007 seeking a review of the rule amendments made in June 2002; and the Treasurer's response dated 13 December 2007
- a letter dated 26 May 2008 sent to SA Superannuants by the Treasurer, indicating 'that he had chosen not to respond to further questions from them concerning EISS'[85] because he had received Crown Law advice that the rule changes made in 2002 were entirely valid
- a letter dated 19 June 2008 sent to Hon Bob Such MP concerning one of his constituents Mr Richard Vear, which indicated that the department did not have copies of worksheets underpinning the 2002 memorandum. I have dealt with this issue above
- a letter sent to the EISS Chairman by the Australian Services Union, dated 15 July 2008; and a response dated 18 September 2008 sent by a solicitor acting on behalf of the EISS Board

[84] Second SA Superannuants submission, p23.
[85] Second SA Superannuants submission, p23.

- a letter and paper dated 11 September 2008 sent to the EISS Chairman, to which SA Superannuants states it received no response
- an undated letter sent by SA Superannuants early in August 2012 to the Minister for Finance, referring to a question asked by the Hon Ian Evans MP in the House of Assembly on 25 May 2012. I have quoted relevant sections of this correspondence above in with the seeking of legal advice from the Crown Solicitor, and connection
indicated that I see no administrative error in relation to it
- a March 2013 letter sent to Super SA by SA Superannuants; and a response dated 26 September 2013. The response declines to answer the questions asked on the basis that the parliamentary referral seeking my investigation had been made. SA Superannuants speculates that 'Super SA was prevented from answering the questions because the answers would have contradicted the advice to the Minister contained in the 2011 Minute'.[86]

123. I have examined all the materials provided to me by the EISS Board and by SA Superannuants, as listed above. With the limited exception of the matter on which I comment in the next paragraph, I am satisfied that the responses have been reasonable, and have accurately reflected the true situation. I do not see any administrative error in the advice and responses outlined above.

124. The limited exception relates to the response dated 1 August 2007 sent to the Australian Services Union by the EISS Chairman. An attachment to this response does not fully answer a question about whether the EISS Board provided advice to the Treasurer concerning the making of the variations to the scheme rules in June 2002. The answer given is that a response should be sought from the Treasurer. Whilst this a correct statement, advice was provided to the Under-Treasurer on behalf of the EISS Board in the letter dated 7 June 2002, and in my view this should have been disclosed.

Opinion

I do not consider that since 2002 the department or the EISS Board has provided misleading advice in connection with the Treasurer's decision on the method used by EISS to calculate its taxed-source pensions.

Ombudsman comment

The amount of material provided to my investigation by the EISS Board, the department and SA Superannuants demonstrates that over the past 10 years there have been significant public resources spent on examining the concerns of SA Superannuants in relation to this issue. This has included a number of legal opinions obtained by the EISS Board, and by the department.

The subject matter of the parliamentary referral is of interest to SA Superannuants and the members of the EISS Schem , because they consider that a change in the approach to administering the scheme would be of direct financial benefit to them; and because of what they see as a possible precedent for future changes to the broader state scheme. However, in my view the matter does not raise any issues of wider public interest.

Richard Bingham
SA OMBUDSMAN

30 June 2014

86 Second SA Superannuants submission, p26.

Appendix A

SIGNIFICANT EVENTS SINCE 2004
Information provided by EISS Board

Early Feb 2005
A Retirement Seminar was held at Torrens Island Power Station (TIPS) by the Chief Executive Officer (EO) that resulted in lots of questions on the tax offset provisions.

March 2005
The EO held another meeting at TIPS to discuss the tax offset issue. The members' view of the perceived difference between the EC Act and the Rules was first raised here.

March/April 2005
The EO held further discussions with Mercer and members on the issues raised. Updates on the Scheme's review of the tax offset rules were provided in May and June.

June 2005 Corporate Governance Meeting
The Committee briefly discussed the issue based on a short history.

The Committee asked for:
- A review of the original decision
- A paper to the EISS Board showing examples of the benefit reduction outcomes that may apply to individual members

June 2005
FOI request received by RESI Corp from a Member of the Legislative Council on the advice given by Mercer on the effect on pensions of the conversion of Scheme to taxed status. This was passed to Treasury (as advice was given to Treasurer).

June 2005 EISS Board Meeting
The issue was raised at the EISS Board meeting after contact from TIPS members who were unhappy with progress to date. The EISS Board requested the EO to inform members of progress, which was done.

July 2005 EISS Board Meeting
A discussion paper prepared by the EO was tabled and discussed. This paper is attached as an example of the consideration that the Board gave this issue over a number of years, including seeking legal, actuarial and tax advice.

The recommendation in this paper was that:
- Benefits continue to be paid in accordance with the Rules
- Simple member communication be prepared
- Administration system be configured to allow for the offset.

The EISS Board were not able to accept this recommendation due to a possible discrepancy between the EC Act and the Rules that was raised at the meeting.

The EISS Board requested that:
- Legal advice be sought on the conflict between the EC Act and the Rules. If this advice was supportive of current practice, then the
- recommendation could be accepted.
- Draft communication to members be prepared

The legal advice was discussed at the August 2005 Board meeting.

August 2005
Further queries received from TIPS members

August 2005
Written advice on the EC Act vs. the Rules provided by DMAW. This advised that the EC Act and the Rules were consistent, provided that the net benefits under the Rules were no less than the net benefits under the EC Act.

Sept 2005
More questions from TIPS members, requesting a meeting.

Sept 2005 EISS Board Meeting
The EO was asked to:
- Summarise previous discussions and resolutions and circulate to the EISS Board.
- Get written advice from DMAW re EC Act vs. Rules
- Invite DMAW to the next Corporate Governance meeting
- Put the tax offset information sheet on hold

Oct 2005
The Chief Executive Officer held a meeting at TIPS on Monday 24 October 2005 with members to discuss the Contribution Tax Offset. The meeting discussed the history and structure of the Tax offset, particularly its effect on pension benefits. Members were concerned about perceived inequities in the Rules, and possible conflicts between the rules and the EC Act.

The members were previously unaware that the Treasurer made the Rules concerning the tax offset, and not the EISS Board. The advice the Scheme received from DMAW stated that the EC Act and the Rules were not in conflict. The members requested a copy of that advice. The EISS Board agreed to DMAW providing a one page summary.

The members were also informed that, to change the Scheme rules, the EISS Board would need clear evidence that a member was disadvantaged by the current rules at the time that a benefit was paid (or commenced to be paid) compared to the pre-privatisation situation. The Chief Executive Officer asked the members to put forward a letter to the EISS Board stating their concerns and how they feel they are being disadvantaged.

November 2005 EISS Board Meeting
A summary of the legal advice on the tax offset on pensions was provided to the EISS Board, who agreed to make it available to members. Advice distributed and posted on website. The EISS Board also requested that the appeal process under Clause 12 of the EC Act be formalised

December 2005
R Vear wrote to two EISS Board members expressing his concerns over the calculation of the tax offset. A response was provided to all the points in this letter on 16 January 2006.

Jan 2006 Corporate Governance Committee meeting
The Committee discussed a draft appeal process under clause 12 of EC Act. This process was never finalised, though this would not have prevented the hearing of any appeals under clause 12.

March 2006
A spreadsheet illustrating the calculation of the tax offset on pensions was released to members. This spreadsheet was available on the website, and individual data was loaded for members on request.

March 2006
A seminar on the tax offset was held at Keswick.

June/July 2006
The EISS Board discussed legal advice on the effect on the tax offset rules of the 2006 Federal Government Budget changes to superannuation.

DMAW provided advice to the EISS Board that the EC Act did not require net benefits to be maintained on the new rules after 1 July 2007, as the equivalence was based on the tax rules at privatisation. The EISS Board agreed to make a submission to Federal Treasury on the tax changes.

Jan/Feb 2007
This is also when the EISS Board was first approached by members wanting to take their pension on an untaxed basis, as allowed under Rule 31 of Division 1.

Advice was received in January 2007 from DMAW that Rule 29 and its application are valid under the EC Act, despite the fact that the reductions on individual member benefits are not matched against reductions in employer costs. This was in answer to concerns raised by members.

At the February 2007 meeting, the EISS Board resolved to provide a summary of the recent legal advice on the tax offset to members and employers.

The Board further resolved to voluntarily come under the jurisdiction of the Superannuation Complaints Tribunal, to provide members with an independent appeals process.

Mar 2007 Board meeting
The EISS Board resolved that the tax offset formula remain unchanged after 1 July 2007. This was based on previous legal advice that members would not be adversely affected, and that clause 5 of the Trust Deed required that employer liabilities not increase due to changes in taxation.

Apr 2007 Board meeting
The EISS Board resolved to stop payment of new untaxed pensions pending a favourable tax ruling, based on advice from DMAW. This was due to uncertainty about the provision of untaxed benefits under the 2007 tax laws.

June 2007
The EO and the Chairman met with members at Keswick to discuss the tax offset at length. The issue was extensively covered during this meeting. Over 100 members attended. Members requested that the EISS Board write to the Treasurer on their behalf.

August 2007
Detailed correspondence was sent to members as a consequence of this meeting.
The Scheme responded to Johnston Withers Lawyers letter of May 2007. Johnston Withers had been engaged by the ASU on behalf of disaffected members.

The scheme wrote to the Treasurer, as requested by members.

The Scheme wrote to employers re recent correspondence, and to ask if they would consider a change to the tax offset rules for pensions, to impose a cap on the reduction for pensions.

KPMG lodged an application on the Scheme’s behalf for a private ATO ruling on paying untaxed pensions.

The Scheme wrote to Division 3 members providing an update on the untaxed pensions tax ruling, the SCT and the letter to the Treasurer.

September 2007 Board meeting
DMAW provided advice on a discrepancy between the calculation of the tax offset on lump sums and the rules as inserted by the Treasurer. This discrepancy had only just been noted. Treasury confirmed that the intention was that the tax offset on lump sums would be no more than ‘15%.

The EISS Board resolved to seek a OC’s opinion on whether the Scheme is acting in accordance with the EC Act in calculating the tax offset, both on lump sums (due to the discrepancy) and pensions.

The brief was delivered to Phillip McNamara QC in November, and his opinion received in December.

Dec 2007
Letter received from the Treasurer in answer to our letter of 2 August 2007 advising that Crown Law considers the tax offset rules are valid and in accordance with the EC Act.

Feb 2008 Board meeting
The EISS Board reviewed the QC’s opinion.

DMAW advised the EISS Board that the opinion confirmed that
a. the Board’s application of the pension tax offset was appropriate and may continue;
b. the Board did not have a basis for applying a 15% cap to the lump sum tax offset.

July 2008
The EISS Board resolved to amend the rules to fix the 15% limit on the lump sum tax offset after discussions with employers, and to write to members and employers.

Johnston Withers wrote to Chairman and EO with more queries arising from our letter to them of Aug 2007.

Aug 2008
Rule change limiting the lump sum tax offset to 15% accepted by all employers.

3 Nov 2008
The Chairman wrote to the ASU in response to a letter written to the ASU by Ray Hickman of the SA Superannuants (and forwarded to the EISS Board by the ASU). This response stated:
- Costs were determined on a scheme-wide basis, and the cost of a taxed pension may be less than an untaxed pension
- The EISS Board is required to comply with the rules, and cannot arbitrarily change them

Our understanding is that this letter was to be posted on the ASU website.

January 2009
The EO and DMAW met with ASU, APESMA and Johnston Withers to discuss the issue. This meeting was the subject of an article in a later ASU newsletter. We offered to review some case history calculations (from Mr year) that were discussed at the meeting, on the basis that we were given the assumptions underlying those calculations. These were not provided. We followed it up in July 2009 but no response was ever provided.

October 2012
Inquiry called for by Parliament.

The EISS Board also received a letter from the Superannuation Complaints Tribunal regarding a complaint from Mr Vear on the EISS Board's disclosure regarding the tax offset provisions.

The paragraph above completes the Ombudsman's report.

From the next page of this document, until its end, material connected to each of the hyperlinks inserted into the Ombudsman's report is presented.

Page 6, Link1: The Ombudsman's doubts about his jurisdiction

When a referral for an investigation of EISS pensions was made to the then- South Australian Ombudsman, Mr Richard Bingham, in October 2012 he saw jurisdictional difficulties with it and suggested an own initiative investigation as an alternative. Mr Bingham's outline of the own initiative investigation was:

> Whether the Department of Treasury and Finance and/or the Electricity Industry Superannuation Scheme Board provided misleading advice to the treasurer in connection with the making, amendment and operation of rule 29(4) of the Rules of the Electricity Industry Superannuation Scheme, made under Clause 4 of the Electricity Superanuation trust deed.

SA Superannuants and Richard Vear rejected the own initiative investigation because it did not directly address the main issues. These were the effect of the pension reduction rule on employer costs and its compliance with Clause 11 of Schedule 1 of the Electricity Corporations Act 1994. The October 2012 referral lapsed and, after discussions with the Ombudsman about the jurisdictional difficulties that he had seen with it, SA Superannuants put the current referral before the Legislative Council. It was referred to the Ombudsman by decision of the Council made on 25 September 2013. Another reason SA Superannuants gave Mr Bingham for rejecting this own initiative investigation was his reference to Clause 4 of the 'Electricity Superannuation trust deed' as if it was relevant to the question of whether the rule for calculating Electricity Industry Superannuation Scheme (EISS) pensions was valid. It was not clause 4 of the trust deed that determined the validity of the rule but clause 11 of Schedule 1 of the Electricity Corporations Act 1994.

It is for an Ombudsman to determine, in the first instance, what lies within his/her jurisdiction. However, the *Ombudsman Act 1972* anticipates an Ombudsman having doubts about jurisdiction, and/or agencies disputing his/her decisions about jurisdiction. The Act provides for this in its Section 28 which reads:

> **28—Determination of the Ombudsman's jurisdiction**
> Where—
> (a) an investigation has been commenced or is proposed under this Act; and
> (b) a question arises as to whether the Ombudsman has jurisdiction to conduct the investigation,
> the Supreme Court may, on the application of the Ombudsman, an agency to which this Act applies or the principal officer of such an agency, determine the question and make any orders necessary to give effect to the determination.

In the case of the particular jurisdictional question of EISS being within his jurisdiction Mr Bingham had told Richard Vear by letter dated August 9, 2012 that he thought EISS was an agency within his jurisdiction. When the referral of October 17, 2012 was made, and EISS told him it did not agree with this, his opinion moved towards EISS not being subject to his jurisdiction.

SA Superannuants and Richard Vear suggested to Mr Bingham, several times, that he should settle doubts over his jurisdiction, in relation to the Legislative Council referral, by making an application to the Supreme Court for a determination as provided for by Section 28. This seems an obvious thing for Mr Bingham to have done once he entertained doubts that he could not resolve himself.

On the question of the effect of the EISS method for calculating its taxed-source pensions on employer costs the Legislative Council referral of October 17 2012 asked the Ombudsman to investigate whether it was method designed to reduce those costs. His concern was that this was a matter of policy on which he was prevented from giving an opinion by a past decision of the Supreme Court. This is the decision of the late Justice Mulligan in the case of *City of Salisbury vs Biganowsky* (1990) 54 SASR 117.

Justice Mulligan ruled that while it was not within the jurisdiction of the Ombudsman, who at that time was Mr Eugene Biganowsky, to report that a policy should be changed he (Justice Mulligan) considered that it would not be outside the jurisdiction of the Ombudsman to report on the effect of a policy so that the agency could consider for itself whether a policy should be changed. The relevant words of Justice Mulligan were:

> "However, I think it would be within the proper exercise of the function of the defendant to draw attention to the policy in his report and to the way in which it operated in relation to the Club which was unreasonable or unjust, if that is his opinion. The plaintiff could then decide to reconsider the policy generally or whether to apply it to the Club. A report in those terms could not be outside the jurisdiction of the defendant."

SASR 54, p 124

With this as the background SA Superannuants and Mr Vear accepted Mr Bingham's invitation to consult with him over modifications that might be made to the 2012 referral for it to better match his jurisdiction.

Dr Hickman, of SA Superannuants, spoke to Mr Bingham and set out what he thought was Mr Bingham's advice on his jurisdictional limitations. Dr Hickman sent the e-mail below to Mr Bingham before reporting to the SA Superannuants' Executive Committee and Richard Vear.

From: Raymond Hickman [mailto:raywen@bigpond.net.au]
Sent: Tuesday, 30 April 2013 4:02 PM
To: Bingham, Richard (OMB)
Subject: EISS matter

Dear Mr Bingham,

Here is what I think is a fair account of the main points of our conversation earlier this afternoon. Please make any adjustments that you consider need to be made.

'I have spoken to the Ombudsman with discussion being largely restricted to the policy issue and his ability to deal with the question of whether or not the method for reducing pensions is a method designed to reduce employer costs for the pensions compared to what the cost would be if the pensions had continued as untaxed-source pensions. The Ombudsman also raised the concern he has with us directing him to possible administrative errors: his preference is for a referral that specifies administrative acts and leaves him to investigate the acts to see if they involve administrative errors.

He does not believe it is possible for there to be no policy behind the authorisation of the rule for reducing pensions. There might be no policy written down anywhere but the fact that the rule is in place through the action of a Government Minister makes the rule a matter of Government policy.

The Ombudsman agreed that the effect of the rule on employer costs was a matter of fact that he could determine, but whether or not the rule was designed to have that effect was something that he could not comment on because if it was designed that way it would be a matter of government policy.

If we can devise a referral which specifies an administrative act and requests him to give an opinion on whether the administrative act, as a matter of fact, led to a rule that reduces employer costs, this would be within his jurisdiction. He would also be able to offer an opinion on whether a rule having the effect of reducing employer costs was contrary to law.'

Yours sincerely,
Ray Hickman

Mr Bingham replied:
Dear Dr Hickman
I agree that's a fair account, thank you.
Regards
Richard Bingham
Richard Bingham
Ombudsman

After this SA Superannuants and Richard Vear compiled a new referral to send to the legislative Council which we hoped would satisfy Mr Bingham's concerns. A copy of the new referral was sent to Mr Bingham on 8 May 2013 and he replied on 13 May 2013 as shown below:

OmbudsmanSA

Enquiries:	Mr Richard Bingham
Telephone:	(08) 8226 8699
Ombudsman reference:	2013/03747
Agency reference:	

Dr Raymond Hickman
SA Superannuants
PO Box 568
TORRENSVILLE SA 5031

Dear Dr Hickman

Parliamentary referral about the Electricity Industry Superannuation Scheme (EISS)

Thank you for your email of 8 May 2013, and to the attached further proposed variation to the terms of the resolution passed by the Legislative Council.

As on the last occasion, I am responding in writing because I imagine that you will wish to discuss the matter with your colleagues. However, if my views are not clear please contact me to discuss them.

Similarly, I again reiterate that it is a matter for the Legislative Council to determine what matters it wishes to refer to me.

I am not persuaded that your most recent variation deals effectively with the concerns that I have raised in the past. However, rather than again itemise those concerns, and in order to advance the matter, I suggest that you seek the adoption of your preferred draft.

As the initial step in any ensuing investigation, I will seek advice from the Crown Solicitor on the extent of my jurisdiction to deal with the issues which you seek to have investigated. This will include clarification of whether the EISS is an agency to which the *Ombudsman Act 1972* applies.

Yours sincerely

Richard Bingham
SA OMBUDSMAN

13 May 2013

Mr Bingham's 13 May 2013 communication shows that the revised referral did not allay his concerns about his jurisdiction and he had decided that, in the event of the Legislative Council sending the revised referral to him, he would be seeking advice from the Crown Solicitor on his jurisdiction.

In the debate on the new referral that took place in the Legislative Council on 25 September 2013, and that resulted in the referral being sent to Mr Bingham, the Government spokesman, Hon Gerry Kandelaars MLC, spoke as follows:

> The motion significantly differs from the terms of reference previously passed in this place. This current motion shifts the focus away from terms that could be construed as commenting on ministerial decisions and moves those terms of reference towards the Ombudsman's jurisdiction.
>
> However, the Minister for Finance has received advice from the Crown Solicitor that there are still jurisdictional issues and technical problems with the current motion. In light of this advice, and the amount of difficulty there has been in establishing appropriate terms of reference since the previous motion addressing this issue was passed, it seems that passing this current motion will do very little to further the cause the Hon. Rob Lucas is seeking to represent.

Even though Mr Kandelaars says here that the Crown Solicitor had advised the Minister for Finance that there were 'still jurisdictional issues and technical problems with the current motion.' Mr Bingham still sought his advice from the Crown Solicitor. On 8 November 2013 the Crown Solicitor advised Mr Bingham that Crown Law could not give the advice he was seeking because of its previous involvement in the matter. Even then Mr Bingham would not go to the Supreme Court and, instead, took advice from Mr Stephen McDonald of the private law firm Hanson Chambers.

If Mr Bingham had gone to the Supreme Court this would have settled the jurisdictional questions in a way that was authoritative and that made the advice available on the public record. By using a private legal adviser the Ombudsman chose a less authoritative method that did not put the advice on the public record.

The questions that are fair to ask here are: what was the advice given on the Ombudsman's jurisdiction by Mr McDonald? and how plausible is the interpretation that Mr Bingham has made of it? Link18 and Link20, both on page 21, will take the reader to comments that SA Superannuants has made about Mr Bingham's interpretation of some other legal advice of Mr McDonald. This was advice he gave to Treasury, when he was at the Crown law Office, on the question of compliance, with legislation, of the rules inserted into the EISS rules by the State treasurer in June 2002. From the perspective of SA Superannuants and Richard Vear Mr Bingham's interpretation of this advice, given by Mr McDonald, is, to say the least, highly implausible.

Click or Crtl-Click to return to Page 6, Link1 of the Final Report

Page 7, Link2: Ombudsman's claim of no reasonable basis for comparing the 2002 explanatory memorandum with the 1998 and 2004 reports.

The component 2 (c) of the referral was:

> (c) Inconsistency between the claim made in the Mercer Explanatory Memorandum of 27 June 2002 that EISS rule changes would have no effect on employer costs, and analyses contained in the Mercer Reports of 1998 and 2004 showing that the rule now being used by EISS to calculate its taxed-source pensions would reduce employer costs if applied to pensions of the State Pension scheme;

And the Ombudsman had this to say about it:

> The administrative acts associated with this paragraph are the preparation of the Mercer explanatory memorandum and the Mercer reports. These are the acts of Mercer LLC (Mercer), a global non-government company. In order to exercise jurisdiction in relation to these acts I need to be satisfied that they were done 'in the performance of functions conferred under a contract of services with the Crown or an agency to which [the Ombudsman] Act applies'.
> I am so satisfied, and I have considered this issue. However, for the reasons set out in this report I am not persuaded that the assumption which underlies this paragraph is correct. I do not consider that there is a reasonable basis for comparing the 2002 explanatory memorandum with the 1998 and 2004 reports, and accordingly I determined not to investigate this matter any further.

Among things that SA Superannuants and Richard Vear saw as providing a reasonable basis for comparing the Explanatory Memorandum of 27 June 2002 with the Mercer Reports of 1998 and 2004 were:

- The explanatory memorandum and the 1998 and 2004 reports were all prepared by Mercer;
- The author of the 2002 explanatory memorandum was the late Mr Allan Archer who was a co-author of the 1998 report;
- The explanatory memorandum and the 1998 and 2004 all included reference to pre-July 1988 Funding Credits (PJFCs) as sources of tax savings;
- The 2004 report made many references to EISS experience which it would not have done if tax effects for the state pension scheme were different than for EISS;
- In 2007 a Treasury minute dealing with taxation status for the state pension scheme recommended that Mercer be engaged to do so because of their experience gained in the move of EISS to the taxed superannuation environment.

One might also expect Mr Bingham to have asked Mercer if its three documents were comparable before he took his position that they were not. If they were prepared to say that their 1998 and 2004 Reports were not relevant to EISS and therefore not comparable with the 2002 Explanatory Memorandum this would have been authoritative support for the position he took. But he did not ask Mercer for its opinion.

In this matter, and in his handling of components 2 (f) and 2 (g) of the referral, Mr Bingham says one thing and does the opposite. After saying that there was no reasonable basis for comparing the 2002 memorandum with the 1998 and 2004 reports he makes a comparison on pages 29-32, paragraphs 79-91 of the report. From this comparison he draws a conclusion favourable to the agencies which reads:

> 91. I have noted above that I do not see evidence of any administrative error to support SA Superannuants' claim that the department should have been aware that the memorandum was misleading in asserting that employer costs would be unaffected; and that the department was 'reckless' in accepting Mercer's conclusions. I have noted also Mr Prior's clear recollection that the Treasurer was provided with the worksheets detailing how the conclusions were obtained.

The last sentence of 91 is disturbing. It shows that Mr Bingham, in reaching his conclusion of 'no administrative error', attached significant weight to the evidence of Mr Prior who was interviewed without being on oath and without the interview being recorded.

The SA Superannuants' comments on the material in paragraphs 79-91 can be accessed via Link31 on page 29 and Link32 on page 31.

Other material that may be part of Mr Bingham's basis for saying that the 2002 memorandum is not comparable with the 1998 and 2004 reports is contained in paragraphs 110-112. The SA Superannuants' comments on this material can be accessed via Link36 on page 37.

Click or Crtl-click to return to page 7, link 2 of the Final Report

Page 7, Link3: Ombudsman's Claim that component 2 (f) is beyond his jurisdiction

The component 2 (f) of the referral was

> (f) Whether the method used to calculate EISS taxed-source pensions has reduced employer costs for those pensions compared to what the cost would be if the pensions had continued as untaxed-source pensions;

And the Ombudsman had this to say about it:

> This matter is beyond my jurisdiction and I determined not to investigate it.
> Mr McDonald advised me that the paragraph is framed in the abstract, as a pure question of law, and there is no administrative act associated with it. Further, even if the question posed in the paragraph could be connected with a particular act, it addresses the content of the ultimate decision, the decision of the Treasurer, which is not within the jurisdiction of the Ombudsman.

In the second sentence of the extract immediately above Mr Bingham seems to be saying that administrative acts of a person other than the Treasurer are not within his jurisdiction if they can be connected with the ultimate decision of the Treasurer. In this way he appears to be using his inability to investigate the act done by the Treasurer as a reason for not investigating administrative acts of other people that might have influenced the Treasurer in what he did. This is contradicted by sub-clause 3 (1) of the *Ombudsman Act 1972* which reads (emphasis added in (b)):

> **3—Interpretation**
> (1) In this Act, unless the contrary intention appears—
> ***act*** includes—
> (a) an omission;
> (b) a decision, proposal or recommendation **(including a recommendation made to a Minister of the Crown),**
> and the circumstances surrounding an act;
> ***administrative act*** means—
> (a) an act relating to a matter of administration on the part of an agency to which this Act applies or a person engaged in the work of such an agency; or
> (b) an act done in the performance of functions conferred under a contract for services with the Crown or an agency to which this Act applies,
> but does not include—
> (c) an act done in the discharge of a judicial authority; or
> (d) an act done by a person in the capacity of legal adviser to the Crown or an agency to which this Act applies; or
> (e) an act of a class declared by the regulations not to be an administrative act for the purposes of this definition;

When Mr Bingham made known, in 2012, concerns he had about his ability to investigate the effect on employer costs of the rule for calculation of EISS taxed-source pensions this was one of several matters we discussed with him. Below are e-mails exchanged between Mr Bingham and Dr Ray Hickman of SA Superannuants. These e-mails were also included in the discussion connected to Link1.

Dr Hickman sent this e-mail to Mr Bingham:

From: Raymond Hickman [mailto:raywen@bigpond.net.au]
Sent: Tuesday, 30 April 2013 4:02 PM

To: Bingham, Richard (OMB)
Subject: EISS matter

Dear Mr Bingham,

Here is what I think is a fair account of the main points of our conversation earlier this afternoon. Please make any adjustments that you consider need to be made.

‘I have spoken to the Ombudsman with discussion being largely restricted to the policy issue and his ability to deal with the question of whether or not the method for reducing pensions is a method designed to reduce employer costs for the pensions compared to what the cost would be if the pensions had continued as untaxed-source pensions. The Ombudsman also raised the concern he has with us directing him to possible administrative errors: his preference is for a referral that specifies administrative acts and leaves him to investigate the acts to see if they involve administrative errors.

He does not believe it is possible for there to be no policy behind the authorisation of the rule for reducing pensions. There might be no policy written down anywhere but the fact that the rule is in place through the action of a Government Minister makes the rule a matter of Government policy.

The Ombudsman agreed that the effect of the rule on employer costs was a matter of fact that he could determine, but whether or not the rule was designed to have that effect was something that he could not comment on because if it was designed that way it would be a matter of government policy.

If we can devise a referral which specifies an administrative act and requests him to give an opinion on whether the administrative act, as a matter of fact, led to a rule that reduces employer costs, this would be within his jurisdiction. He would also be able to offer an opinion on whether a rule having the effect of reducing employer costs was contrary to law.’

Yours sincerely,
Ray Hickman

Mr Bingham replied:

Dear Dr Hickman

I agree that’s a fair account, thank you.

Regards

Richard Bingham

Richard Bingham
Ombudsman

From this agreement by Mr Bingham that Dr Hickman had given a fair account of his capacity to investigate the effect of the EISS rule on employer costs we anticipated that he would be able to investigate both 2 (f) and 2 (g)

With respect to 2 (f) it is hard to understand what basis Mr McDonald could have had for saying it is ‘a pure question of law’. It is an actuarial question.

In the material that is accessible via Links 18 and 20 on page 21 there is discussion of the interpretation that Mr Bingham made of advice that Mr McDonald gave to Treasury in 2007 when Mr McDonald was at the Crown Law office. Mr Bingham’s interpretation seems highly implausible. If Mr Bingham got this advice as wrong as we say he has then there should be little credence given to what he says about the advice he obtained from Mr McDonald on his jurisdiction in relation to 2 (f) unless the details of that advice are made known.

As for 2 (f) having no associated administrative act there is the act of obtaining advice about rules that had the potential to affect employer costs. In paragraph 65 the Ombudsman refers to a letter that he accepted was proof of the proper commissioning of the work that led to the Explanatory Memorandum of 27 June 2002.

> 65. However, the department has provided me with a copy of a letter dated 4 December 2001, written by the Director, Superannuation (Policy) in the department to Mr Allan Archer, Principal, William M Mercer Pty. Ltd. The letter states:
>
> The purpose of this letter is to formally advise you that the Treasurer has appointed you to assist in advising the Treasurer in relation to the appropriate rule changes to avoid or reduce an increase in employer costs caused by changes in the incidence of taxation as a result of the EISS scheme’s expected future loss of constitutional protection.

It would appear that the preparation and dispatch of this letter is an administrative act associated with component 2 (f) of the referral.

In paragraph 73 a letter dated 26 June 2002 and signed by Mr Deane Prior is described and quoted. This letter contains the paragraphs:

> Mr Allan Archer, Principal with Mercer Human Resource Consulting, who was appointed by the former Treasurer to assist in advising the Treasurer in regards to the proposed rules to be inserted under Clause 11, has prepared a set of draft rules which reduce member gross benefits in the Electricity Industry Superannuation Scheme in a manner which provides for member net after tax benefits to remain the same, while at the same time maintaining the same level of employer support to the superannuation scheme.
>
> Both John Barrett (Actuarial Analyst) and myself have had extensive consultation with Mr Archer in relation to these draft rules and we are satisfied that the proposed rules meet the intentions of the legislation and also satisfy the guarantees provided to members by the legislation.

Here Mr Deane Prior refers to ‘extensive consultations’, with Mr Allan Archer, in relation to the rules and their effect on the level of employer support for the scheme. Mr Prior is reporting in writing to the Treasurer on the outcome of his (Mr Prior’s) experiences and using this experience to recommend to the Treasurer a course of action. This would appear to be another administrative act associated with component 2 (f).

While Mr Bingham says that 2 (f) is beyond his jurisdiction and he would not investigate it, the fact is he did investigate it. On pages 32-35 of his report there is a section headed ‘Have the rule changes resulted in reduced employer costs?’. This section comprises paragraphs 96-104 and immediately after paragraph 104 Mr Bingham offers an opinion favorable to the agencies on this matter that was outside his jurisdiction.

I do not consider that any administrative error occurred in connection with the changes to the scheme rules made on 28 June 2002

The SA Superannuants' comments on this section of the Ombudsman's report are accessible via Link34 on page 32.

Click or crtl-Click to return to Page 7, Link3 of the Final Report

Page 7, Link4: Ombudsman's Claim that component 2 (g) is beyond his jurisdiction

The component 2 (g) of the referral was:

> (g) Whether the method complies with the Electricity Corporations Act 1994 including Schedule 1, Part F, clause 11: Treasurer may vary rules in relation to taxation, subclauses (1) and (2); and
>
> This matter is beyond my jurisdiction, for the same reasons as for paragraph (f), and I determined not to investigate it.

Here Mr Bingham says that 2 (g) is beyond his jurisdiction for the same reasons as applied to 2 (f).

Component 2 (g) does involve a question of law but it is certainly not the case that there are no administrative acts associated with it. Treasury sought advice on this question at least twice (2006 and 2007) and then made use of the advice when responding to questions that were asked about compliance of the rules with clause 11. The seeking of this advice and the use made of it are all administrative acts associated with component 2 (g) and involve acts of persons other than the Treasurer. As with 2 (f), clause 3 (1) of the *Ombudsman Act 1972* would appear to authorize the Ombudsman to investigate and offer an opinion on an administrative act occurring in the lead up to a decision by the Treasurer.

The fact of 2 (g) being a question of law would not appear to prevent an Ombudsman from offering an opinion on whether an administrative act has been made contrary to law or is based on a mistake. The basis for saying this is contained in clause 25 of the *Ombudsman Act 1972* which reads:

25—Proceedings on the completion of an investigation

(1) This section applies to any investigation conducted by the Ombudsman as a result of which the Ombudsman is of the opinion that the administrative act to which the investigation relates—
(a) appears to have been made contrary to law; or
(b) was unreasonable, unjust, oppressive or improperly discriminatory; or
(c) was in accordance with a rule of law or a provision of an enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or
(d) was done in the exercise of a power or discretion and was so done for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations; or
(e) was done in the exercise of a power or discretion and the reasons for the act were not but should have been given; or
(f) was based wholly or in part on a mistake of law or fact; or
(g) was wrong.

This indicates that it would be open for an Ombudsman to investigate, and form an opinion about, whether a recommendation made to the Treasurer was contrary to law, as in 25 (1) (a), or based on a mistake of law or fact, as in 25 (1) (f).

As with 2 (f) Mr Bingham, after saying that 2 (g) was beyond his jurisdiction, did conduct an investigation into whether the rules introduced by the Treasurer were compliant with clause 11. After reading legal advice provided to him by the agencies he came to the conclusion (again favorable to the agencies) that even if the rules introduced by the Treasurer did reduce employer costs this would not make them contrary to law. The SA Superannuants' comments on this reasoning of Mr Bingham's can be accessed via Link15 on page 20 and Link18 on page 21.

By proceeding as he did with components 2 (f) and 2 (g) Mr Bingham may have created a situation where anything his report said that was connected with these components could be vetoed by the agencies. If one of the agencies did not agree with what Mr Bingham said it would have grounds for insisting that he change or remove it without having to go to the Supreme Court for an order that he do so.

Click or Crtl-click to return to Page 7, Link4 of the Final Report

Page 8, Link5: SA Superannuants' letter on apprehended bias

After Mr Bingham circulated his Provisional Report in February 2014 it was seen as biased by SA Superannuants and Richard Vear. On 17 March 2014 Dr Ray Hickman sent an e-mail to Mr Bingham which said:

Dear Mr Bingham,

Ahead of today's interview I want to let you know about a concern I have about apprehended bias and your investigation. I understand that you may be proceeding quite quickly to your final determination and I want to put my concern to you before this has happened. I will not be raising my concern at today's interview but I will do my best to answer any questions you put to me on the matter if you choose to do so.

The term 'apprehended bias' is one that I had not come across until I saw it used in numbered point 91 of your provisional report. I have now done some research into the term and one resource I have looked at is a paper that I found at the web address:
http://www.robinson.com.au/monoartpapers/papers/MAR-Practical%20Justice%20and%20Procedural%20Fairness-Peace%20Group%20Dec%202003.pdf
In this paper, by Barrister Mark Robinson, apprehended bias is discussed on pages 5-8 and on page 7 Mr Robinson says:

'Normally, if bias becomes an issue, it should be raised or be dealt with by an applicant immediately upon the issue first becoming apparent. In court proceedings this might well occur while proceedings are being conducted. Allegations of bias can be waived by failure to raise the issue promptly and before the decision maker concerned.'

In sending this e-mail to you now I am taking the advice of Mr Robinson's paper.

When I first read your provisional report my thought was that it was biased and did not deal with evidence on merit. However, you are the Ombudsman having the powers of a Royal Commission and I was not confident about how to deal with my perception of bias on your part. And there is no doubt that I am biased by my long association with this matter and the views I have expressed.

Now my thoughts are: you are the decision maker in this EISS matter and all parties had a right to expect that you would bring an open mind to the question and report on your investigation according to the merit of the evidence before you. I now respectfully put to you that numbered point 43 in your provisional investigation indicates that you have a personal view that EISS is an example of a 'notoriously generous' public sector superannuation scheme and its employer cost should be reduced. I ask you to consider whether an ordinary person with a knowledge of the facts of the EISS matter, on reading numbered point 43, could reasonably conclude that you might not be an impartial decision maker in the matter.

I have not been able to consult fully with the people who have been relying on me to represent them in this matter and at this stage I must take personal responsibility for putting this view to you.

Yours sincerely,
Dr Ray Hickman

Mr Bingham responded to this e-mail on 18 March 2014:

> Dear Dr Hickman
>
> As I indicated on the telephone yesterday, I have taken some advice and given consideration to your submission.
>
> Subject to any further representations which you may wish to make, I have formed the tentative view that:
>
> - there is no reasonable apprehension of bias apparent on my part in relation to the matter you have raised, and
> - I propose to continue to conduct this investigation.
>
> Paragraph 43 of my provisional report, to which you object, questions your assertion that the intent of the Heads of Government Agreement on Superannuation (HOGAS) was to ensure that tax outcomes for EISS members were the same as occurred in the other Australian jurisdictions. The paragraph maintains that instead, the purpose of the HOGAS was to ensure that 'national standards should apply, without distinguishing between public and private sector schemes'. It also observes that HOGAS may also have been intended to contain the costs of public sector schemes, because they were more generous than private sector or industry schemes; and that this construction would support a conclusion that government had a policy intention that employer costs for one such scheme (EISS) should be reduced.
>
> I do not believe that this assessment could reasonably be asserted as demonstrating bias. In my view it is commonly understood that at the time HOGAS was signed, governments were dealing with the issue of unfunded liabilities arising from defined benefit schemes. For example, the following extract is taken from a publication from the Australian Prudential Regulation Authority describing the history of superannuation in Australia. It is available at http://www.apra.gov.au/Insight/Documents/07-Insight-Issue-2.pdf at pp5-6:
>
> *The superannuation guarantee and defined benefit funds*
>
> *Defined benefit funds provide members with a pre-determined benefit generally based on the member's final salary and length of service with the employer-sponsor of the fund. The employer-sponsor is responsible for financing the pre-determined benefit (to the extent it is not funded by member contributions) and therefore bears the residual risk associated with investing the fund's assets.*
> *Prior to award superannuation, most members were in defined benefit funds; for example, in 1982/83, 82 per cent of fund members were covered by defined benefit funds. Generally, the industry funds established to accept award (and, later, superannuation guarantee contributions) were accumulation funds. The administrative complexity of defined benefit funds compared to accumulation funds made them less attractive for employers to use to satisfy their superannuation guarantee obligations. Other reasons for the decline in defined benefit funds are their typically higher and uncertain costs that with the passage of time could overshadow corporate balance sheets. By 2005/06, 97 per cent of members were in funds that provided either accumulation benefits or a mixture of accumulation benefits and defined benefits.*
>
> *A key difference between defined benefit and accumulation funds is that accumulation fund members bear the investment risk since, over time, all investment earnings and losses are credited or debited to member accounts. Members may be*

offered a choice of investment options. This shift of investment risk to members and away from employers is a central feature of the decline in defined benefit funds both in Australia and overseas.

The superannuation guarantee and the public sector

While all levels of government in Australia had a long tradition of providing retirement benefits for their employees, public sector superannuation was generally provided through unfunded or partially funded arrangements whereby the cost of benefits was met at the time the benefits were paid rather than as the benefits were accrued. The introduction of mandatory superannuation through the superannuation guarantee had the effect of setting a widely accepted standard for employer-funded superannuation for all employers, including public sector employers. In response to the superannuation guarantee and a growing concern with unfunded superannuation liabilities against the projections of an ageing work force, governments closed their unfunded or partially funded defined benefit schemes to new members and established fully funded accumulation schemes to provide new employees benefits at the level of the superannuation guarantee or higher.

Further, I have invited you to respond to a provisional report. I have thereby given you an opportunity to respond to what you believe to be my errors, and to provide further information to assist my investigation. In these circumstances, I do not consider that the wording of the provisional report could reasonably be interpreted as indicating that I have pre-judged the issues and that I am not able to change my mind in the light of further evidence.

If you have any further submissions to make on the issue of apprehended bias, please do so by 28 March 2014. In the absence of any further response from you, I will then recommence my investigation.

Yours sincerely

Richard Bingham

Richard Bingham
Ombudsman

Ombudsman SA
Level 5 East Wing
50 Grenfell Street
Adelaide SA 5000

On 25 March Dr Hickman sent the following letter to Mr Bingham

President: Peter Fleming
Ph. (08)8295 1832
Email: peterfleming8@bigpond.com

Secretary: Vic Potticary
PO BOX 568 Torrensville S.A. 5031
Ph: (08) 8352 6504
Email: cosme@senet.com.au

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www.sasuperannuants.org.au

Mr Richard Bingham
Ombudsman SA
Level 5 East Wing
50 Grenfell Street
Adelaide SA 5000

25 March 2014

Dear Mr Bingham,

This letter is a response to your e-mail to me of 18/3/2014 that I am making on behalf of SA Superannuants, Richard Vear and Barry Foster. Your e-mail dealt with paragraph 43 of your Provisional Report on the EISS matter and the possibility that the paragraph raises an important issue of apprehended bias in your investigation.

After reading your explanation of why you consider that 43 would not create apprehended bias in an ordinary person I make two comments which are informed by discussion I have had with the Association Vice-President, Mr Clive Brooks. Clive has had extensive experience as a solicitor in private practice and in the Crown Law office.

1. My understanding is that apprehended bias does not require the demonstration of actual bias. Even without the demonstration of actual bias an apprehended bias can still be sufficient to warrant a decision maker standing down from the decision making activity.

2. An ordinary person reading not just your paragraph 43 but also your e-mail to me of 18/3/2014 might be more concerned, rather than less concerned, about apprehended bias in your investigation. This person would see in the e-mail a willingness of the decision maker to rely entirely on the mere possibility of there being a certain policy when there is no hard evidence that the policy exists. This might make an ordinary person apprehensive that the decision maker will conduct an investigation that does not treat evidence on its merit.

Other examples of matters possibly giving rise to apprehended bias

There are other matters arising from your Provisional Report that might give rise to apprehended bias on the part of an ordinary person. It has been agreed, among the group with whom I consult, that these include:

1. Paragraphs 34 and 35 of your provisional report which state that the Department 'authorised' you to disclose the substance of legal advice.

An ordinary person who read this, and took account of the fact that the Ombudsman has the power of a royal commission and that Section 20 of the Ombudsman Act 1972 prevents any agency from claiming privilege in respect of documents or the giving of evidence, might reasonably be apprehensive about you being unwilling to make full use of your powers over agencies in the conduct of the investigation.

2. Footnote 26 on page 16 of the Provisional Report which reads:

'The advice contains a statement which on its face provides support for the construction which SA Superannuants would urge, namely, that the power in clause 11 could not be used to insert a rule which had the effect of decreasing employer costs. However, I consider that this statement is not consistent with the general tenor of the advice; and in any event, this is a different question to whether the clause prevented the making of a rule which had the effect of decreasing employer costs.'

This statement of yours would be likely to make an ordinary person apprehensive that, in your role of decision maker, you will not deal with evidence on its merit.

3. Your handling of evidence connected with Mr Deane Prior

a) In the Legislative Council Hansard of 17 October 2012 the Government spokesman (the Hon Gerry Kandelaars, MLC) was referring to Deane Prior when he said:

> 'Finally, there is one more issue I would like to address. The Hon. Mr Lucas makes reference to correspondence received by members that makes specific criticism of a senior government officer who provided superannuation advice to the government over a long period of time until his recent retirement. I concur with the Hon. Rob Lucas that this government holds that particular individual in very high regard, and any criticism of his advice and esteemed service to the government over many years is unwarranted.'

b) The Provisional Report indicates that you interviewed Deane Prior without requiring him to be on oath.

c) The Provisional Report acknowledged that a letter dated 4 December 2001 prepared by Deane Prior, which turned up during the investigation, had not turned up in an earlier search made in response to a Freedom of Information application from SA Superannuants.

d) You were the person who signed off on the early unsuccessful search but it would appear that you did not consider it necessary to seek an explanation from the Department for this failure when the letter appeared in the investigation.

An ordinary person viewing this set of circumstances, and being aware that Deane Prior was closely associated with the EISS rule changes, would be apprehensive that, in your role of decision maker, you have avoided subjecting his conduct to the close scrutiny that the evidence presented to you required, and that your powers allowed.

Other examples of a lack of procedural fairness

These include:

1. The investigation is effectively the own initiative investigation of 2012

In an e-mailed letter to me dated 22 January 2013 you set out your intentions with respect to any future referral from the Legislative Council, and with respect to the own initiative proposal you had made as an alternative to the Legislative Council referral of 17 October 2012. Your words were:

> '…I will not now proceed with my own proposed initiative investigation, and I will close my files on the existing parliamentary referral, and on Mr Vear's individual complaint.
>
> If and when a new referral is agreed, I will open a new file for that'

It is now clear that you have proceeded with the own initiative proposal and this amounts to a lack of procedural fairness in the conduct of the investigation. We were misled over your intentions. We had a right to expect that you would treat the referral of 25 September, 2013 as a 'new referral' and give close attention to our submission made on that referral. There is compelling evidence that our submission on the referral of 25 September 2013 was not considered on its merit and that significant sections of it were not even read.

2. Acts not administrative acts investigated, relevant administrative acts not investigated
You have stated an intention to conduct your investigation on the basis that an act of a person acting in the capacity of legal adviser to the Crown or to an agency within the Ombudsman's jurisdiction is not an administrative act in terms of the Ombudsman Act 1972. This is apparent from the passage below which appeared on page 5 of the Provisional Report.

> *(d) Probity of the decision to provide only the Explanatory Memorandum of 2002, and not the Mercer Reports of 1998 and 2004, to the Crown Solicitor when advice was sought on compliance of the method with the Electricity Corporations Act 1994;*
>
> I determined to investigate this matter. However, I advised the parties that depending upon the particular factual circumstances, it may become apparent that the administrative acts to which this paragraph relates were acts done by a person acting in the capacity of legal adviser to the Crown, in which case it would then be apparent that I do not have jurisdiction to investigate it. If that occurs, I will desist from investigating it.

In paragraphs 32-38 of the Provisional Report you refer to legal advice given to Treasury by Crown Law and to EISS by private law offices. You have investigated this advice, dissecting it and commenting on it. For example, in the case of Mr Stephen McDonald's advice to Treasury you have observed that it contained a statement supporting the SA Superannuants' position on employer costs and offered the comment that the statement was not consistent with the 'general tenor' of the advice.

You led us to believe that you would not do this because it would be an activity outside your jurisdiction to investigate acts done by a person acting in the capacity of a legal adviser. We had a right to expect that you would investigate the acts of people who **briefed the legal advisers and made use of the legal advice after it had been received.** Your powers unambiguously allow you to do this but you have not done it.

I have consulted with other members of the SA Superannuants' Committee and Richard Vear and Barry Foster on the best way to proceed from here.

We would like to see your interviews of Barry Foster and myself take place as you have previously outlined. We would like to have you supply us with a copy of the letter dated 4 December 2001 referred to in paragraph 63 of the Provisional Report and then we would like to see your report finalised as soon as possible. To facilitate a speedy finalization I suggest that our communications be done via e-mail or telephone between your office and me from this point on.

Yours sincerely,
Dr Ray Hickman

On receipt of this letter Mr Bingham referred it to the Office for Public Integrity on 31 March 2014. His reason was that the allegation of apprehended bias might raise a potential issue of maladministration in the office of the Ombudsman.

On 5 June 2014 Mr Bingham was advised by the Independent Commissioner Against Corruption that the letter had not 'enlivened any reporting obligations under the Directions and Guidelines'. More on this is accessible via Link6 on page 8 of the final report.

Click or Crtl-click to return to page 8, Link5 of the Final Report

Page 8, Link6: Advice from the Independent Commissioner Against Corruption (ICAC)

The SA Superannuants' correspondence to the Ombudsman dealing with the matter of apprehended bias and procedural fairness was never intended to be the basis for a complaint to OPI/ICAC. SA Superannuants did not know that the Ombudsman had referred this correspondence to OPI/ICAC until 17 June 2014.

> The correspondence was sent so that the Ombudsman would be aware of there being a perception of bias on his part by SA Superannuants, Mr Richard Vear and Mr Barry Foster (like Richard, Barry is a pensioner member of EISS). The purpose was to ensure that the Ombudsman knew this before, rather than after, he had completed his report. We understand that this is the recommended way of dealing with concerns about apprehended bias. For example, there is a document authored by Mark Robinson, Barrister, and entitled 'Practical Justice and Procedural Fairness' which was referred to in the correspondence with the Ombudsman. The document is available at http://www.robinson.com.au/monoartpapers/papers/MAR-Practical%20Justice%20and%20Procedural%20Fairness-Peace%20Group%20Dec%202003.pdf and on its page 7 it says:
>
> *'Normally, if bias becomes an issue, it should be raised or be dealt with by an applicant immediately upon the issue first becoming apparent. In court proceedings this might well occur while proceedings are being conducted. Allegations of bias can be waived by failure to raise the issue promptly and before the decision maker concerned.'*

The result of the Ombudsman making his referral is described by him as follows:

> On 5 June 2014, the Independent Commissioner Against Corruption advised me that he did not consider that my conduct had 'enlivened any reporting obligations under the Directions and Guidelines'.

SA Superannuants has interpreted the Commissioner's statement as advice that none of the matters raised in its correspondence of 25 March 2014 was a matter requiring referral to OPI/ICAC and they were all simply matters about which he had to make up his own mind. This was all that SA Superannuants ever wanted him to do. The OPI/ICAC has been set up to deal with corruption, maladministration and misconduct by public officers and these are matters far removed from the question of whether a basis exists for apprehension of bias on the part of a public officer.

The document of Mark Robinson referred to above includes, on its page 6, a statement which is pertinent here:

> *The High Court has stated that the apprehension of bias principle "admits of the possibility of human frailty" and "its application is as diverse as human frailty".*

Apprehension of bias refers to a fair-minded lay observer having a basic knowledge of a situation and knowing what a decision-maker has said or done in that situation. It exists when there is a reasonable basis for this fair-minded lay observer to think that the decision-maker is not likely to make a fair decision.

A reasonable finding of apprehension of bias against an official based on knowledge of their conduct or views might, and often would, indicate nothing more sinister than that he/she was not the right person to be making a particular decision. In putting to the Ombudsman the concerns we had about his conduct, and his views, related to the investigation of interest to us, there was no intention to do more than have him think about this possibility before he completed his investigation.

The paragraphs of the Provisional Report that first led us to raise the apprehended bias question with the Ombudsman were:

> 42. SA Superannuants asserts that HOGAS 'placed an obligation on the State Government to ensure that tax outcomes for EISS members were the same as occurred in the other Australian jurisdictions'.38 It quotes the following Paragraph from HOGAS:
>
> The Commonwealth and the State and Territory Governments recognise the need to apply national standards to certain aspects of superannuation without distinguishing between employees of the public and private sector. For example, it is important that members' accrued benefits are securely protected, and there is consistency of taxation outcomes for members' superannuation benefits.
>
> 43. In my view, the quoted extract does not support a suggestion that there should be equity as amongst members of public sector schemes in Australia. It states that national standards should apply, without distinguishing between public and private sector schemes. Given the notorious generosity of public sector superannuation schemes as compared with private superannuation at the time, in my view this quotation is more likely to support a contention that the costs of public sector schemes should be limited – and, in the context of my present investigation, that employer costs for a generous public sector scheme should be reduced.

We felt that a fair-minded lay observer reading in 42 the paragraph from HOGAS that we had quoted, and then reading in 43 the Ombudsman's view about it, would have a reasonable basis for being apprehensive that the Ombudsman would not give our evidence fair treatment. There is nothing in the paragraph that we quoted even hinting at HOGAS being an agreement that employer costs for public sector superannuation schemes were to be reduced. If the fair-minded lay observer was given the full HOGAS to read (it is only 6 pages long) he/she would not have seen a hint of this anywhere in it.

In response to this the Ombudsman replied in an e-mail as follows:

> Paragraph 43 of my provisional report, to which you object, questions your assertion that the intent of the Heads of Government Agreement on Superannuation (HOGAS) was to ensure that tax outcomes for EISS members were the same as occurred in the other Australian jurisdictions. The paragraph maintains that instead, the purpose of the HOGAS was to ensure that 'national standards should apply, without distinguishing between public and private sector schemes'. It also observes that HOGAS may also have been intended to contain the costs of public sector schemes, because they were more generous than private sector or industry schemes; and that this construction would support a conclusion that government had a policy intention that employer costs for one such scheme (EISS) should be reduced.
>
> I do not believe that this assessment could reasonably be asserted as demonstrating bias. In my view it is commonly understood that at the time HOGAS was signed, governments were dealing with the issue of unfunded liabilities arising from defined benefit schemes. For example, the following extract is taken from a publication from the Australian Prudential Regulation Authority describing the history of superannuation in Australia. It is available at
> http://www.apra.gov.au/Insight/Documents/07-Insight-Issue-2.pdf , at pp5-6:

The superannuation guarantee and defined benefit funds

Defined benefit funds provide members with a pre-determined benefit generally based on the member's final salary and length of service with the employer-sponsor of the fund. The employer-sponsor is responsible for financing the pre-determined benefit (to the extent it is not funded by member contributions) and therefore bears the residual risk associated with investing the fund's assets.
Prior to award superannuation, most members were in defined benefit funds; for example, in 1982/83, 82 per cent of fund members were covered by defined benefit funds. Generally, the industry funds established to accept award (and, later, superannuation guarantee contributions) were accumulation funds. The administrative complexity of defined benefit funds compared to accumulation funds made them less attractive for employers to use to satisfy their superannuation guarantee obligations. Other reasons for the decline in defined benefit funds are their typically higher and uncertain costs that with the passage of time could overshadow corporate balance sheets. By 2005/06, 97 per cent of members were in funds that provided either accumulation benefits or a mixture of accumulation benefits and defined benefits.

A key difference between defined benefit and accumulation funds is that accumulation fund members bear the investment risk since, over time, all investment earnings and losses are credited or debited to member accounts. Members may be offered a choice of investment options. This shift of investment risk to members and away from employers is a central feature of the decline in defined benefit funds both in Australia and overseas.

The superannuation guarantee and the public sector

While all levels of government in Australia had a long tradition of providing retirement benefits for their employees, public sector superannuation was generally provided through unfunded or partially funded arrangements whereby the cost of benefits was met at the time the benefits were paid rather than as the benefits were accrued. The introduction of mandatory superannuation through the superannuation guarantee had the effect of setting a widely accepted standard for employer-funded superannuation for all employers, including public sector employers. In response to the superannuation guarantee and a growing concern with unfunded superannuation liabilities against the projections of an ageing work force, governments closed their unfunded or partially funded defined benefit schemes to new members and established fully funded accumulation schemes to provide new employees benefits at the level of the superannuation guarantee or higher.

Further, I have invited you to respond to a provisional report. I have thereby given you an opportunity to respond to what you believe to be my errors, and to provide further information to assist my investigation. In these circumstances, I do not consider that the wording of the provisional report could reasonably be interpreted as indicating that I have pre-judged the issues and that I am not able to change my mind in the light of further evidence.

What the Ombudsman has quoted from APRA does not even refer to HOGAS. The full document from which the quote is taken refers to HOGAS only once in a paragraph that reads:

> The Commonwealth Government did not seek to directly regulate the superannuation schemes of the States and Territories and instead entered into a

> Heads of Government Agreement in 1996 whereby it was agreed that the public sector schemes covered by the agreement would be operated in accordance with the Commonwealth's retirement incomes policy. These schemes, known as Exempt Public Sector Superannuation Schemes, were treated as complying superannuation funds for superannuation guarantee and taxation purposes.

This statement is simply describing that the HOGAS permitted public sector schemes to operate without being directly regulated by APRA. HOGAS allowed for employer contributions made to the schemes to qualify as contributions that were eligible to be counted for superannuation guarantee purposes and eligible to be taxed at concessional rates. Any state Government that did not sign the HOGAS would have had to run its public sector schemes without access to tax concessions and without the employer contributions satisfying the superannuation guarantee requirements.

This is quite consistent with the HOGAS being an agreement that public sector schemes would deliver the same tax outcomes for members as other schemes and have employer contributions at the level of the superannuation guarantee **or higher.** There is nothing in the document to indicate that governments had agreed to reduce employer costs for public sector schemes.

All Governments dealt with their concerns about unfunded liabilities, and complexities of defined benefit schemes, by closing their unfunded schemes to new members and there is no Government that has reduced its costs for existing members. Unfunded liability is a debt owed to members, and reducing employer costs for a benefit that has accrued is the equivalent of a borrower deciding that it will repay a debt at a lower interest rate than the one it agreed to pay when it borrowed the money. On behalf of SA Superannuants Dr Ray Hickman responded to this information from the Ombudsman by letter on 25 March 2014 saying:

> An ordinary person reading not just your paragraph 43, but also reading your e-mail to me of 18/3/2014 might be more concerned, rather than less concerned, about apprehended bias in your investigation. They would see in the e-mail a willingness of the decision maker to take account of a mere possibility of there being a certain policy when there is no hard evidence that the policy exists. This might make an ordinary person apprehensive that the decision maker will conduct an investigation that does not treat evidence on its merit.

In his final report paragraph 43 has become paragraph 45 and the last sentence of 43 has been removed. SA Superannuants and Richard Vear would have preferred the Ombudsman to leave the sentence in place thereby letting readers of his Final Report know what lay behind the apprehended bias claim.

Another matter in which we saw apprehended bias was the Ombudsman's handling of evidence given by Mr Deane Prior. Mr Prior was at the centre of the EISS matter from its beginning in 2000 until very recently. We felt that a fair-minded lay observer, knowing this and observing that the Ombudsman had allowed him to give evidence without being on oath and without the evidence being recorded, would have a reasonable apprehension that the Ombudsman was not likely to be even-handed in his treatment of witnesses or the assessment of their evidence. Neither the Provisional Report nor the Final Report included an explanation for why the Ombudsman did not put Mr Prior on oath and record his evidence. We put our concern about his handling of evidence from Mr Prior to the Ombudsman as follows:

> a) In the Legislative Council Hansard of 17 October 2012 the Government spokesman (the Hon Gerry Kandelaars, MLC) was referring to Deane Prior when he said:

‘Finally, there is one more issue I would like to address. The Hon. Mr Lucas makes reference to correspondence received by members that makes specific criticism of a senior government officer who provided superannuation advice to the government over a long period of time until his recent retirement. I concur with the Hon. Rob Lucas that this government holds that particular individual in very high regard, and any criticism of his advice and esteemed service to the government over many years is unwarranted.’

b) The Provisional Report indicates that you interviewed Deane Prior without requiring him to be on oath.

c) The Provisional Report acknowledged that a letter prepared by Deane Prior, which turned up during the investigation, had not turned up in an earlier search made in response to a Freedom of Information application.

d) You were the person who signed off on the early unsuccessful search but it would appear that you did not consider it necessary to seek an explanation from the Department for this failure when the letter appeared in the investigation.

An ordinary person viewing this set of circumstances would be apprehensive that, in your role of decision maker, you have avoided subjecting the conduct of Deane Prior to the close scrutiny that the evidence presented to you required, and that your powers allowed.

Click or crtl-click to return to Page 8, Link6 of the Final Report

Page 10, Link7: Interviewing Mr Prior

Mr Deane Prior was the person most closely associated with the advice given to Treasurer Kevin Foley and Minister for Finance, Michael O'Brien about the rule changes of 28 June 2002. The Ombudsman must have known this from documents provided to him in the course of the investigation if not by other means. If there had been an administrative error with advice given to the Ministers Mr Prior would have been the person most likely to be responsible. Several important and/or controversial documents associated with matters set out in the Legislative Council referral were written by Mr Prior. Consequently, of the witnesses interviewed, the one who it was most important to put on oath was Mr Prior.

It is not only the case that Mr Prior was interviewed without being on oath his interview was not recorded. This created a situation where both the Ombudsman and Mr Prior would have been unable to prove what was said by the other in the interview should this become an issue later. Any difference of opinion between the two about what happened, or was said, at the interview would be a matter of one person's word against that of the other.

An investigator with the power to compel the giving of evidence on oath who chooses not to do so and who chooses, in addition, not to record the interview exposes the investigation to an unnecessary risk of its findings being based on unreliable evidence.

Material accessible through Link8 and Link9, both of which are on page 11 of the final report, show that there are inconsistencies between evidence provided by Mr Prior and other evidence. Mr Bingham made no attempt to resolve these inconsistencies even though it would have been easy, and in everyone's best interest, for him to do so.

Click or Crtl-click to return to Page10, Link7 of the Final Report

Page 11, Link8: Mr Prior's attendance at Board meetings in 2002

In paragraph 55, on page 25 of the Final Report under the heading Did the Treasurer properly consult the EISS Board? the Ombudsman outlines contacts between Treasury and the EISS board between 2 July 2000 and 26 June 2002.

> 55. In the event, the then Treasurer wrote to the EISS Board on 2 July 2000 to advise that rules would be inserted into the scheme rules to reduce benefits following EISS's move into a taxed environment, and this was supplemented by correspondence from the Undertreasurer on 5 July 2000. On 29 May 2002, the EISS Board established a subcommittee to deal with the matter, but SA Superannuants asserts that at the EISS Board meeting held on 26 June 2002 the Board was still confused as to the workings of the tax reductions to benefits. The Chairman sought a further report to be provided to the July meeting of the EISS Board.

SA Superannuants did not merely assert that the Board was still confused about the rules at its 26 June 2002 meeting. It provided a document produced by EISS that said this. In a footnote to paragraph 55 the Ombudsman refers to comments made by Mr Prior on paragraph 55. We assume that these comments were contained in the letter of 26 February 2014 from Mr Prior to the Ombudsman.

> In relation to the Board's deliberations at this time, Mr Prior commented to my investigation as follows:
> I feel the need to make comment on this paragraph because I attended several of the EISS Board meetings during the period when the Board was considering the matter how and the extent of the benefit reduction that was to apply to member benefits. I can clearly recall the Board finding it difficult to understand the explanations that Allan Archer, as actuarial adviser to the Treasurer, was providing in justification for the formula reductions that he was recommending to the Treasurer. The Board was having difficulty in understanding the explanations because of the complex actuarial workings. I also clearly remember, the then chair of the Board, Mr Max Bray, making a comment along the lines; 'well whilst several members are still having difficulty In understanding all this, I guess at the end of the day the Treasurer is going to accept the advice of his actuarial adviser and so we as a board should endorse the proposed formula adjustment'. As I stated at our meeting, the Board's records about this time are probably 'a bit lacking' as it is my recollection that the period immediately before the benefit reduction formula was brought into operation, the secretary of the board became seriously Ill and the secretarial role was undertaken by several "stand in persons".

It can be seen in paragraph 55 that the Ombudsman has no evidence that Mr Prior had any dealings with the EISS Board between 2 July 2000 and 26 June 2002 but in the footnote to paragraph 55 he reports that Mr Prior told him, after the Provisional Report had been circulated, that he had been at several Board meetings in 2002. This is the only reference that SA Superannuants has ever seen to Mr Prior being at EISS Board meetings around the time the rule changes were adopted. Mr Richard Vear has interacted extensively with EISS over its role in the rule changes and he was never told of Mr Prior's presence at Board meetings at this time. Furthermore, Mr Prior has named one of the people present at a meeting as being 'the then chair of the Board, Mr Max Bray'. Mr Prior says he clearly remembers this and the gist of what Mr Bray said. **But Mr Max Bray was no longer chairman after March 2002.** The new chairman was appointed on 20 March 2002 and there would have been no Board position for Mr Bray to occupy after this date. From Mr Prior's account Mr Bray was present when Mr Allan Archer was explaining the rules to the Board and they were having difficulty understanding him. By the

EISS Board's own account this was at the meeting of 26 June 2002, at least three months after Mr Bray had departed the Board.

The Ombudsman made no attempt to corroborate Mr Prior's evidence about attendance at EISS Board meetings. This would have been in everybody's best interest and he could have done so simply by asking EISS to confirm Mr Prior's attendance at its meetings close to, and before, the rules were adopted. This is one of several instances where Mr Bingham dealt with a matter involving Mr Prior as if what Mr Prior had to say about it was to be accepted without further enquiries being made.

If we assume that inconsistencies between Mr Prior's evidence, that he was at EISS Board meetings in 2002 when rule changes were discussed, and other evidence, together with the Ombudsman's lack of interest in resolving them, are entirely benign it is still hard to understand the Ombudsman's conclusion that there was no evidence of the EISS Board having made an administrative error. The Ombudsman was witness to evidence that the Board endorsed rules it did not understand and failed to maintain adequate records of its affairs at the time. And yet the Ombudsman was prepared to say:

> 56. Given that these events occurred 12 years ago, it is not now possible to state with any certainty what was in the minds of the EISS Board members at the time. Even if I accept the conclusions proposed by SA Superannuants as to the EISS Board's state of knowledge of the matter, I do not consider that this is evidence of administrative error. Clause 11 makes it clear that it was the Treasurer's responsibility to satisfy himself as to the matters set out there.

There is a certain irony in the fact that the first sentence of 56 has Mr Bingham saying that because 'these events occurred 12 years ago, it is not now possible to state with any certainty what was in the minds of the EISS Board members at the time'. Nearby 56 in his report, in the footnote to paragraph 55, Mr Bingham was prepared to report Mr Prior's 'clear recollection' of the Board's thinking at the time.

Click or crtl-click to return to Page 11, Link8 of the Final Report

Page 11, Link9: Mercer worksheets

The Explanatory Memorandum contained values for PJFC utilisation, savings from benefit reductions and tax costs; for none of these were supporting calculations provided. SA Superannuants claimed that Treasury did not have worksheets containing such calculations. In paragraphs 67 and 68 the Ombudsman refers to these 'missing' worksheets as follows:

> 67. SA Superannuants also claims that the department should have been aware that the memorandum was misleading in asserting that employer costs would be unaffected; and that the department was 'reckless' in accepting Mercer's conclusions without the evidence of worksheets detailing how they were obtained.
>
> 68. In responding to my provisional report, Mr Prior commented as follows:
>
> This assertion is simply not correct as a copy of Mercer worksheets were provided as background material in the file that went before the Treasurer. … I can assure you that much more than a copy of the 2002 memorandum accompanied the minute that went to the Treasurer. In fact a very detailed copy of the actuary's workings went in the file to the Treasurer. EISS Board files, Treasury files and the ERSU files would (should) have a copy of the Mercer detailed workings, as there many copies produced and distributed as they were produced by a commercial printer.

Here Mr Bingham is accepting Mr Prior's assurance that the Treasurer was given a copy of the 2002 memorandum and related actuarial worksheets. From paragraph 91 it is clear that Mr Bingham attached considerable weight to Mr Prior's assurance that the Treasurer had been given these documents. Mr Bingham refers to Mr Prior's 'clear recollection' of this.

> 91. I have noted above that I do not see evidence of any administrative error to support SA Superannuants' claim that the department should have been aware that the memorandum was misleading in asserting that employer costs would be unaffected; and that the department was 'reckless' in accepting Mercer's conclusions. I have noted also Mr Prior's clear recollection that the Treasurer was provided with the worksheets detailing how the conclusions were obtained.

Mr Bingham apparently saw no inconsistency between these claims and the content of the letter Mr Prior wrote to the Treasurer on 26 June 2002 recommending that he adopt the proposed rule changes. The portion of this letter quoted by Mr Bingham in paragraph 73 does not mention the 2002 memorandum or worksheets. If the Treasurer had been given these items Mr Prior's letter of 26 June 2002 would surely have said so. Mr Bingham had read the letter of 26 June 2002 and attached importance to it. And yet he appears not to have asked Mr Prior to explain why he did not refer to the explanatory memorandum or worksheets in his letter to the Treasurer of 26 June 2002. Once more it is as if Mr Bingham approached any matter involving Mr Prior as being a matter where what Mr Prior told him about it was to be accepted without further enquiries being made.

SA Superannuants' basis for saying that there were no worksheets was the fact that, in a letter of 19 June 2008 sent to the late Hon Bob Such MP, the then-Treasurer Hon Kevin Foley stated that Treasury did not have copies of the worksheets corresponding to calculation of the figures contained in the Explanatory Memorandum. This letter was directly referred to in the SA Superannuants' submission and a copy supplied to the Ombudsman. With the Ombudsman having both the letter to the Hon Bob Such saying that Treasury did not have the worksheets and Mr Prior's evidence that Treasury 'would(should)' have them one might expect the Ombudsman to have asked Mr Prior about the letter to the Hon Bob Such. But the Ombudsman either did not take this obvious step or, if he did, he did not say anything in his report about the outcome.

On page 11 of the final report the Ombudsman refers to Mr Prior having written to him on 26 February in response to the provisional report. Some components of the letter were listed and one of these was:

> a copy of the Mercer worksheets were provided as background material that went to the Treasurer to assist his decision-making in June 2002. Mr Prior noted that he had retained a copy of the worksheets, and had shown them to me at his interview with me.

In his provisional report Mr Bingham made no reference to Mr Prior having shown any worksheets to him. One might expect him to have taken a keen interest in these worksheets, retained a copy and referred to them in his provisional report. The fact that none of these things happened, combined with the way Mr Bingham has written about this in the sentence above, makes it possible that Mr Bingham has no recollection of his own of the worksheets having been shown to him by Mr Prior. He might be accepting Mr Prior's assurance that this happened at the interview. If the Ombudsman disagreed with Mr Prior it would be the word of one against the other because the Ombudsman made no record of what was said at the interview.

To summarise: Mr Bingham has attached more weight to Mr Prior's recollection of what the Treasurer was told than to the content of two letters one of which Mr Prior had written.

Following the release of Mr Bingham's Final Report the SA Superannuants' Vice-President Mr Clive Brooks made a Freedom of Information application to the Department of Treasury and Finance for a copy of the worksheets. The document supplied by the Department in response to this request was described on its cover sheet as follows:

> **Tax reductions to benefits**
> **June 2002**
> Electricity Industry Superannuation Scheme

But on its page 23 the document has the information:

> **A R Archer**
> Principal, Mercer Human Resource Consulting
>
> September 5, 2002

September 5, 2002 is the true date for the document because on its page 1 Mr Archer says:

> Attached as an appendix are the rule changes made by the Treasurer to reduce the benefits

So this is a document produced after the Treasurer had made the rule changes on 28 June 2002 and cannot have been provided 'to assist his decision-making in June 2002'

Of the values quoted in the 27 June 2002 Explanatory Memorandum, the document of September 5, 2002 refers to only one and this is the tax that was payable on rollover when the scheme became a taxed scheme from 1 July 2000. This calculation would have been done in order for the scheme to complete its tax return for the 2000/2001 financial year and there is an invoice where the payment made for the calculation is recorded. There is nothing in the document to indicate how the estimates for other amounts quoted in the 27 June 2002 Explanatory Memorandum were obtained.

On page 5 of the September 5 2002 document, in two paragraphs under a heading ‘Maximum Practical Benefit Reductions’, there is a reference to the reductions made to EISS benefits as follows:

> The purpose of this attachment is to outline the maximum taxation reductions to benefits (sic) could practically be made without any member suffering a reduction to his/her after tax benefit. A later section demonstrates that, subject to some adjustments, these maximum reductions are required to prevent employer costs increasing on account of becoming taxed.
>
> The approach differs by whether (sic) benefit is a lump sum rolled over to another fund, a lump sum paid in cash as an eligible termination payment (ETP), a pension transferred to the State Scheme, or a pension paid from the Scheme. Those cases are considered separately below:

In the second sentence of the first paragraph reference is made to a later section demonstrating the need for maximum reductions to benefits but there appears to be no such section in the document.

In the second paragraph there are four cases that are to be ‘considered separately below’ and this is followed by four sections (a), (b), (c) and (d) which have headings *Rollover of a Lump Sum to Another Fund; Payment of a Lump Sum in Cash as an ETP; Payment of a Lump Sum, part of which is cashable and part of which must be rolled over;* and *Disability Lump Sum benefit* respectively. The document does not consider any case involving the reduction of pensions.

Click or crtl-click to return to Page 11, Link 9 of the Final Report

Page 12, Link10: Not an unreasonable response?

On Page 12 of his Final Report Mr Bingham describes his experience of obtaining an explanation from Treasury for its failure to find a document that had been sought by SA Superannuants:

> I subsequently sought clarification from the department as to why the 4 December 2001 letter was not discovered when the FOI application was made by Mr Brooks. On 27 June 2014, the department advised me as follows:
>
> … we are not able to provide a definitive explanation as to why the document was not produced as part of the FOI application made on 15 February 2012. However, an examination of the history of the matter reveals that the search appeared to be conducted under the assumption that the relevant document was held by the "Electricity Reform and Sales Unit" (which I understand to have been established as a division of DTF).[9]
>
> In my view this is not an unreasonable response.

SA Superannuants made its request of the Ombudsman for him to obtain the reason for the 4 December 2001 letter not turning up in response to its FOI request in a letter dated 26 February 2014. It was not until Friday 27 June 2014 that the Department responded by e-mail as shown above. The Ombudsman vacated his position on Monday 30 June 2014. The long delay between him being asked to get the explanation, its arrival at his office on the second last working day of his tenure and his conclusion that the response was 'not unreasonable' is consistent with him being prepared to accept anything done by the Department as being 'not unreasonable'.

The mere fact that the letter was signed by Mr Prior in his capacity as Director, Superannuation (policy) with no reference to the "Electricity Reform and Sales Unit" should have been sufficient to make the Ombudsman question this explanation. The Ombudsman also had possession of a 26 June 2002 letter to the Treasurer in which Mr Prior had said:

> Both John Barrett (Actuarial Analyst) and myself have had extensive consultation with Mr Archer in relation to these draft rules and we are satisfied that the proposed rules meet the intentions of the legislation and also satisfy the guarantees provided to members by the legislation.

This is further information available to the Ombudsman indicating that the most likely person to have been involved in writing to Mr Archer about his being an adviser for the Treasurer was Mr Prior. It beggars belief that documents produced by Mr Prior would have been excluded from a genuine search for a letter commissioning the actuarial work behind the Explanatory Memorandum.

The 2000/2001 Auditor General's report refers to the Electricity Reform and Sales Unit as follows:

> **CHANGES TO ORGANISATIONAL STRUCTURE AND FUNCTION**
> With the completion of the disposal of the State's electricity assets, from 1 January 2001, the Electricity Reform and Sales Unit was disbanded. Electricity reform management is now part of the broader microeconomic reform function in the Department of Treasury and Finance and is funded from revenue from government.

So, the unit had been disbanded by 1 January 2001 but Treasury suggests that when they got the SA Superannuants' FOI application for documents related to the rule changes of June 2002 they went looking among the papers of a unit that had been disbanded on 1 January 2001 instead of looking among papers produced by the Director of Superannuation Policy.

Click or crtl-click to return to Page 12, Link10 of the Final Report

Page 12, Link 11: 2001 Contract between the Department and Mercer

A scanned copy of the 4 December 2001 letter is shown immediately below and then on the following two pages an invoice and list of items are shown.

DEPARTMENT OF TREASURY AND FINANCE

State Administration Centre
200 Victoria Square East
Adelaide 5000

GPO Box 1045
Adelaide SA 5001
DX56205

Telephone (08) 8226 9500
Facsimile (08) 8211 7755
Telex AA82814

4 December 2001

Mr Allan Archer
Principal
William M Mercer Pty Ltd
GPO Box 854
ADELAIDE SA 5001

Dear Allan

Electricity Industry Superannuation Scheme - Loss of Constitutional Protection

I refer to our recent meeting on the above matter where we discussed the process leading to the Treasurer giving notice in terms of Clause 11 of Schedule 1 of the *Electricity Corporations Act 1994*, of an amendment to the EISS scheme rules.

As background, Clause 11 of Schedule 1 of the *Electricity Corporations Act 1994*, provides as follows:

> *(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 subparagraphs (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.*

Clause 11 then goes on to specify the terms and conditions which the rule change or changes inserted by the Treasurer must satisfy.

The purpose of this letter is to formally advise you that the Treasurer has appointed you to assist in advising the Treasurer in relation to the appropriate rule changes to avoid or reduce an increase in employer costs caused by changes in the incidence of taxation as a result of the EISS scheme's expected future loss of constitutional protection.

At this stage we still await consultation on the regulation changes under the *Income Tax Assessment Act* that will effectively delist the scheme from constitutional protection. I will keep you updated on progress of this matter and would be happy to discuss any rule change proposals with you when they are ready.

Yours sincerely

Deane Prior
DIRECTOR, SUPERANNUATION (POLICY)

Ombudsman Inquiry into ...
S.A. Superannuants submission

7

Subject Attachment 10 with the
Explan

Refer page 10 AR

MERCER
Human Resource Consulting

Resource Consulting Pty Ltd
S 917
108 North Terrace Adelaide SA 5000
GPO Box 854 Adelaide SA 5001
08 8110 3400 Fax 08 8110 3499
www.mercerHR.com

16007260/

TAX INVOICE

Number:	03172419
Date:	10-Sep-2002
Client Account:	ETSAC

Mr Keith Rohead
Secretary
Electricity Industry Superannuation Board
GPO Box 854
ADELAIDE SA 5001

For professional services during the period 27 April 2002 to 24 May 2002 in respect of work NOT covered by our consulting retainer contract.

ITEMS CONCERNING THE CHANGES BROUGHT ABOUT BY NEW SCHEDULE 1 OF THE ELECTRICITY CORPORATIONS ACT 1994

(Refer attached schedule for details).

Sub Total	$	2,533.00
GST	$	253.30
Total Amount Due:	$	2,786.30

RECEIVED
– 2 DEC 2002
FINANCE

CERTIFIED CORRECT 29.11.02
PRINT NAME JOHN BRIA
Purchase Order Issued? Y/N DISPUTED? Y/N
EXPENSE LINE 357.9999.99.458.72111
TAX CODE Y10 TAX AMOUNT 253.30
AMOUNT - GST EXCLUSIVE 2,533.00 AMOUNT - GST INCLUSIVE 2,786.30
APPROVED FOR PAYMENT 30.11.02
Dep. Under-Treasurer

Please retain this copy for your records
TERMS: STRICTLY 7 DAYS

KM. MERSOO1.

Electricity Industry Superannuation Scheme
MAY 2002

CHANGES

Review of notices to bring into operation certain sections of the Part 4 amendments of the Restructuring and Disposal Act		
Amendments to the Rules to change the financing arrangements & the ownership of assets	206	5001
Amendments to the Rules to require funding by public sector employers	103	5010
Advice to new public sector employers on funding arrangements	769	5018
Application for Pre July 1988 Funding Credit	102	5020
Amendments to the Rules for tax reductions to benefits	309	5420
Actuarial calculation of the special rollover tax payable upon the Scheme losing constitutional protection	68	5451
	976	5550
Total	**2,533**	

The Ombudsman accepted the letter of 4 December 2001, and the invoice with its set of items, as proof that the work backing the Explanatory Memorandum had been properly commissioned and carried out. SA Superannuants had concerns about this based on the following:

1. The letter of 4 December 2001 makes no mention of remuneration for Mr Archer. We would have expected details of remuneration to be included in the letter of 4 December 2001.
2. The invoice makes no mention of the letter of 4 December 2001. We would have expected the invoice to refer to the letter of 4 December 2001.
3. The invoice is addressed to EISS when we would have expected it to be addressed to the Department. No-one has ever confirmed that this invoice was connected to the Explanatory Memorandum
4. The list of items attached to the invoice, with one exception, do not correspond to values reported in the Explanatory Memorandum. The exception is the item ‘Actuarial calculation of the special rollover tax payable upon the scheme losing constitutional protection’. Other values reported in the Explanatory Memorandum that would have required actuarial calculations were estimates for the values of PJFC utilisation, benefit reductions, contributions tax and investment earnings tax. None of the items on the list accompanying the invoice correspond to these estimates.

SA Superannuants requested the Ombudsman to seek additional information related to the letter of 4 December 2001. Our requests put to the Ombudsman were:

> We request that you establish whether Treasury obtained a response from Mr Archer to the December 4 2001 letter and the details of any response.
>
> We request that you establish if Treasury can supply documentation of the remuneration which Mr Archer was to receive for providing the advisory service described in the letter of December 4 2001.
>
> We request that you obtain from the Department a statement confirming that the invoice was a payment made for work done in preparing the explanatory memorandum and performing the actuarial calculations that the memorandum claims back the conclusions and results contained in the memorandum.

The Ombudsman declined to meet these requests which were made by letter dated 26 February 2014. The Ombudsman did not advise us that he was not prepared to do this until 17 June 2014. Given that the letter of 4 December 2001 had come forward in the investigation after an earlier, unsuccessful attempt to obtain it via an FOI application we would have expected the Ombudsman to be prepared to meet these requests.

If the Department had been able to supply Mr Bingham with the information that we sought this would have provided a much more convincing basis for Mr Bingham's conclusion that there had been proper commissioning of the work that resulted in the Explanatory Memorandum being produced.

On the other hand, if the Department had not been able to supply Mr Bingham with the information that we sought this would have been a sign that the work corresponding to the Explanatory Memorandum may not have been properly commissioned.

It is as if Mr Bingham did not want to go where he might find evidence of an administrative error on the part of the Department even when by going there he might have found more evidence to support the Department's version of events.

Click or ctrl-click to return to Page 12, Link11 of the Final Report

Page 15, Link12: EISS Board Comments

The EISS comments set out in paragraph 12 imply that because some reduction in benefits had to be made in order to avoid or reduce an increase in employer costs the particular changes made were justified. In other words if the particular changes had not been made the only alternative would have been to leave the gross benefit intact.

In the SA Superannuants' submission to the Ombudsman's inquiry we acknowledged that benefit reductions were justified but made clear our view that the actual reductions made to EISS pensions were excessive i.e. the reductions went beyond avoiding or reducing an increase in employer costs. In other words our position was that benefit reductions were justified but to a lesser extent than had been applied.

This possibility must have been obvious to both EISS and Mr Bingham but neither has considered it worthy of mention.

It is also the case that Richard Vear in his own representations to EISS and Treasury always acknowledged that some reduction in pensions was justified and that his complaint was that the reductions went beyond the point at which they would have been sufficient to compensate employers for the tax that became payable as a result of the loss of consitutional protection.

Click or crtl-click here to return to Page 15, Link12 of the Final Report

Page 16, Link13: Windfall

The ombudsman repeatedly refers to an improvement in net income for EISS pension division members, or a reduction in employer costs, resulting from a move to the taxed superannuation environment as a 'windfall'.

The concise Oxford dictionary defines a windfall as 'unexpected good fortune'. For the same employer cost there is nothing unexpected about an improvement in net income that occurs as a result of a pension being paid from the taxed superannuation environment rather than from the untaxed environment. It is universally acknowledged that the main advantage of saving for retirement through the Australian Superannuation system is a tax advantage. The advantage is due to the fact that contributions and earnings for a superannuation fund are taxed at a maximum rate of 15% which is well below the most common marginal tax rate for personal income.

This improvement has been enjoyed in other Australian jurisdictions by fund members but not by employers. Had EISS pensions been recalculated by a method that kept employer costs the same the resulting improvement in net income of the pension recipients would not have been a windfall it would have been an intended outcome of Federal Government retirement income policy.

An analogy can be made here with an employer who permitted employees to salary sacrifice but only on the condition that the employer, rather than the employee, gained the advantage. Any reasonable person would recognize in this an inappropriate use of power by the employer.

Click or crtl-click to return to Page 16, Link13 of the Final Report

Page 17, Link14: Clause 5 of the Trust deed

In several parts of the Final Report the Ombudsman refers to Clause 5 of the EISS Trust deed as if it has relevance to the Treasurer's action taken on 28 June 2002 to make rule changes in response to the change in taxation status for EISS.

Clause 5 of the EISS Trust Deed is only relevant to rule changes made by the Trustee after 30 June 2002 (the relevant day). It has no relevance to the Treasurer's action of inserting the tax reduction rules on 28 June 2002.

If the rule for reduction of pensions is invalid because it was designed to reduce employer costs (as SA Superannuants and Richard Vear maintain) then the timing of the rule change has ensured that the Trustee could only replace it with a valid rule if all employers agreed to accept an increase in their costs.

In other words if the rule has reduced employer costs for pensions then the situation is as follows:

The Treasurer inserted an invalid rule that reduced employer costs and unlawfully provided employers with a financial advantage that they were not entitled to receive and that employees were entitled to receive and should have received. Now, even if the rule is demonstrated to have been unlawfully made, Clause 5 of the EISS trust deed is an obstacle to the Trustee correcting the situation.

Click or crtl-click to return to Page 17, Link14 of the Final Report

Page 20, Link 15: was there any requirement that employer costs should not decrease?

The fact of Mr Bingham introducing this question is a worry. He stated early in the report that components 2 (f) and 2 (g) of the Legislative Council referral were outside his jurisdiction and he would not be investigating them. These components dealt with the question of employer costs and requirements of clause 11. So why did he introduce a question that involves both these matters? It would have been better for him to refrain from offering the opinion that employer costs were permitted to decrease. Representatives of SA Superannuants repeatedly put to him the view that his construction was both wrong and highly implausible.

The only support for Mr Bingham's construction on Clause 11 came from his own interpretation of legal advice obtained by the agencies themselves on questions that, with one exception, were nothing to do with possible reductions in employer costs. In the case of the legal advice that did address the question of whether employer costs could be lawfully reduced, that advice said that such reductions would not be lawful. More on this aspect of Mr Bingham's report is accessible via Link 20 on page 21.

Mr Bingham's willingness to take, and then hold, the position that Clause 11 did not preclude a decrease in employer costs is in sharp contrast to his apparent lack of confidence over his legal position in respect of his own jurisdiction. For example, in the question of EISS being an agency subject to the jurisdiction of the Ombudsman, the relevant section of the Ombudsman Act 1972 is part (d) in the definition of 'agency' in **Section 3 – Interpretation**. This says that an agency subject to the jurisdiction of the Ombudsman includes:

> (d) an incorporated or unincorporated body—
> (i) established or continued in existence for a public purpose by an Act; or
> (ii) established or continued in existence for a public purpose under an Act (other than an Act providing for the incorporation of companies or associations, co-operatives, societies or other voluntary organisations); or
> (iii) subject to control or direction by the Governor, a Minister of the Crown or other instrumentality or agency of the Crown or a council (whether or not the body is established or continued in existence by or under an Act); or

When Richard Vear wrote to Mr Bingham in 2012 to ask if EISS was subject to the jurisdiction of the Ombudsman he was told that it did because of (d). When the first Legislative Council referral was made in 2012 EISS disputed this and Mr Bingham changed his position to say that he now considered it likely that EISS was not subject to his jurisdiction. After the 2013 referral had been made Mr Bingham then went to Mr McDonald who appears to have advised him that he had been right with the advice he had given Richard Vear on 9 August 2012!

Click or crtl-click to return to Page 20, Link 15 of the Final Report

Page 20, Link 16: SA Superannuants view on Clause 11

On 3 January 2014 Mr Bingham rang Dr Ray Hickman of SA Superannuants to say that he had formed a view that Clause 11 did not preclude the Treasurer from inserting rules into the EISS rules that had the effect of reducing employer costs for EISS pensions. He told Dr Hickman that the representations being made by SA Superannuants and Mr Richard Vear to MPs appeared to be based on the assumption that clause 11 did preclude a reduction in employer costs. Dr Hickman agreed that this was the case and went on with words to the effect that if SA Superannuants and Mr Richard Vear were wrong about this then the argument was over and we had lost. However, Dr Hickman also made clear that he did not agree with Mr Bingham's assessment of Clause 11 and he undertook to accept Mr Bingham's invitation to provide in writing 'An argument against the proposition that Clause 11 does not preclude a reduction in employer costs'. This argument was provided in the form of the document below.

President: Peter Fleming
Ph. (08)8295 1832
Email: peterfleming8@bigpond.com

Secretary: Vic Potticary
PO BOX 568 Torrensville S.A. 5031
Ph: (08) 8352 6504
Email: cosme@senet.com.au

SA Superannuants Established1927
Unite – Protect – Represent
www.sasuperannuants.org.au

To: Mr Richard Bingham, South Australian Ombudsman
From: Dr Ray Hickman speaking for SA Superannuants and Richard Vear
Subject: An argument against the proposition that Clause 11 does not preclude a reduction in employer costs

Introduction

You are the first person to say to SA Superannuants or Richard Vear that the rule for reducing pensions can be valid even if it reduces employer costs. You say this because you have formed a view that Clause 11 does not preclude a reduction in employer costs.

In setting out my argument below I have kept in mind the possibility that you hold the view that clause 11 does not preclude a reduction in employer costs because of Mr McNamara's advice to EISS that Clause 11, or perhaps just subclause 11(2) , is a spent force. I deal with this possibility towards the end of my argument. I cannot identify any other reason you might have for thinking that employer cost reductions are not precluded by Clause 11.

Now I want to make clear what SA Superannuants and Richard Vear have said to parliamentarians about EISS pension reductions and what lies behind the referral sent to you from the Legislative Council on 25 September 2013.

In the course of our lobbying of parliamentarians on this EISS matter we had Iain Evans put a series of questions to Minister O'Brien. One of these questions was:

Question 8.

If the method for calculating EISS taxed-source pensions was expected to reduce employer costs for those pensions would it be compliant with Section

> 11(2), Part F of Schedule 1 *Superannuation* of the Electricity Corporations Act 1994?

Minister O'Brien responded:

> The formula that reduced gross pensions was determined actuarially in order to comply with the provisions of Clause 11(2) Part F of Schedule 1 Superannuation of the *Electricity Corporations Act 1994.* It was determined in a manner to avoid or reduce an increase in employer costs, but not reduce existing employer costs. It also satisfied the Act by ensuring that members received a net benefit that was not less than their existing net benefit applying before the fund moved into the taxed environment.

These words of the Minister describe accurately what SA Superanuants and Richard Vear claim are the requirements that the formula for reducing gross pensions must meet -it should not reduce employer costs and it should not make any member's net benefit less. Our emphasis in the representations we made to parliamentarians was that the formula was reducing employer costs in contravention of Clause 11(2) and was invalid for that reason. We have acknowledged that the requirement for member's benefits to be no less than before has been met and we have had little to say about that. In the Legislative Council on 17 October 2012, immediately before the first motion referring this matter to the Ombudsman was passed, the Government spokesman described our position on employer costs, and clause 11(2), in similar terms to those used by the Minister in his answer to Iain Evans. In the extract from the Legislative Council Hansard given below I have highlighted in bold the most relevant sentence.

> The Hon. G.A. KANDELAARS (17:19):
>
> This issue is being driven by the SA Superannuants and a small number of EISS pensioners. **These groups had a long-held view that the benefits reduction formula was incorrect, thereby reducing the superannuation costs of employers at the expense of EISS pensioners and contravening the intent of its provision in the Electricity Corporations Act 1994, which was to go no further than to avoid an increase in the employer's costs.**
> SA Superannuants has been calling for a review of the formula for some time, and the motion by the Hon. Mr Lucas sets out proposed terms of reference for the review

Now you are saying to us that Clause 11 does not preclude a reduction in employer costs and you have invited me to give you an argument that would change your mind.

Looking at Sub-clause 11(2) it can be seen that it has something to say about the effects of rules on employer costs. Clause 11(2) reads:

> *(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.*

If there was not an intention in clause 11(2) to preclude reductions in employer costs the last two lines would have been left out.

Sub-clause 11(3) reads :

(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.

In discussing with me your view that Clause 11 does not preclude a reduction in employer costs you referred to an increase in net benefits for members as being a windfall gain. But 11(3) does allow for members to get an increase in their net benefit. Any rule that sees members getting benefits equal to or greater than what they would have received if the Scheme had not lost constitutional protection is compliant with 11(3). If there was an intention in clause 11 to prevent any members from ending up with an increased benefit i.e. what someone might regard as a windfall, 11(3) would be modified in a way, such as I have indicated, to read as:

(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~~ equal to, but no more than , the level of net benefits to which he or she would have been entitled if the Scheme had not lost constitutional protection.

To sustain the position that Clause 11 does not preclude a reduction in employer costs, and/or has within it some implication that gains by members were to be avoided, both 11(2) and 11(3) would have to be written differently and in ways equivalent to those I have suggested. But even then there would be a problem with 11(1) which reads:

(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.

This requires the rules for changing benefits to be rules that relate the changes in benefits to corresponding changes in employer costs. Rules 29(4) and 29(5), which are being used to achieve pension reductions, do not take any account of changes in employer costs. They rely entirely on personal income tax rates for untaxed-source and taxed-source pensions.

So, for clause 11 to not preclude employer costs being reduced and/or ensure that member benefits did not change as a consequence of the tax changes arising from loss of constitutional protection its parts (1), (2) and (3) would have to become something close to the following.

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 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.,
(3) Subject to subclause (4), the change in benefits effected by a rule made under this clause must result in the level of net benefits to which a member, or a person in respect of a member, is entitled being equal to, but no more than, the level of net benefits to which he or she would have been entitled if the Scheme had not lost constitutional protection.

The difference between this set of words and the words of the actual Clause 11 is sufficiently great to make highly implausible the proposition that the actual clause 11 also does not preclude a reduction in employer costs.

The 'Spent force' and other EISS legal advice

Your e-mail to me of 3 January 2014 refers to certain legal advice. You say in your first paragraph:

> *'Clause 11 does not preclude employer costs being reduced as a consequence of the tax changes arising from loss of constitutional protection'. Indeed, you may wish to draw to my attention any other element in the EISS framework which precludes a reduction in employer costs. This is because the McNamara advice states that Clause 11 is a spent force, and has no current effect.*

I have a copy of a letter dated 18 September 2008 from a Suzanne Mckenzie of DMAW lawyers (representing EISS) to a Mr Richard Bradshaw of the law firm Johnston Withers (representing the Australian Services Union). This letter uses the expression 'spent force' in a numbered point 14 on page 2. This reads:

> *14. In particular, the Queen's Counsel's opinion confirms that clause 11(2) of Schedule 1 of the EC Act is a spent force and does not bind the Board and is not relevant to the correct interpretation of rule 29.*

I also have copy of a letter dated 3 November 2008 from Mr Mark Day, Chairman of the EISS Board to Mr Andy Dennard, Secretary of the Australian Services Union. In a numbered point 3. on its second page this letter says:

> *3) Over the years, the Board has sought extensive advice about the benefit reduction formula and the application of the rules. Last year the Board obtained the opinion of Philip McNamara QC. All advice has supported the Board's conduct in connection with the application of the benefit reduction formula.*

These two extracts confirm that the advice from Mr McNamara was concerned with questions of correct interpretation and application of rule 29 after it had been inserted into the EISS rules as provided for in Clause 11. All such questions are quite separate from the question of whether rule 29 is valid. An analogy would be that the police department might be interpreting and applying regulations to the traffic act correctly but the regulations might not comply with the Act.

The numbered points 11. 12. And 13. in the Suzanne Mckenzie letter read:

> *11. You contend that the Board would have to treat rule 29 as invalid if it is presented with evidence that demonstrates that the Treasurer's power to make rules under clause 11 of Schedule 1 of the EC Act was not properly exercised.*
>
> *12. Our client has received an opinion from Queen's Counsel that it is not a matter for the Board to determine the validity or invalidity of rule 29 and that the production of such evidence to (or by) the Board would not relieve the Board from its obligation to continue to apply with the Scheme rules and apply rule 29.*
>
> *13. Further, it is not incumbent upon the Board, and would be inappropriate for the Board, to conduct an investigation into whether rule 29 of Division 1 of the rules might be invalid, including because it may not have been made 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.*

This makes it very unlikely that either Mr McNamara or DMAW has given advice to the Board that Rule 29 is valid in all respects. The only legal advice EISS is likely to have is that they (EISS) are not responsible for its validity.

Mr McNamara's advice was obtained in 2007 and this is the year in which a 10% tax offset became available on untaxed-source pensions. If this tax offset had been included when rule 29 was applied to pensions there would have been an increase in employer costs for the pensions. The EISS Board amended rule 29 to ensure that the 10% tax offset did not get counted and in this way arranged for employer costs to be reduced compared to what they would have been if no change to rule 29 was made.

It is likely that the McNamara advice only addresses the question of whether Clause 11(2) needed to be taken account of by the Board as it considered changing rule 29 in response to the availability of the 10% tax offset from 1 July 2007. SA Superannuants and Richard Vear agree that once the rule 29 had been inserted by the Treasurer the Board was empowered to amend it using its own Trustee powers and without involvement of the Treasurer or reference to clause 11(2) . This is not to say that the Board acted correctly only that it was not bound to take account of 11(2). It may well be that this is why Mr McNamara and/or DMAW have referred to clause 11(2) as a spent force. But it is not a spent force as far as the validity of the rule originally inserted by the Treasurer is concerned.

Your e-mail to me of 3 January 2014 also says

> *The legal advice to the EISS Board concludes that the rules are valid, but the questions put to the lawyers were in a different context not directly related to the rules' effect on employer costs. In the case of the DMAW advice, the question related to which marginal tax rate of a pensioner the Board should apply in calculating a benefit reduction.*

The first sentence in this statement concedes that the legal advice being referred to was given in response to questions about the rules that were not directly related to employer costs. The second sentence in the statement refers to advice given about whether sub-clause 11(3) was being complied with. It has no relevance to the question of compliance with 11(2) and it is the question of compliance with 11(2) that you have been asked to investigate.

.

The final sentence in your e-mail of 3 January 2014 says:

> *In the case of the McNamara advice, the question was whether rule 29(3) is invalid because it does not satisfy the 'no worse off' test for the Treasurer's power to vary the rules under clause 11(3).*

Once again Mr McNamara's advice is about compliance with clause 11(3) and not clause 11(2). Furthermore rule 29(3) is for reduction of lump sums, not pensions.

Crown Law advice: I have restricted my argument about legal advice to the examples contained in your e-mail to me of 3 January 2014. The Crown law advice to Treasury is of the same species i.e. it is advice on an irrelevant question.

Other elements in the EISS framework?

Your e-mail to me of 3 January 2014 included the invitation '*you may wish to draw to my attention any other element in the EISS framework which precludes a reduction in employer costs.'* Other elements of the EISS framework that might preclude a reduction in employer costs are:

The Heads of Government Agreement on Superannuation (HOGAS)

HOGAS says in its first paragraph.

> *The Commonwealth and the State and Territory Governments recognise the need to apply national standards to certain aspects of superannuation without distinguishing between employees of the public and private sector. For example, it is important that members' accrued benefits are securely protected, and there is consistency of taxation outcomes for members' superannuation benefits.*

EISS is a superannuation scheme operating under this agreement and the State Government bears the ultimate responsibility for EISS compliance with HOGAS. So the HOGAS placed an obligation on the State Government to ensure that tax outcomes for EISS members were the same as occurred in the other Australian jurisdictions.

In New South Wales the state government pension funds operated as taxed sources from 1 July 1988 when taxes on superannuation fund income were introduced. In Victoria the pension funds moved into the taxed environment in the 1990s. But in both jurisdictions members whose pensions commenced before 1 July 1988 experienced no reduction in their pensions and became eligible to claim a 15% tax offset on the entire taxable amounts of their pensions. These people received an increase in the net value of their pensions of up to 15% of the pension's taxable amount. This has never been referred to as a windfall but accepted as an improvement in net income that the Federal Government intended they should receive.

Where people had pensions commencing after 1 July 1988 their pensions were reduced but only by a proportion of 15% that matched the proportion of service completed after 1 July 1988 and the proportion of the pension that was employer-funded. For example, in NSW if a person had 20% of service completed after 1 July 1998 the pension was reduced by 3% of the taxable amount that had been funded by the employer. The person was able to claim the 15% tax offset on the entire taxable amount of the reduced pension. This person lost less than 3% of his/her pension and recovered about 14% in the form of reduced tax payable on the pension.

This was the typical outcome for pensions paid in both the public and private sectors. It is the outcome that clause 11 was designed to deliver to EISS pension division members.

Members' interests to be paramount

Where an action being contemplated by a superannuation scheme trustee could deliver an advantage either to members or to some other party, such as an employer , and there is no specific authority to consider giving the advantage to the other party the advantage must go to scheme members. This is because of the specific obligation of trustees to act in the best interests of its beneficiaries.

Instead of inserting the rules 29(4) and 29(5) for reducing pensions the Treasurer might have inserted the different rule

> *Amount of the taxed-source pension is to be calculated using the formula:*
>
> *Current (untaxed) benefit x (1-.15 B/C x P)*
> *Where B = the period in days of contributory service that began on 1 July 1988*
> *C = the period in days of contributory service*
> *P = the proportion of the benefit deemed to be employer financed'*

I will call this the **Treasurer's alternative rule** and it is being used to determine pensions paid in New South Wales. This rule would have complied with all parts of Clause 11 including 11(1) and 11(2). The Treasurer's alternative rule would have been valid according to all the tests it was required to pass.

The Trustee had the power to change the Treasurer's alternative rule once it had been inserted into the EISS rules. This power is given to the Trustee by 11(7).

> (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.

So the Trustee might have replaced the Treasurer's alternative rule with the rules 29(4) and 29(5). Had this happened the Treasurer and his advisers would be 'off the hook'. Responsibility for the validity of 29(4) and 29(5) would rest entirely with the Trustee.

However a trustee contemplating a substitution of 29(4) and 29(5) for the Treasurer's alternative rule would have to have a reason consistent with the obligations a Trustee has to act in the best interests of the beneficiaries of the trust.

In this scenario the Trustee would be making a change from a rule that kept employer costs the same and passed a tax advantage to the beneficiaries of the trust (as happens with similar trusts) to a rule which reduces employer costs and passes the tax advantage to employers rather than the beneficiaries. This would make the rule invalid on the grounds that the Trustee was displaying a preference for the interest of a third party over the interests of its beneficiaries.

Of course, it was not the Treasurer's alternative rule that was inserted, but rules 29(4) and 29(5). Whatever the Trustee is doing with these rules they are invalid if they do not comply with Clause 11 (11(2) particularly). The Treasurer and his advisers are therefore not 'off the hook' unless they can prove that rules 29(4) and 29(5) do not reduce employer costs.

The Trustee is only 'off the hook' if its conduct in relation to adoption of rules 29(4) and 29(5) is judged to meet acceptable standards of probity for a superannuation fund trustee and if the changes it has made to the rules after they were inserted are consistent with its powers and responsibilities.

Summary: the above establishes that:

- Clause 11 precluded the Treasurer from inserting a rule that would have the effect of reducing employer costs in response to tax changes arising from loss of constitutional protection.
  and
- The requirement for the Trustee to maintain the interests of its beneficiaries paramount would have precluded the Trustee from introducing such a rule.

SA Superannuants and Richard Vear will be interested to know if the above has any impact on your view that clause 11 does not preclude employer costs being reduced as a consequence of the tax changes arising from loss of constitutional protection.

Yours sincerely,
Dr Ray Hickman
12 January 2014

This argument had no effect on Mr Bingham's view concerning clause 11.

Click or crtl-click to return to Page 20, Link 16 of the Final Report

Page 20, Link 17: Letter of 12 October 2006

A scanned copy of this letter is provided below.

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Attachment 20
page 23 AR

TRS06D0448
TRS06D1166

Date: 12/10/06

Mr Vic Potticary
27 Torrens Street
TORRENSVILLE SA 5031

Dear Mr Potticary

I refer to your recent letters dealing with the adjustment that was made to gross pensions payable out of the Electricity Industry Superannuation Scheme (EISS) following the scheme's move into the taxed environment.

Clause 11 of Schedule 1 of the *Electricity Corporations Act 1994*, provides that "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." You are advised that as a result of the EISS losing its constitutional protection status on 1 July 2002 (with effect from 1 July 2000), the Trustee of the EISS wrote to me recommending a rule change pursuant to Clause 11 of Schedule 1 of the *Electricity Corporations Act*.

As you are aware, the rules were changed to reduce the gross benefits of members so that benefits could be paid as taxed benefits from the restructured taxed fund.

I am advised that the rule change implemented is not inconsistent with the requirements of subclauses (2) and (3) of Clause 11.

I can also inform you that the rule change implemented was supported by the scheme's actuary and lawyer.

In your letter you state that the legislation covering the EISS provides that any rule inserted following the move of the fund into the taxed environment may reduce gross benefits "but only to the extent needed to avoid or reduce an increase in employer costs arising from a change in the incidence of taxation". The quote used in your letter is not a correct reflection of the provisions of the Act.

The Trustee of the EISS is now completely responsible for the rules of the scheme, and if the Trustee believes that the rule that reduced gross pensions as a consequence of the scheme moving into the taxed environment is not operating as originally intended, the Trustee may vary or replace the rule as provided for Clause 11(7) of Schedule I of the *Electricity Corporations Act*.

2

Should you or the member of the EISS who has contacted your Association have any further questions about this matter, the questions should be referred to the Trustee of the Electricity Industry Board.

Yours sincerely

Paul Holloway
Acting Deputy Premier
Acting Treasurer

Mr Bingham claims that this letter told SA Superannants that Clause 11 allowed rules to have the effect of reducing employer costs. Perhaps the most interesting thing about Mr Bingham saying this is that he makes no reference to Treasury, or anyone else, having confirmed that the letter was meant to tell SA Superannuants that Clause 11 permitted employer costs to go down. He interviewed Mr Prior and two staff from Super SA and would have had an opportunity to have this confirmed by one or more of those people. He also could have made a request of the Department for confirmation.

At the time of saying that the 12 October 2006 was advice that employer costs were permitted to go down Mr Bingham had in his possession, and had read, two Crown Law opinions concerning the validity of the rules. One of these opinions was from a Mr Chad Jacobi and was dated 25 January 2006 i.e. before 12 October 2006. The other was from Mr Stephen McDonald and was dated 28 November 2007 i.e. after 12 October 2006. Consequently, the earlier opinion is the only Crown Law advice that the Department had at 12 October 2006.

From Mr Bingham's description of this advice (refer paragraph 34, page 21 of the Report) it dealt with compliance of the rules with sub-clause 11(3) only. Mr Bingham must have known this and must have (or should have) recognised that the letter of 12 October 2006 was representing Crown Law advice as confirming that the rules were compliant with all parts of Clause 11, including 11(2), when the advice was only confirming compliance with 11(3). This is apparent from the advice and from the memorandum that Mr Deane Prior wrote later (4 September 2007) that is presented in paragraph 107 on page 36 of the Report.

Mr Bingham also had in his possession the later Crown Law advice from Mr McDonald that was given in response to Mr Prior's 4 September 2007 Memorandum. This advice rejected Mr Prior's assertion, made in the 4 September 2007 Memorandum, that the earlier Crown Law advice from Mr Jacobi had said that the rules were valid in all respects. Furthermore, this advice stated plainly that the rules could not be valid if they reduced employer costs (refer paragraph 35, pages 21-22 of the Report).

Considering all this it beggars belief that Mr Bingham could accept the letter of 12 October 2006 to be:

- advice to SA Superannuants that clause 11 allowed rules that reduced employer costs and
- evidence supporting his own view that this was the case.

Click or crtl-click to return to Page 20, Link 17 of the Final report

Page 21, Link 18: Ombudsman's construction on Clause 11

At this point in Mr Bingham's report his reasoning becomes bizarre. In paragraph 33 he says:

> 33. It is true that the legal opinions have not directly addressed the topic of whether clause 11 operated to prevent the making of a rule which permits a 'windfall' gain being used to reduce employer costs. However, I consider that the opinions can provide some illumination on the question of whether clause 11 operated in that way; and in my view there is nothing in those opinions which renders that construction wrong. I set out below a summary of these opinions.

Here Mr Bingham, having placed on clause 11 the construction that it does not preclude a reduction in employer costs, says that legal advice supplied to him by the agencies contains nothing that proves his construction wrong. Even if this was the case it would be a flimsy basis for the construction he proposes. Reasoning of this sort is fairly described as 'wishful thinking'. In paragraph 35 on pages 21-22 Mr Bingham presents an extract from the Crown Law advice of Mr McDonald which says:

> The purpose of the power granted to the Treasurer by clause 11 was to enable the reduction or complete avoidance of an increase in employer costs (ie, an increase in employer contributions to the fund) which would have otherwise resulted from the shortfall created by the imposition of a significant tax liability on the fund. The power in clause 11 did not extend to the making of a rule that provided for a total reduction in gross benefits which was greater than that which is required to avoid an increase in employer costs. Put another way, the power in clause 11 could not be used to insert a rule which had the effect of decreasing employer costs.

Refer Paragraph 35

This extract directly contradicts his claim that clause 11 does not preclude a reduction in employer costs. In footnote 30 on page 22 he makes matters worse with the astounding claim that the last sentence in this extract is inconsistent with the other two sentences and the general tenor of the 'advice in total'. In response to this, two questions can be asked:

- how can a sentence beginning with the words 'Put another way…' be inconsistent with the sentence that precedes it? and
- why has Mr Bingham not quoted something from the advice to illustrate what he means by inconsistency of the general tenor of the advice in total?

In the paragraphs 30 and 31 Mr Bingham had referred to the argument put to him (at his request) by SA Superannuants that he was wrong in saying that clause 11 did not preclude a reduction in employer costs.

> 30. Second, SA Superannuants suggests that if it had been the intention of clause 11 to permit the possibility that employer costs may reduce, it would have been worded differently. It provides several possible alternatives to the existing wording of clause 11 seeking to demonstrate this contention.
>
> 31. With respect to the position advanced SA Superannuants, I consider that approach to be speculative. In my view the words of clause 11 must be interpreted according to their plain meaning, not construed to advance a position which a proponent may hold.

The second sentence of 31 is good advice for anyone but it is advice that Mr Bingham does not observe himself. There was a plain meaning to the words of Mr McDonald in the last sentence of paragraph 35 – 'the power in clause 11 **could not be used** to insert a rule that had the effect of decreasing employer costs' (emphasis added) but Mr Bingham interprets the words to have the opposite meaning –'the power in clause 11 **could be used** to insert a rule that had the effect of reducing employer costs' (emphasis added).

The main point that SA Superannuants made to Mr Bingham about the meaning of the words of clause 11 had referred to sub-clause 11(2) which reads:

> *(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.*

SA Superannuants stated 'If there was not an intention in clause 11(2) to preclude reductions in employer costs the last two lines would have been left out.' The plain meaning of the last two lines of 11(2) is that employer costs might stay the same or they might increase and, if the latter case applies, the increase can be kept to a minimum. These two lines made it unnecessary for 11(2) to state explicitly that employer costs must not decrease.

Mr Bingham sets out his interpretation of the meaning of the words of 11(2) in paragraph 26:

> 26. In my view, clause 11(2) simply permitted the Treasurer to make rules which decreased member benefits, so as to avoid an increase in employer costs resulting from changes in the incidence of taxation following from the EISS's loss of constitutional protection. Its introductory words specify that the Treasurer 'may' make such a rule. I imagine that the framers of the clause considered it to be necessary because it is unusual for member benefits in a superannuation scheme to be reduced. But clause 11(2) did not prevent a 'windfall' gain being used to reduce employer costs: indeed, it says nothing about such an occurrence.

At the beginning of this paragraph Mr Bingham has 11(2) allowing the Treasurer to 'avoid an increase' in employer costs when the exact wording is 'avoid or reduce an increase' in employer costs. At the end of paragraph 26 Mr Bingham has 11(2) not preventing a reduction in employer costs. His reason for saying 11(2) does not prevent a 'windfall gain' from reducing employer costs is that clause 11 'says nothing about such an occurrence'. Here Mr Bingham is giving a meaning to 11(2) based on words that it does not contain and that would be in conflict with words it does contain.

The second last sentence in 26 requires some comment. It is certainly 'unusual for member benefits in a superannuation scheme to be reduced' and so there has to be a good reason for doing so. The reason in this case was that the fund from which the benefits were being paid became liable to pay tax that had previously not been payable. In this circumstance it is surely self-evident that any authority to reduce benefits by more than was needed to meet the tax cost had to be explicit and unambiguous.

Everything that Mr Bingham advances in support of his view that clause 11 does not preclude a reduction in employer costs is inference from the legal advice given to him by the agencies. With one exception (the advice of Mr McDonald which included the passage contained within paragraph 35 and quoted on the previous page) this was advice given on different questions.

In Mr Bingham's Report there is no reference to either Treasury or EISS having argued that their legal advice had led them to the same conclusion as he had reached through reading it. So, Mr Bingham saw in the legal advice obtained by the agencies something that they had not seen and have not, even now, proposed.

In paragraphs 34 and 35 Mr Bingham refers to the Treasury as having ‘authorised’ him to disclose the substance of the advice it had received from Crown Law. This suggests that Treasury may have taken the position that, having ruled components 2 (f) and 2 (g) as being outside his jurisdiction, Mr Bingham had no power to compel it to release legal advice dealing with employer costs and/or compliance with legislation. But Treasury might have been more than happy to do so if they knew Mr Bingham was going to see, in the advice, evidence that legislation did not preclude a reduction in employer costs and put that in his report. Being in a position to be able to ‘authorise’ Mr Bingham to disclose the substance of the legal advice would have also given Treasury the power to censor what Mr Bingham described as the substance of the advice.

Another question that seems pertinent is:

- why did Mr Bingham not get Mr McDonald to give him an opinion on the question of whether clause 11 precluded the Treasurer from inserting rules that would see, as Mr Bingham puts it in paragraph 26, “a ‘windfall’ gain being used to reduce employer costs.”?

In footnote 30 on page 24 Mr Bingham referred to this question as being a different question from the one that Mr McDonald was advising on when at Crown Law. If this was true then there would have been no impediment to Mr McDonald giving an opinion on the question.

It is not just the case that Mr Bingham has made implausible interpretations of a lot of legal advice in order to sustain his position that clause 11 allows for the rules inserted by the Treasurer on 28 June 2002 to have the effect of reducing employer costs. He also ‘turned a blind eye’ to statements made by a Government Minister, EISS, Treasury and Mercer all of which indicated that he was wrong in saying this.

Minister O’Brien described the formula for reducing pension benefits by saying it ‘was determined actuarially to comply with the provisions of Clause 11(2)…’ and ‘in a manner to avoid or reduce an increase in employer costs, but not reduce existing employer costs.’ (see paragraph 41 on page 23). Minister O’Brien could not have stated more clearly the position that the rules were not permitted to reduce employer costs.

EISS told Mr Bingham in its submission to him that ‘The EC Act allowed the Treasurer to introduce rules to minimize the extra cost to employers.’ (see the numbered point 37 in paragraph 12 on page 16). Being allowed to **minimize an extra cost** does not permit costs to be reduced.

Treasury in a 26 June 2002 letter of advice to then-Treasurer Kevin Foley referred to the rules for reduction of EISS benefits as rules that maintain ‘…the same level of employer support for the superannuation scheme.’(see paragraph 73 on page 28). Using the expression **same level of employer support** in this communication with the Treasurer was misleading if it did not mean that employer costs were to stay the same.

Mercer, in the person of the late Mr Allan Archer, stated on page four of the Explanatory Memorandum of 27 June 2002 that ‘benefit reductions must not lead to a reduction in employer costs’. On page 1 of a later document of 5 September 2002 Mr Archer stated ‘the reductions can only **avoid or reduce an increase** in employer costs –Clause 11(2) – which means that the reductions cannot be so high that they reduce employer costs.’ (emphasis in the original). There could not be a clearer statement than this of the fact that clause 11 was not permitted to reduce employer costs.

It beggars belief that an Ombudsman would cling to the proposition that clause 11 allowed for a reduction in employer costs when he had access to so much evidence indicating that this was wrong.

Click or crtl-click to return to Page 21, Link18 of the Final Report

Page 21, Link19: Crown Law advice to Treasury from Mr Chad Jacobi

Mr Bingham's account of the Crown Law advice of Mr Chad Jacobi contained in paragraph 34 on page 21 has no relevance to the construction that Mr Bingham places on clause 11. Nor is it related to compliance of EISS rules with sub-clause 11(2). It deals with the question of whether sub-clause 11(3) placed on the Treasurer an obligation to make up a difference arising from changes in personal income rates occurring after a pension had commenced.

Mr Jacobi's advice was that no such obligation existed when the rule changes were made or now. SA Superannuants and Richard Vear have always agreed with this.

Click or crtl-click to return to Page 21, Link 19 of the Final Report

Page 21, Link20: Crown Law advice to Treasury from Mr Stephen McDonald

Mr Bingham discusses, and quotes from, Mr McDonald's advice in paragraphs 35-37 on pages 21-22.

> 35. Second, there is advice provided by Mr Stephen McDonald of the Crown Solicitor's Office on 28 November 2007.[29] The department has provided me with a copy of that advice also, and has authorised me to disclose its substance. The advice includes the following statement:
>
> The purpose of the power granted to the Treasurer by clause 11 was to enable the reduction or complete avoidance of an increase in employer costs (ie, an increase in employer contributions to the fund) which would have otherwise resulted from the shortfall created by the imposition of a significant tax liability on the fund. The power in clause 11 did not extend to the making of a rule that provided for a total reduction in gross benefits which was greater than that which is required to avoid an increase in employer costs. Put another way, the power in clause 11 could not be used to insert a rule which had the effect of decreasing employer costs.[30]
>
> 36. Mr McDonald's advice concludes that 'on the assumption that the actuarial calculations can be justified, so that it could be demonstrated, if necessary, that the level of reduction in gross benefits effected by the insertion of Part XV into the Rules did have the effect of reducing or avoiding an increase in employer contributions and did not go beyond what was necessary to achieve that purpose … the insertion into the Rules of Part XV by the Treasurer is not invalid'. In support of this conclusion, he noted that:
>
> The extent of the reduction in gross benefits resulting from the insertion of the new rules has been justified actuarially in the Explanatory Memorandum which has been provided to me. I am not in a position to provide advice as to the accuracy of the actuarial calculations underlying the assertions in that Explanatory Memorandum. However, assuming that the assertions are correct, it appears that, had the Treasurer determined to insert a rule providing for a lesser reduction in gross benefits, that rule would have resulted in a shortfall in the fund such that, in order for the benefits to be paid to members, it would have become necessary to increase employer contributions to the fund. It follows that the rules which the Treasurer did insert were rules which had the effect of reducing or avoiding an increase in employer costs, as required by clause 11.
>
> 37. Mr McDonald's advice also explains the effect of the 25 January 2006 advice provided earlier by Mr Jacobi as follows:
>
> Mr Jacobi's advice did not directly state that the variations to the Rules made on 28 June 2002 were legal. Mr Jacobi advised more generally that, where factors other than a change to the Rules (factors such as reductions in Commonwealth Income Tax or expansions of Income Tax brackets) produce the result that members of the EISS are entitled to lower net benefits,
> clause 11 of Schedule 1 does not require the Treasurer or the State to compensate those members for any reduction in benefits. Clause 11(3) does not operate as a general guarantee that the net level of benefits to which a member is entitled cannot fall below that to which the member would have been entitled had the Scheme not lost constitutional protection: it merely restricts the effect of rules made under clause 11(1) so that those rules could not themselves have that effect.

Paragraph 35 has the Ombudsman quoting a passage from Mr McDonald's advice that includes the clear statement '…the power in clause 11 could not be used to insert a rule which had the effect of decreasing employer costs.' This was sufficient to tell Mr Bingham that he was not likely to be correct in saying that clause 11 did not preclude a reduction in employer costs.

Paragraph 36 has the Ombudsman quoting another passage from Mr McDonald's advice in which Mr McDonald refers to the Explanatory Memorandum and makes clear that he was put in the position of having to assume the accuracy of actuarial calculations underlying the assertions it contained. This statement of Mr McDonald's is inconsistent with what Mr Bingham says in paragraphs 108 and 109 on page 37.

> 108. SA Superannuants contends that:
>
> … the Treasury case that the rule changes of 2002 had a sound basis in law has always been flimsy. The quality of the Crown Law advice that all rule changes are entirely valid can be no better than the quality of the calculations used to generate the values contained in the Explanatory Memorandum.
>
> 109. I consider that this statement is misconceived. As outlined above, I agree with the Crown Solicitor that the rules were validly made. In my view, there was no legal obligation requiring that the rules should not reduce employer costs.

Paragraph 37 quotes Mr McDonald's advice about the earlier Crown law advice provided by Mr Jacobi and bluntly dismisses the suggestion that Mr Jacobi had given advice that the rules were valid in all respects.

Prior to the tabling of the Ombudsman's report in the Legislative Council on July 2, 2014 SA Superannuants had not had the opportunity to read any part of Mr McDonald's advice and had to rely on Mr Bingham's account of it given in his Provisional Report of 4 February 2014.

But we were very confident in making the statement that Mr Bingham quotes in 108 and rejects in 109. We were also very confident that our claim to the effect that neither EISS nor Treasury had ever received legal advice that did more than confirm compliance of the EISS rules with sub-clause 11(3). This confidence has been fully vindicated by the actual words of Mr McDonald quoted in paragraphs 35-37.

Click or crtl-click to return to Page 21, Link20 of the Final Report

Page 22, Link 21: 2005 advice to EISS by DMAW Lawyers

A summary of this advice is reproduced below.

ELECTRICITY INDUSTRY SUPERANNUATION SCHEME

SUMMARY OF LEGAL ADVICE RECEIVED BY THE BOARD CONCERNING TAX REDUCTION OF PENSION BENEFITS

1 There has been some concern about the validity of rule 29 of the Division 1 of the Rules with regard to its application to determining the tax reduction for pension benefits payable from the Scheme. This is because in calculating the reduction:

1.1 clause 11 of Part F of Schedule 1 of the Electricity Corporations Act 1994 (SA) (**EC Act**) provides for the marginal tax rate of the pension *as at the date the Scheme lost its constitutional protection* to apply:

whereas,

1.2 rule 29(5) of the Division 1 Rules provides for the marginal tax rate of the pensioner *as at the date of the commencement of the pension* to apply.

2 We advise that advice has been obtained to the effect that rule 29 and clause 11 are for most pensioners in most circumstances likely to be consistent as the benefit provided by rule 29 will be greater than the benefit required by clause 11. Rule 29 will therefore be valid in most cases. Clause 11 only requires that the level of net benefits for a pension *must not be less* than the amount to which the pensioner would have been entitled had the Scheme not lost constitutional protection and assuming that the same marginal rates of tax applies as those applicable at the time the Scheme lost its constitutional protection (**minimum pension benefits**) and does not prevent a higher benefit from being paid.

3 Therefore, a rule that results in higher net pension benefit than the minimum pension benefits described under clause 11 would not be inconsistent with the EC Act and would not be invalid. This is because in the case of many pensions, the calculation of the reduction of gross pension benefits under rule 29 will result in a net pension benefit that is actually higher than the minimum pension benefits described under clause 11. Given that for such pensioners the net pension benefit will not be less than the minimum pension benefits, rule 29 remains valid for these pensioners and the higher level of net pension should apply.

4 However, for any pensioner where the calculation under rule 29 would result in a lower net pension benefit than the minimum pension benefit required by clause 11, the Board has received advice that it must construe rule 29 so as to determine the pension benefit using the marginal tax rates applicable at the date the Scheme lost constitutional protection.

5 Accordingly, if the net pension benefit determined under rule 29 is greater than the minimum pension benefits specified by clause 11, then the Board will pay the greater pension benefit. If the net pension benefit determined under rule 29 is less than the minimum pension benefit specified by clause 11, then the Board must determine and pay the net pension benefits by applying the marginal rates of tax at the date the Scheme lost constitutional protection in accordance with clause 11.

21 November 2005

Mr Bingham refers to the advice summarised here in paragraph 38 on page 22 of his report saying:

> Third, I consider that my conclusion is consistent with advice provided to the EISS Board by DMAW Lawyers in 2005. This advice was provided in response to a question concerning which marginal tax rate of a pensioner the EISS Board should

> apply in calculating a benefit reduction. The advice relevantly concluded that whilst a net pension benefit ‘may in some cases be less than is required by the calculation under clause 11 [this] will not invalidate rule 29 in its entirety, but will only cause it to be construed in those cases so that the higher net benefit applies’

Mr Bingham’s reference to marginal tax rates and the calculation of net pension benefit shows clearly that the advice is dealing with compliance of rule 29 with subclause 11(3) and not compliance with 11(2). But still Mr Bingham represents it as being relevant to, and supportive of, his view that 11(2) does not preclude rules that reduce employer costs.

Furthermore, this summary of the DMAW advice seems to be representing the situation, after the rules were inserted by the Treasurer, as one that still required the Board to be mindful of what clause 11 contained. Mr Bingham’s account of later advice given to EISS by Mr P A McNamara, QC seems to contradict this (refer to the Link22 discussion). The summary of the DMAW advice also endorses an interpretation of 11 (3) that sees the Board paying a higher benefit than it would have had to pay if 11 (3) had ceased to have an effect once the rules for taxation changes to benefits had been put in place by the Treasurer.

Click or crtl-click to return to Page 22, Link 21 of the Final Report

Page 23, Link 22: Advice to EISS from Mr P A McNamara, QC

Mr Bingham refers to this advice in paragraphs 39 and 40 on page 23 of his report. These read:

> 39. Fourth, my conclusion is also consistent with advice provided to the EISS Board by P A McNamara QC in 2007. In this case, the principal question upon which advice was sought was whether rule 29(3) is invalid because it does not satisfy the ‘no worse off’ test for the Treasurer’s power to vary the rules under clause 11(3).
>
> 40. The McNamara advice confirmed that clause 11(2) is a spent force; does not bind the Board; and is not now relevant to the correct interpretation of sub-rule 29(4). The advice also concluded that ‘sub-clause 11(3) does not bind the Board, and cannot be taken into account in construing sub-rule 29(3)’. This position applies because:
>
> Clause 11 required that particular rules be inserted having a particular effect on the day on which the Scheme lost its constitutional protection. That day has come and gone. At the same time, the Treasurer’s powers under Clause 11 have expired.

In 39 Mr Bingham says that the McNamara advice:

- dealt with rule 29(3); and
- with the Treasurer’s powers under clause 11(3).

Rule 29(3) is a rule for reductions to lump sums, not pensions, and compliance with 11(2) not 11(3) is the matter Mr Bingham was supposed to be considering.

In 40 Mr Bingham says that the advice also stated that clause 11(2) is a spent force not binding the Board in its correct interpretation of sub-rule 29(4). It is not the interpretation of 29(4) that is the issue but its validity. If the rule inserted by the Treasurer did not meet the requirement of 11(2) then it is an invalid rule. An analogy would be that the police department might be interpreting and applying regulations to the traffic act correctly but the regulations might not comply with the Act.

In 40 Mr Bingham describes the advice of Mr McNamara as being that ‘sub-clause 11(3) does not bind the Board, and cannot be taken into account in construing sub-rule 29(3).’ This would appear to contradict the advice of DMAW lawyers (refer to the Link21 discussion).

It beggars belief that Mr Bingham could have access to all this information about legal advice that has been received by EISS and Treasury without being able to see the implausibility of the construction that he insists on placing on the effect of clause 11 which is that the clause allows employer costs to be reduced.

Click or crtl-click to return to Page23, Link 22 of the Final Report

Page 23, Link23: The Heads of Government Agreement on Superannuation (HOGAS)

SA Superannuants quoted a paragraph from the HOGAS that Mr Bingham included in his report, and commented on, in paragraphs 44 and 45 on pages 23-24 of the Report.

> 44. SA Superannuants asserts that HOGAS 'placed an obligation on the State Government to ensure that tax outcomes for EISS members were the same as occurred in the other Australian jurisdictions'. It quotes the following Paragraph from HOGAS:
>
> The Commonwealth and the State and Territory Governments recognise the need to apply national standards to certain aspects of superannuation without distinguishing between employees of the public and private sector. For example, it is important that members' accrued benefits are securely protected, and there is consistency of taxation outcomes for members' superannuation benefits.
>
> 45. In my view, the quoted extract does not support a suggestion that there should be equity as amongst members of public sector schemes in Australia. It states that national standards should apply, without distinguishing between public and private sector schemes.

With his view expressed in paragraph 45 Mr Bingham has ignored completely the second sentence of the extract we quoted. It is as if the second sentence is not even there and yet it gives an example of what the first sentence is referring to by commencing with the words 'For example,'.

It is very revealing to compare the above paragraphs with two corresponding paragraphs that appeared in Mr Bingham's preliminary report. These were paragraphs numbered 42 and 43. They read:

> 42. SA Superannuants asserts that HOGAS 'placed an obligation on the State Government to ensure that tax outcomes for EISS members were the same as occurred in the other Australian jurisdictions'. It quotes the following Paragraph from HOGAS:
>
> The Commonwealth and the State and Territory Governments recognise the need to apply national standards to certain aspects of superannuation without distinguishing between employees of the public and private sector. For example, it is important that members' accrued benefits are securely protected, and there is consistency of taxation outcomes for members' superannuation benefits.
>
> 43. In my view, the quoted extract does not support a suggestion that there should be equity as amongst members of public sector schemes in Australia. It states that national standards should apply, without distinguishing between public and private sector schemes. Given the notorious generosity of public sector superannuation schemes as compared with private superannuation at the time, in my view this quotation is more likely to support a contention that the costs of public sector schemes should be limited – and, in the context of my present investigation, that employer costs for a generous public sector scheme should be reduced.

Mr Bingham has removed the last sentence of paragraph 43 and well he might. It beggars belief that he could see in the extract quoted by SA Superannuants anything that justified his second sentence of 43 beginning with 'Given the notorious …'

Click or crtl-click to return to Page 23, Link 23 of the Final Report

Page 24, Link24: ‘Speculative’ wording of clause 11 by SA Superannuants

In paragraph 47 on page 24 Mr Bingham refers to what he calls speculative wordings for EISS rules and clause 11 by SA Superannuants.

> 47. SA Superannuants goes on to suggest that ‘instead of inserting the rules 29(4) and 29(5) for reducing pensions the Treasurer might have inserted [a] different rule’,[40] which would have had the effect which they seek. As with other possible alternative drafts proposed by SA Superannuants, I consider this speculative and not relevant to a construction of the effect of clause 11. Whilst the Treasurer might have so acted, in the event he chose not to; and my task is to consider clause 11 as it exists, not as SA Superannuants would wish it to be.

In the last sentence of 47 Mr Bingham seems to be saying that SA Superannuants and Richard Vear had given him some indication of being dissatisfied with the wording of clause 11 and there was some other wording that we preferred. **SA Superannuants and Richard Vear are perfectly happy with the wording of clause 11 and have never suggested that it should have been different or needs to be changed now.**

If, in 2002, the Treasurer had proposed to SA Superannuants that the State Pension Scheme be shifted to the taxed superannuation environment under provisions identical to those set out in clause 11 we would have agreed that this was a suitable basis for the change.

In 47 Mr Bingham is referring to a document we prepared for him at his request. The complete document can be read by going back to the Final Report and scrolling up to Link 15 on page 20. This link will take the reader to the full document. Two sections of the document that the Ombudsman is referring to are reproduced as extracts below and it might be sufficient to read just these. Our purpose in proposing word changes for clause 11 was not speculative but illustrative. We were attempting to illustrate for Mr Bingham what sort of wording changes would be required to transform clause 11 into something that would make plausible his construction that the actual clause 11 did not preclude a reduction in employer costs. We put it to him that the difference between this wording and the actual wording was so great as to render his construction highly implausible.

> First extract begins:
>
> Looking at Sub-clause 11(2) it can be seen that it has something to say about the effects of rules on employer costs. Clause 11(2) reads:
>
> *(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.*
>
> If there was not an intention in clause 11(2) to preclude reductions in employer costs the last two lines would have been left out.
>
> Sub-clause 11(3) reads :
>
> *(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.*

In discussing with me your view that Clause 11 does not preclude a reduction in employer costs you referred to an increase in net benefits for members as being a windfall gain. But 11(3) does allow for members to get an increase in their net benefit. Any rule that sees members getting benefits equal to or greater than what they would have received if the Scheme had not lost constitutional protection is compliant with 11(3). If there was an intention in clause 11 to prevent any members from ending up with an increased benefit i.e. what someone might regard as a windfall, 11(3) would be modified in a way, such as I have indicated, to read as:

(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~~ equal to, but no more than , the level of net benefits to which he or she would have been entitled if the Scheme had not lost constitutional protection.

To sustain the position that Clause 11 does not preclude a reduction in employer costs, and/or has within it some implication that gains by members were to be avoided, both 11(2) and 11(3) would have to be written differently and in ways equivalent to those I have suggested. But even then there would be a problem with 11(1) which reads:

(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.

This requires the rules for changing benefits to be rules that relate the changes in benefits to corresponding changes in employer costs. Rules 29(4) and 29(5), which are being used to achieve pension reductions, do not take any account of changes in employer costs. They rely entirely on personal income tax rates for untaxed-source and taxed-source pensions.

So, for clause 11 to not preclude employer costs being reduced and/or ensure that member benefits did not change as a consequence of the tax changes arising from loss of constitutional protection its parts (1), (2) and (3) would have to become something close to the following.

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 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.,
(3) Subject to subclause (4), the change in benefits effected by a rule made under this clause must result in the level of net benefits to which a member, or a person in respect of a member, is entitled being equal to, but no more than, the level of net benefits to which he or she would have been entitled if the Scheme had not lost constitutional protection.

The difference between this set of words and the words of the actual Clause 11 is sufficiently great to make highly implausible the proposition that the actual clause 11 also does not preclude a reduction in employer costs.

End of the first Extract

After this we used the possibility of the Treasurer having inserted a rule that we thought would have met the requirements of the actual clause 11 rather than the rules he did. Our purpose here was to illustrate the obligations that the trustee has when it considers altering rules. In other words we were illustrating for Mr Bingham the distinction to be made between the constraint that clause 11 placed on the Treasurer in respect of rules he inserted and the constraint that the Trustee is under when it contemplates making a rule change after it has no need to get the Treasurer's approval for the change. This situation was outlined for Mr Bingham under the heading 'Members' interests to be paramount'

Second extract begins:

Members' interests to be paramount

Where an action being contemplated by a superannuation scheme trustee could deliver an advantage either to members or to some other party, such as an employer , and there is no specific authority to consider giving the advantage to the other party the advantage must go to scheme members. This is because of the specific obligation of trustees to act in the best interests of its beneficiaries.

Instead of inserting the rules 29(4) and 29(5) for reducing pensions the Treasurer might have inserted the different rule

Amount of the taxed-source pension is to be calculated using the formula:

Current (untaxed) benefit x (1-.15 B/C x P)
Where B = the period in days of contributory service that began on 1 July 1988
C = the period in days of contributory service
P = the proportion of the benefit deemed to be employer financed'

I will call this the **Treasurer's alternative rule** and it is being used to determine pensions paid in New South Wales. This rule would have complied with all parts of Clause 11 including 11(1) and 11(2). The Treasurer's alternative rule would have been valid according to all the tests it was required to pass.

The Trustee had the power to change the Treasurer's alternative rule once it had been inserted into the EISS rules. This power is given to the Trustee by 11(7).

(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.

So the Trustee might have replaced the Treasurer's alternative rule with the rules 29(4) and 29(5). Had this happened the Treasurer and his advisers would be 'off the hook'. Responsibility for the validity of 29(4) and 29(5) would rest entirely with the Trustee.

However a trustee contemplating a substitution of 29(4) and 29(5) for the Treasurer's alternative rule would have to have a reason consistent with the obligations a Trustee has to act in the best interests of the beneficiaries of the trust.

In this scenario the Trustee would be making a change from a rule that kept employer costs the same and passed a tax advantage to the beneficiaries of the trust (as happens with similar trusts) to a rule which reduces employer costs and passes the tax advantage to employers rather than the beneficiaries. This would make the rule invalid on the grounds that the Trustee was displaying a preference for the interest of a third party over the interests of its beneficiaries.

Of course, it was not the Treasurer's alternative rule that was inserted, but rules 29(4) and 29(5). Whatever the Trustee is doing with these rules they are invalid if they do not comply with Clause 11 (11(2) particularly). The Treasurer and his advisers are therefore not 'off the hook' unless they can prove that rules 29(4) and 29(5) do not reduce employer costs.

The Trustee is only 'off the hook' if its conduct in relation to adoption of rules 29(4) and 29(5) is judged to meet acceptable standards of probity for a superannuation fund trustee and if the changes it has made to the rules after they were inserted are consistent with its powers and responsibilities.

End of the second extract

Click or crtl-click to return to Page 24, Link24

Page 24, Link25: Elements of the legislative scheme protecting members

Mr Bingham's final component of his argument supporting his view that Clause 11 does not preclude a reduction in employer costs is that there were 'elements in the legislative scheme' designed to protect the interests of members. This is outlined in paragraphs 49 and 50.

> Protections for EISS members
>
> 49. Finally, whilst the policy question of whether the variation of the scheme rules should have had the effect of reducing employer costs is beyond my jurisdiction, I note that a number of elements in the legislative scheme were designed to protect the interests of EISS members. In my view these factors are relevant in considering whether clause 11 should be given the interpretation which I have proposed above.
>
> 50. The elements are:
>
> - the protection of the interest of members was afforded by the obligation to ensure that they were no worse off[41]
> - subclause 11(2) explicitly contemplated that a variation could be made to ensure that costs to employers were not increased[42]
> - the 2002 memorandum states that as part of the privatisation process, the Treasurer indicated to the tenderers that he would vary the rules so as to avoid an increase in employer costs, to the extent permitted by the constraint contained in clause 11.[43]

The protection outlined in the first dot point of 50 is real, but modest. It could have been achieved by not making rule changes. The members were entitled to be better off if that could be achieved without an increase in employer costs.

The second dot point is false because 11(2) says the rule changes may only 'avoid or reduce an increase' in employer costs. In other words employer costs could be unchanged or they could increase but they must not decrease. Furthermore, even if 11(2) was as Mr Bingham says, it would be a protection for employers not for EISS members.

The third dot point is also false because the explanatory memorandum is not part of the legislative scheme. Furthermore, as well as saying that an increase in employer costs may only be avoided to the extent permitted by the constraint contained in clause 11 it also includes an explicit statement that employer costs must not decrease.

Click or crtl-click to return to Page 24, Link 25 of the Final report

Page 25, Link26: The obligations of a Trustee in relation to member interests

In paragraph 48 on page 24 and paragraphs 52-54 on page 25 Mr Bingham outlines his view of the obligations of a superannuation scheme trustee. He does this in response to the SA Superannuants' claim that member interests should be held paramount by a superannuation fund Trustee and that the EISS Board was a passive recipient of rule changes and lacked the assertiveness needed to defend the interests of its beneficiaries.

> 48. Whilst I agree that a trustee has an obligation to act in the interests of the beneficiaries of a trust, in this case the EISS Board has an overriding obligation to apply the scheme rules. This obligation cannot be set aside by an expressed wish for the scheme to be administered in a way which delivers additional benefits to members, if administration in that way is not authorised by the scheme rules.
>
> 52. SA Superannuants' principal contention is that 'the Board was merely a passive recipient of the new rules',[44] and that this was in breach of its obligation to be an active participant in the process leading up to adoption of rules for benefit reductions. SA Superannuants states that the EISS Board lacked 'the assertiveness required to adequately defend the interests of its beneficiaries'.[45]
>
> 53. However, I can see no basis for this contention. Under clause 11 the responsibility for making the scheme rules rested on the Treasurer, and before making the rules the Treasurer was obliged to consult with the EISS Board. This is a common legislative formulation to ensure that rules are not made without a relevant party having the opportunity to express a view about a proposal. But in my view it does not cast any obligation on the recipient of the benefit to take advantage of the opportunity. In my view the provision was intended as a limitation on the Treasurer's power.
>
> 54. I note also that the EISS Board is the trustee of the scheme. In my view, this role does not extend to 'defending the interests of its beneficiaries'. The EISS Board's role is to administer the scheme pursuant to the Schedule, the Trust Deed and the scheme rules.[46] This should be done in the interests of all parties who have an interest in it, not simply scheme members. This includes employers.

In paragraph 48 Mr Bingham is correct to say that the over-riding obligation of the Trustee is to administer the rules as they stand. But the situation applying to EISS in 2002 was one where the existing rules were to be changed by an external power. This external power was required to consult with the Trustee and take its views into account on the validity and appropriateness of the new rules that were to be inserted into the existing rules. Because it has an over-riding obligation to apply scheme rules as they stand it is self-evident that the Trustee has an obligation to do all it can to ensure that rule changes are valid and appropriate.

In paragraph 53 Mr Bingham condones indifference on the part of a Trustee to a matter having the potential to affect the welfare of its beneficiaries. The members of a trustee board cannot decide to forgo the opportunity to get involved in discussions about rule changes as might people who were not in the role of a trustee.

The EISS Board advised Mr Bingham in its submission that 'The EISS Board complies with SIS as far as practicable.' SIS is the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth. Under SIS, superannuation fund trustees are bound by a set of covenants which include the covenants to:

(a) to act honestly in all matters concerning the entity;

> (b) to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;
> (c) to ensure that the trustee's duties and powers are performed and exercised in the best interests of the beneficiaries;

A trustee that does not take up the offer to be part of the deliberations leading to changes in the rules of its scheme is not observing the covenant (b) listed above.

In his paragraph 54 Mr Bingham rates the interests of beneficiaries as no more important than the interests of other parties. A trustee who acted on this basis would be in breach of the covenant (c).

It is certainly the case that a trustee must have regard for interests other than those of its members but the covenant (c) requires that the member interests must be held paramount where the trustee has the discretion to do so. This has been acknowledged by the EISS Board itself. The 2011/12 Annual Report of EISS on its page 7 states:

> **All Board members are required by law to follow the rules of the EISS, as well as any laws that apply. If the Board has any discretion under the rules, then it has to consider the best interests of members when applying that discretion.** This is regardless of how they are appointed to the Board, so employer-appointed Board members have the same obligations as member-elected Board members. A decision of the Board requires two-thirds of the Board members to be in favour.

All this leaves little room to doubt that the SA Superannuants' position on trustee obligations is soundly based while the view of Mr Bingham is not.

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Page 25, Link27: EISS letter to the Under-treasurer dated 7 June 2002.

This letter is discussed by Mr Bingham in Paragraphs 57-61 on pages 25-26 of his report.

57. A related matter concerns a letter dated 7 June 2002, which appears on EISS Board letterhead, and which states that it is signed with the authority of the Secretary to the Board. In considering this letter I have accepted that it purports to represent the position of the Board on 'the proposed movement of the fund into the tax environment'.

58. SA Superannuants has asserted that there is no evidence that the EISS Board actually considered this letter; and that certain officers (including the then and current Chairman of the EISS Board, and its Chief Executive Officer) who would have been expected to know of its contents have no recollection of it. SA Superannuants assert that the letter was prepared by an actuary who worked at the time for Mercer; and who is since deceased. They imply that there is no factual basis for the letter's statement that the Board 'supports and recommends the proposed rule changes that have been developed by [the actuary]'.

59. SA Superannuants has also suggested to me that 'there is a reasonable basis for suspecting that the letter is a false document in terms of the Criminal Law Consolidation Act 1935 (Section 140 Dishonest dealings with documents)'. I do not agree that there is any evidence to support a conclusion that there is some criminality attached to the preparation of the document. The offence created by section 140(4) of the Criminal Law Consolidation Act requires (in paragraph (b) of the subsection) proof beyond reasonable doubt of an intention to benefit the creator of a document, or to cause detriment to another. In my view there is simply no evidence of this element of the offence.

60. Further, in my view it does not follow that any doubt surrounding the authenticity of the letter amounts to evidence of an administrative error. In order to make a finding to this effect, I would need to be satisfied to the requisite degree[49] that such an error occurred. Whilst I consider it possible that the letter was sent without the express authorisation of the Board, or at least of a senior officer of the Board, I have no evidence - only conjecture - that the letter misrepresents the EISS Board's position.

61. I note also that even if I were to find an administrative error, that would have no practical effect on the decision made by the Treasurer to adopt the rules. The Treasurer's decision is beyond my jurisdiction, but I consider it likely that the letter written on behalf of the EISS Board was simply one element or factor taken into account by the Treasurer. I am not able to speculate as to its significance in that process.

In paragraph 59 the characterisation of the letter by SA Superannuants as a letter that might be a false document in terms of the *Criminal Law Consolidation Act 1935* was based on Section 140, sub-section (1) of that Act which states:

140—Dishonest dealings with documents

(1) For the purposes of this section, a document is ***false*** if the document gives a misleading impression about—
(a) the nature, validity or effect of the document; or
(b) any fact (such as, for example, the identity, capacity or official position of an apparent signatory to the document) on which its validity or effect may be dependent; or
(c) the existence or terms of a transaction to which the document appears to relate.

The SA Superannuants claim did not include any assertion that its production and/or use involved criminal conduct. It is not necessarily an offence to create and/or use a document meeting these criteria. For example, it would not be an offence to create and use a false document as part of a harmless practical joke. But the letter of 7 June 2002 certainly had the effect of encouraging the Treasurer to insert a rule that would ensure EISS pension division members did not gain the benefit that had been gained by other people in equivalent circumstances. This was sufficient for the Ombudsman to take the authenticity of the letter more seriously than he did.

In paragraph 60 Mr Bingham says that he considers it 'possible' that the letter was sent without the normal authorization. He interviewed representatives of EISS but he gives no indication of whether he asked them about this. It would have been a simple matter for the Ombudsman to establish beyond reasonable doubt whether or not the Board had expressly authorised dispatch of the letter and yet he did not.

From paragraph 61 it would appear that Mr Bingham's reason for declining to establish for certain whether the Board had not formally authorised dispatch of the letter was that even certain knowledge of this would, in his opinion, be of no effect because decisions of the Treasurer are beyond his jurisdiction. Here he is using the limitation that an act of the Treasurer is beyond his jurisdiction as a reason for not conducting a thorough investigation of an act of the Board. The Board would have known that a letter like the letter of 7 June 2002 was likely to be a factor in the Treasurer's decision. If it had endorsed the content before 7 June 2002 it seems very likely that it would have done this formally. The absence of evidence that formal endorsement was made before 7 June 2002 would be evidence that an administrative error was made in the form of a letter, clearly requiring the Board's express authority to be dispatched, going to the Treasurer without that authority.

In paragraph 61 Mr Bingham says he considers it likely that the letter of 7 June 2002 was simply one element or factor in the Treasurer's decision but he makes no suggestions about what other matters might have been involved. The only other factor influencing the Treasurer that Mr Bingham would have had evidence of was the Explanatory Memorandum of June 27, 2002 and this had also been suggested by SA Superannuants as having features to suggest it, like the letter of 7 June 2002, was a false document in terms of the *Criminal Law Consolidation Act 1935*.

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Page 26, Link28: The Explanatory Memorandum of 27 June 2002

This was another document that SA Superannuants characterized as having features that provide a reasonable basis for suspecting that it is a false document in terms of the *Criminal law Consolidation Act 1935*. Mr Bingham's discussion of the Explanatory memorandum begins with:

> 62. Mercer prepared the 2002 memorandum to assist the Treasurer's consideration of the proposed rule changes. The memorandum states the purpose of the amendments as being:
>
> … to specify the way in which benefits from the Electricity Industry Superannuation Scheme should be reduced to allow for the Scheme being taxed with effect from I July 2000.
>
> In summary, the reductions to gross benefits payable from the Scheme are such that:
> - benefits after tax received by existing members will not be lower than would have applied had the Scheme remained untaxed;
> - employer costs are not expected to change as a result of the tax changes.

The answer to the question posed by Mr Bingham, 'Was the 2002 memorandum misleading?', is dependent upon the correctness of the last line of paragraph 62 - 'employer costs are not expected to change as a result of the tax changes.'

SA Superannuants and Richard Vear maintain employer costs did change and were reduced. We further maintain that this was an outcome that would have, or should have, been expected by Treasury. If this is true then the Memorandum is misleading.

Mr Bingham concludes his discussion of the question 'Was the 2002 memorandum misleading?' in paragraph 71.

> 71. In summary, I do not see any administrative error in the department's advice to the Treasurer at this time. Mercer was an appropriately qualified body to provide expert advice on superannuation matters, and in my view it was not unreasonable for the department to rely on the expert advice which it commissioned to assist the Treasurer's decision-making. I do not consider that the department was under an obligation to 'second guess' the Mercer advice.

In paragraph 71, when he says that the Department was under no obligation to 'second guess' the Mercer advice, Mr Bingham is ignoring the fact that evidence presented to him included the information that Mercer had provided Treasury with an earlier (1998) report on possible movement of the State Pension Scheme to the taxed superannuation environment. This advice predicted that a method identical to that used for calculation of EISS taxed-source pensions would, on application to the State pension Scheme, deliver a large reduction in employer costs. Questioning the advice in the Explanatory Memorandum that applying the same method to EISS pensions would have no effect on employer costs would not have been second guessing an expert adviser, it would have been simple prudence.

The Department is now claiming that the 1998 report is not relevant to EISS. This is highly implausible. There can be little doubt that the EISS pension scheme is very similar to the State Pension Scheme because existing EISS pensioners were transferred to the State Pension Scheme before constitutional protection was lost. Even if it was the case that the 1998 report was not relevant its existence, and an explanation of why it was not relevant to EISS, should have been brought to the attention of the Treasurer in 2002.

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Page 28, Link29: Was the effect of the proposed rule changes properly explained to the Treasurer in 2002?

Mr Bingham's discussion of this begins with paragraph 72.

> 72. The next substantive question is whether the effect of the rule changes was properly explained in the advice provided to the Treasurer by the department and the EISS Board in May 2002 when the new rules were made. In considering this question I have had particular regard to the departmental advice; the 2002 memorandum; and the 7 June 2002 letter purporting to be from the EISS Board.

Paragraph 72 lists three items of evidence that Mr Bingham considered when assessing whether the effect of the rule changes was properly explained to the Treasurer. These were:

1. **the 7 June 2002 letter from the EISS Board:** Mr Bingham had conceded that this letter may have never been expressly authorised for dispatch by the Board. Furthermore, the letter, whatever its authenticity, had nothing to say about the effect of the rule changes and cannot have made a contribution to the Treasurer's understanding of those effects. On top of all this Mr Bingham had no evidence that Mr Foley had even seen the letter when he authorized the rule changes. If he had seen it, all that he could have concluded was that it was a letter saying that the Board supported the rule changes. He would have assumed that they had done so after subjecting the rules to close scrutiny. The evidence was that this was not the case.

2. **the 2002 Explanatory Memorandum:** This document is dated 27 June 2002, one day before the rules were in place which makes it unlikely that the Treasurer even saw the document, let alone had the opportunity to make use of it, before he acted on advice from the Department and inserted the rule for reduction of pensions on 28 June 2002. The EISS Board certainly had not seen it before the new rules were in place.

3. **the departmental advice:** This is left as the only documentation that the Ombudsman could be confident was seen by the Treasurer before 28 June 2002, the day on which the Treasurer signed the notice that put the rule for calculating EISS taxed-source pensions in place. And this advice is dated 26 June 2002, only one day before the date of the Explanatory Memorandum and two days before the rule changes were in place.

The account of the departmental advice given by Mr Bingham in paragraph 73 is totally dependent on both the 7 June 2002 letter, and the Explanatory Memorandum, being true documents. It would have been prudent for the Department to make the Treasurer aware of the 1998 Mercer Report which had predicted a reduction in employer costs for pensions if Mr Archer's proposed rule for recalculation of EISS pensions was applied to the State Pension Scheme.

It was surely an administrative error for the department to wait as long as it did to advise the Treasurer on the proposed EISS rule for calculation of EISS taxed-source pensions. It could have, and should have, provided the advice much earlier.

In the Departmental advice it is revealed that the 'relevant day' for the rule changes was 30 June 2002. This was the day by which the rule for calculating EISS taxed-source pensions had to be in place and after which it would no longer be within the power of the Treasurer to remove or vary the rule.

SA Superannuants had provided Mr Bingham with strong evidence that 26 June 2002 was the earliest that the EISS Trustee could have been given notice of the rule that would be used to reduce pensions. This evidence showed that, prior to 26 June 2002, all information given to the Trustee about intentions for tax changes to benefits dealt with lump sum benefits only and excluded information about pensions. On 26 June 2002 Mr Allan Archer was explaining to the EISS Board 'the workings of the tax reductions to benefits with the aid of slide copies'. This is the earliest date on which the Trustee could have been given notice about the rule that would be used to reduce pension benefits. The situation is described as follows in Board minutes.

> However, the EISS Board remained confused about this complex issue, and the Chairman asked that this explanation be given again at the July meeting , to provide more time for EISS Board members to consider the material provided. The EISS Board requested that the Scheme's tax adviser be briefed of the matter, and asked to attend the July meeting.

The suggestion made by the Board Chairman to put off further consideration of the working of the rules was accepted and this had the effect of ensuring that the rules were in place before any further consideration could be given to them by the Board and that the relevant day had come and gone without the Board having any opportunity to give an informed opinion to the Treasurer on the pension rule and/or request him to change it.

All this last minute activity leading to the rule changes, and in which Mr Prior and the late Mr Archer were involved, should have been subject to close consideration by Mr Bingham. It was not. He interviewed Mr Prior without having him on oath and without recording the interview.

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Page 29, Link30: the 2002 Explanatory memorandum and its assumptions

In paragraph 76 Mr Bingham says:

> 76. The 2002 memorandum outlines the assumptions upon which the interim benefit reductions were calculated. It states, and I accept, that these assumptions were conservative, and led to the lowest practical level for the benefit reductions. The 2002 memorandum states that in practice, many members would have ended up with higher net benefits because their individual situations were more favourable than assumed.

In paragraph 76 Mr Bingham is accepting the proposition that, in setting the rules, assumptions had been made about individual situations which were favorable to members when it was open to the Treasurer to approve rules based on less favorable assumptions. In particular that the Treasurer could have approved a rule that took into account the non-superannuation income of members. But this would be means testing of a superannuation entitlement. The making of such rules was not open to the Treasurer.

The truth of this matter is that the assumptions made in setting the rules for reduction of EISS pensions were designed to be as disadvantageous to members as possible. While clause 11 allows the after-tax value of a taxed-source pension to be **equal to or greater than** that of the corresponding untaxed source pension there has never been a single case of a taxed-source pension that has a greater value.

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Page 29, Link31: The 1998 Mercer Report

Mr Bingham compares the 1998 Mercer Report with the Mercer 27 June 2002 Explanatory Memorandum in paragraphs 80-84. We take this to be where he has set out at least some of his reasons for believing that there is no reasonable basis for comparing the 27 June 2002 Explanatory Memorandum with the 1998 report. Mr Bingham also considers that the 2004 Mercer Report is not comparable with the 2002 Explanatory Memorandum. Some reasons for him saying this are set out in paragraphs 85-91 and the SA Superannuants' comments on these reasons are accessible via Link32.

In paragraph 80 referring to the 1998 Mercer Report Mr Bingham says:

> 80. I note firstly that the 1998 memorandum refers to the whole state pension scheme, not simply the EISS. It is my understanding that there was significant difference between the two schemes,[62] arising from the taxation treatment of the movement of assets to support existing pensions. At the relevant time there were no existing pensioners for the EISS scheme, as they had all been moved to the wider state scheme.

The 1998 Mercer Report dealt with the three main State Government superannuation schemes. These are the State Pension Scheme, the State Lump Sum Scheme and the Southern State Superannuation Scheme. The 27 June 2002 Explanatory Memorandum dealt solely with EISS. However, EISS has a set of sub-schemes which correspond closely to the schemes dealt with by the 1998 report. Thus:

The EISS pension sub-scheme is a defined benefit pension scheme so similar to the main state pension scheme that the EISS members who were already receiving pensions prior to 2002 were transferred to become members of the main state pension scheme.

The EISS Lump Sum and RG Schemes are defined benefit lump sum schemes similar to the state lump sum scheme

The EISS accumulation scheme is similar to the Southern State Superannuation Scheme.

Thus, the EISS set of sub-schemes with which the 27 June 2002 Explanatory memorandum deals can be considered to be a smaller version of the set of main state superannuation schemes with which the 1998 Mercer Report dealt. On this basis alone it is likely that the predictions made in the 1998 Report would hold up in a transfer of EISS to the taxed superannuation environment.

Another similarity between the two set of schemes is that the EISS pension scheme and the main state pension scheme would both have members with relatively large amounts of pre-July 1988 service. This would allow tax costs associated with the move of both pension schemes into the taxed superannuation environment to be reduced by relatively large amounts through the use of pre-July 1988 Funding Credits (PJFCs).

From the last two sentences of paragraph 80 it might be thought that Mr Bingham has formed some understanding that different tax is payable on assets moving from the untaxed superannuation environment to the taxed environment according to whether or not the assets are backing pensions already commenced rather than pension entitlements that are accruing to people still at work. This is not the case and the main factor creating a difference between tax payable on shift of different pension schemes to the taxed superannuation environment is the service history of the scheme members.

In this section of his report Mr Bingham is setting out reasons why he declined to fully investigate component 2 (c) of the Legislative Council referral. This component was:

> (c) Inconsistency between the claim made in the Mercer Explanatory Memorandum of 27 June 2002 that EISS rule changes would have no effect on employer costs, and analyses contained in the Mercer Reports of 1998 and 2004 showing that the rule now being used by EISS to calculate its taxed-source pensions would reduce employer costs if applied to pensions of the State Pension scheme;

In paragraphs 81-83 Mr Bingham refers to PJFCs, acknowledging that they were available for use when EISS moved to the taxed superannuation environment and would have been available had the state pension scheme made the same move. Then in paragraph 84 he says:

> 84. I do not see any inconsistency between the statement in the 1998 memorandum that the PJFC would be available to reduce tax on employer contributions for the state pension scheme, and the statement in the 2002 memorandum that the PJFC would result in credits to the EISS. It appears to me that the import of the statements in both documents is that the PJFC would be of benefit in reducing the employer funding costs. The 2002 memorandum includes an actuarial estimate of that benefit to the EISS because the extent of the available PJFC had been confirmed by the Australian Prudential Regulation Authority at that time

In the first sentence of 84 it would appear that Mr Bingham regards the 1998 report and 27 June 2002 memorandum as being consistent with one another because both contain statements that PJFCs would be available to reduce employer costs. In the second sentence he acknowledges that the statements in both documents indicate that the PJFCs 'would be of benefit in reducing employer funding costs'. But he does not state the obvious conclusion from these two points that the 1998 report and 27 June 2002 memorandum are therefore inconsistent because the 1998 report predicts a reduction in employer costs and the 27 June 2002 memorandum no change in those costs. This was the inconsistency defined in 2 (c) of the Legislative Council referral. It beggars belief that Mr Bingham could not recognize this.

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Page 31, Link32: The 2004 Mercer Report

On page 7 of his report, in the second paragraph from the top, Mr Bingham says that there is no reasonable basis for comparing the 27 June 2002 explanatory memorandum with the 1998 and 2004 Mercer reports.

> I do not consider that there is a reasonable basis for comparing the 2002 explanatory memorandum with the 1998 and 2004 reports, and accordingly I determined not to investigate this matter any further.

In the same paragraph Mr Bingham had said that his reasons for making this statement were set out in the report but he did not specify where. One possibility is that these reasons for the case of the 2004 Mercer Report are set out in paragraphs 85-91. These are discussed immediately below. Another possibility for reasons that Mr Bingham could have for making the statement above is material he presents in paragraphs 111-115 on pages 38 and 39. Comments on this section of the report can be accessed via link 36.

> 85.SA Superannuants asserts also that the 2002 memorandum is inconsistent with a 2004 memorandum also prepared by Mercer.[64] Again I have relied on an extract from that document provided by SA Superannuants.[65]
>
> 86. I infer from the covering letter to the extract of the 2004 memorandum that, like the 1998 memorandum, the 2004 memorandum addresses taxation issues relevant to the broader state superannuation schemes; rather than simply the EISS.
>
> 87.In addition, the 2004 memorandum post-dates the 2002 memorandum, and thus it could be expected that it would be able to draw on post-implementation experience in outlining the effects of moving the EISS to a taxed status. SA Superannuants contends that the content of the 2004 memorandum should have alerted the department to the alleged deficiencies in the 2002 memorandum, and the fact that employer costs had been reduced as a result of the variation of the scheme rules.
>
> 88. I acknowledge that the extract from the 2004 memorandum does not refer to the 2002 memorandum. In my view this is not surprising given that the two memoranda were dealing with different schemes. Further, the 2004 memorandum in my view is broadly consistent with the statements made in the 1998 and 2002 memoranda. I note in particular the following comment, which is referring to the broader state superannuation schemes rather than the EISS:
>
> In the Lump Sum/Pension Scheme there is a net tax advantage in moving from an untaxed environment to a taxed environment. These advantages could be used to increase members' benefits and/or reduce employer costs. If members' benefits are maintained at current levels (after allowing for tax effects), then savings of the order of $450 million are estimated for the employer.

In paragraph 87 Mr Bingham appears to be saying that he expected that the 2004 Mercer Report would have taken account of EISS experience after 2002 as it reported on the possible move of the state pension schemes to the taxed superannuation environment. This is a reasonable expectation to have and all the more so because the 2004 Mercer Report made repeated references to 'EISS experience'. But it seems unlikely that there is no mention of the 27 June 2002 explanatory memorandum because, as Mr Bingham says in 88. above, 'the two memoranda were dealing with different schemes'. If the two documents were dealing with different schemes the 2004 Mercer Report would not have made any references to EISS.

The simplest explanation for the fact that the 2004 Mercer report refers to EISS experience with pensions is that this experience had confirmed that when the method being recommended in the 2004 Mercer Report as a method that would reduce employer costs for state scheme pensions had been applied to EISS pensions there had been a reduction in EISS employer costs.

The quote from the 2004 memorandum that is contained in 88. above is an unmistakable confirmation that, for the state pension scheme, if member benefits are held constant (after allowing for tax effects), employer costs are reduced. On page 10 of the 2004 memorandum (this page was included in the set of pages given to Mr Bingham) under the heading **EISS experience** there is a description of the EISS method the last sentence of which says 'That is, the pensioner's after tax income does not alter'.

This confirms that the author of the 2004 memorandum knew that the method was designed to keep members' net benefits unchanged and reduce employer costs. If, in the case of EISS, this was not producing a reduction in employer costs the author of the 2004 memorandum, in his discussion of savings for employers available from applying the same method to the state pension scheme, would surely have said this and given the reasons.

The simplest explanation for the 2004 Mercer Report not having mentioned the 27 June 2002 Explanatory Memorandum is that the author of the 2004 Report was not aware of its existence when he wrote his report. If he had been aware of its existence he would surely have referred to it and given an explanation for why it was saying that employer costs for EISS pensions were not expected to change when he was saying that the same method applied to state scheme pensions was expected to reduce the employer cost of those pensions.

In paragraph 89 Mr Bingham makes a number of points about the 27 June 2002 Explanatory Memorandum and the last of these is:

- it is not inconsistent with the advice provided by Mercer in the 2004 memorandum about taxation issues relevant to the broader state superannuation schemes.

As explained above this statement is at odds with the fact that the 27 June 2002 memorandum had the method for calculating EISS taxed-source pensions as a method that would not alter employer costs and the 2004 memorandum had the same method reducing employer costs when applied to the state pension scheme.

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Page 32, Link33: Mercer and legitimate public interest considerations

In paragraph 95 of the final report Mr Bingham rejected a claim by SA Superannuants that Mercer had a conflict of interest that should have seen it precluded from being an adviser to the Treasurer on the EISS rule changes.

> 95. Further, I do not consider that any question of a perceived conflict of interest on the part of Mercer can arise. Whilst I acknowledge that SA Superannuants does not like the views expressed by Mercer, as being inimical to their interests, those views were nonetheless legitimate public interest considerations in the decision-making process. The department would have been remiss had such matters not formed a part of the advice given to the Treasurer at the time.

Mr Bingham included in his report (paragraph 82) only part of the passage that SA Superannuants had included in its submission to him. This was:

> 82. The 1998 memorandum includes the following comment:
>
> 19.23 The Government may need to cope with demands from members of the Pension Scheme that they, as well as the Government, should share in the gains achieved. An important part of the response would be that these people are still members of schemes which have been closed because of their generosity, and yet their benefits have been continued. Thus they should have little to complain about if the advantage of applying the PJFC is not passed through to them, so long as they are not detrimentally affected. A critical point is that the benefit reductions should be such as to remove the windfall gains, but not to the extent of causing detriment to any members.

The full passage that SA Superannuants had quoted in connection with conflict of interest on the part of Mercer was:

> 'To achieve this though benefits under the Superannuation Act would need to be reduced and we anticipate that this exercise would need careful handling and very good communications.
>
> The government may need to cope with demands from members of the pension scheme that they, as well as the Government, should share in the gains achieved. An important part of the response would be that these people are still members of schemes, which have been closed because of their generosity, and yet their benefits have been continued. Thus they should have little to complain about if the advantage of applying the PJFC [pre-July 1988 Funding Credit] is not passed through to them, so long as they are not detrimentally affected. A critical point is that the benefit reductions should be such as to remove the windfall gains, but not to the extent of causing detriment to any members
>
> We would be pleased to help investigate the possible savings under various scenarios. For this work, our model would need to be refined so as to make it sensitive to the detailed issues which would need to be worked through should the project proceed to the next stage.'

This passage stuck out like the proverbial 'sore thumb' in the 1998 report. Mercer is not known as a provider of advice on public interest matters. This passage was a clear sign of Mercer seeking more business for itself by letting Treasury know it would be willing to help ensure that employers, rather than members, got the advantage of a shift to the taxed superannuation environment.

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Page 32, Link34: Have the rule changes resulted in reduced employer costs?

Mr Bingham had previously stated that he would not be investigating the effect of the rule changes on employer costs because he had been advised by Mr McDonald that this was outside his jurisdiction. The effect of the rule changes on employer costs was the matter set out in 2 (f) of the Legislative Council referral. On page 7 of the report Mr Bingham quotes from the referral and states his intention with respect to 2 (f).

> (f) Whether the method used to calculate EISS taxed-source pensions has reduced employer costs for those pensions compared to what the cost would be if the pensions had continued as untaxed-source pensions;
>
> This matter is beyond my jurisdiction and I determined not to investigate it.

In paragraphs 96-104 on pages 32-35 Mr Bingham has done what he said he would not do – he has ‘investigated’ the question set out in 2 (f) of the Legislative Council referral.

His investigation outlines what SA Superannuants and EISS said about this question (the effect of the method on employer costs) in their submissions to him. He makes no mention of Treasury having said anything on this question, either in a written submission or at interview. Having ruled the matter as being outside his jurisdiction he could not compel Treasury to engage with him on this question and this might be the reason there has been no input from that source. Treasury could have refused to do so without going to the Supreme Court for backing because Mr Bingham had made his own decision that the question of reduced employer costs was outside his jurisdiction.

EISS evidence: in paragraph 99 Mr Bingham presents a series of numbered points made to him by EISS in relation to the effect of the rule changes on employer costs. These points do not include any detail of calculations that support a position that employer costs were not altered by the rule changes. They do include the numbered point 77:

> 77. The actuarial analysis in the explanatory memorandum is that the reductions imposed by the rule changes, as well as the use of the Scheme’s PJFC, are sufficient to pay the extra tax liability caused by the Scheme’s loss of constitutional protection. That is, on a scheme-wide basis, employer costs were expected to be unchanged

This suggests that the only basis EISS has for saying that the rules did not reduce employer costs is the Explanatory Memorandum of 27 June 2002.

In paragraph 102 Mr Bingham reports on evidence given by the EISS Board Chief Executive Officer.

> 102. In oral evidence given to me, the EISS Board Chief Executive Officer (a qualified actuary) stated that it is not practically possible today to quantify the impact of the 2002 rule changes on employer costs. However, it is his view that there is no doubt that employer costs have risen since 2002, due to a range of factors which include fewer pension commutations; longer life expectancies; fewer resignations; and salary increases being higher than expected. He gave evidence that this view is certainly shared by the employers.

The advice that it is not practically possible to assess the effect of the rule changes on employer costs seems implausible. Actuaries routinely assess the effect of changes on future experience. It should be easier to analyse the effect of past changes on actual experience.

There was a specific piece of authoritative evidence from another actuary available to Mr Bingham. This contradicted the proposition that the effects of the rule changes on employer costs are not now practically possible to determine. The evidence was a statement in the EISS 30 June 2011 triennial actuarial investigation that employer costs for untaxed-source pensions are higher than for taxed-source pensions. This is one of items of evidence that SA Superannuants provided to Mr Bingham and which he lists in paragraph 98. If the actuary carrying out the scheme's triennial actuarial investigation in 2011 was able to say that untaxed pensions have a higher employer cost this is a clear indicator that the effects of the 2002 rule change on employer cost remain quite discernible.

The other advice from EISS outlined in paragraph 102 is obviously not relevant to the question of the effect that the rule changes of 2002 had on employer costs. The rule changes were intended to compensate employers for increased tax costs not increases arising from the factors listed in paragraph 102. It beggars belief that Mr Bingham has reported this evidence without comment on such an obvious flaw.

SA Superannuants' evidence: a list of evidence items is provided in paragraph 98.

98. On the question of whether employer costs have in fact reduced, SA Superannuants maintains that this is demonstrated by:

- the 'arithmetic certainty' that EISS assets would have been depleted by much less than 15%
- the alleged deficiencies in the 2002 memorandum
- the 1998 and 2004 memoranda
- the annual taxation experience of EISS between 2000 and 2006
- a series of reports dated 23 March 2003 provided by Mr Archer to the EISS Board concerning different parts of EISS related to different employers
- the 30 June 2011 actuarial investigation of EISS
- the alleged deficiencies in the response given by the Hon Michael O'Brien MP, Minister for Finance, to a question by the Shadow Treasurer, the Hon Iain Evans MP, in 2012.[71]

This is the set of evidence items that SA Superannuants included in its submission on the Legislative Council referral of October 2012 which was the referral that lapsed. SA Superannuants made another submission on the referral of September 25, 2013 and this contained additional material of which Mr Bingham makes no mention in his final report. This additional material (refer pages 29 and 30 of the SA Superannuants submission on the 2013 referral) included the following:

Part D: Written statements of the EISS Board Chairman, and Executive Officer, indicating reduced costs for pensions

EISS Board Chairman: on 3rd December 2008 the EISS Board Chairman wrote to the Secretary, Australian Services Union (Attachment 30). Referring to the concerns of EISS pension division members over the method being used to calculate taxed-source pensions the Chairman wrote:

The way the benefit reduction is calculated on a taxed pension may mean that the cost of a Division 3 taxed pension may be lower than the cost of a Division 3 untaxed pension. However, it is not the Board's job to determine whether the condition relating to employer costs under clause 11(2) of Part F of Schedule 1 of the EC Act is or has been satisfied – this was a matter for the Treasurer to determine at the time of making the rule amendments. Regardless of whether the Board considers the rules to be equitable, the role of the Board is to apply the rules. The *rules require that pensioners receive the same benefit after income tax without regard to how this impacts on employer costs."*

The first sentence of this paragraph acknowledges that taxed-source pensions may have a lower cost than untaxed-source pensions. The only pensions that could have a higher cost as taxed-source pensions are those of relatively small amounts that are subject to reductions of less than 15%. These pensions are in the minority and it would be in the interests of most members receiving them, as well as employers, for the pensions to be paid as untaxed-source pensions.

The last sentence of the paragraph acknowledges that the pensions are being reduced without taking account of how the reduction affects employer costs. This is an admission that Rules 29(4) and 29(5) are not likely to be valid. This paragraph and the rest of the letter creates a reasonable suspicion that the Chairman knows rules 29(4) and 29(5) are reducing employer costs.

EISS Executive Officer: At a meeting of the EISS Board held on 27 July 2005 there was discussion of a paper (Attachment 31) prepared by the Executive Officer and dealing with the tax offset i.e. rules 29(4) and 29(5). The paper is dated 29 June 2005. On page 5 of the document it is reported that members had concerns about the tax offset. One of these concerns expressed by members was stated as:

' The offset is there to compensate the Scheme for contribution and investment tax paid to fund the benefit. The tax is at most 15%, so why is the offset greater than 15% in some cases?'

The paper does not attempt to answer the question that the members were asking which was – why is the offset greater than 15%? Instead the paper changes the subject immediately and says:

'Looking at it slightly differently, the reduction in the gross pension is needed because: The aim is to equate after-tax pensions from taxed and untaxed schemes;

A little further down the same page the Executive Officer suggests to the Board that the answer to the member's question of -why is the tax offset greater than 15%? - be given as:

'The member is no worse off in net terms, so it shouldn't matter what is the percentage reduction'.

With these two statements the Executive Officer is telling the Board that the only purpose of rules 29(4) and 29 (5) is to ensure that members do not end up worse off or better off and if the employers costs are reduced this does not matter. This is sufficient to create the reasonable suspicion that the Executive Officer knows that rules 29(4) and 29(5) are reducing employer costs. This possibility is strengthened later in the document. On page 8 the last two options of four, dealing with members' concerns about the tax offset on pensions, are listed as:

Place a limit on the current offset calculation of 15% or 17%
Amend the offset calculation in line with the actuary's suggestion.

Immediately after these two options it is stated that:

'The final two options reduce the impact of the offset calculation, and impose a cost on employers compared to what is done now.

> The cost compared to pre-privatisation may in fact be lower, but the cost compared to now will be higher.'

It seems odd that Mr Bingham would interview the EISS Executive Officer without asking him about these statements but the reason might be one of the following:

a) Anything Mr Bingham included in his report on the possibility of employer costs having been reduced would have needed the approval of one or both agencies. An agency would not have had to go to the Supreme Court to compel Mr Bingham to remove material it objected to from his report because he had made his own decision that the question of reduced employer costs was outside his jurisdiction.

b) Mr Bingham might not have read the SA Superannuants' account, given in its submission on the 2013 referral, of the statements by the EISS Chairman and Executive Officer. He may have read only the material on employer costs contained in the 2012 submission. This did not include anything about the statements made by the Chairman and Executive Officer. In the list of evidence items in paragraph 98 Mr Bingham quotes the expression 'arithmetic certainty' which was contained in the submission on the 2012 referral but not in the submission on the 2013 referral.

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Click or crtl-click to return to Page 32, Link 34 of the Final Report.

Page 36, Link35: Whether the Department misled the Crown Solicitor

SA Superannuants has been convinced for some time that letters signed by the Treasurer, and saying that the Department had Crown Law advice to the effect that the EISS rules complied with all provisions of clause 11, are misleading. We were sure that the Department could not have advice that the rules complied with sub-clause 11 (2) unless that advice had been obtained with the Department holding back from Crown Law the Mercer Reports of 1998 and 2004 and providing only the Mercer Explanatory Memorandum of 27 June 2002. Our concern was that Treasury might have instructed Crown Law to accept the conclusions and figures contained in the Explanatory Memorandum at their face value.

Eventually, SA Superannuants was able to confirm through Freedom of Information applications that Mr McDonald had indeed been given only the 27 June 2002 Explanatory memorandum and not the 1998 and 2004 Mercer Reports as well.

Mr Bingham considers this matter in paragraphs 105-119 on pages 36-39 of his report.

In paragraph 106 Mr Bingham refers to advice obtained from Mr McDonald of the Crown Law Office that the EISS rules did comply with clause 11. But Mr McDonald had included in his advice the information that he was in no position to say if the calculations reported in the 2002 explanatory memorandum were correct. In Mr McDonald's own words:

> The extent of the reduction in gross benefits resulting from the insertion of the new rules has been justified actuarially in the Explanatory Memorandum which has been provided to me. I am not in a position to provide advice as to the accuracy of the actuarial calculations underlying the assertions in that Explanatory Memorandum. However, assuming that the assertions are correct, it appears that, had the Treasurer determined to insert a rule providing for a lesser reduction in gross benefits, that rule would have resulted in a shortfall in the fund such that, in order for the benefits to be paid to members, it would have become necessary to increase employer contributions to the fund. It follows that the rules which the Treasurer did insert were rules which had the effect of reducing or avoiding an increase in employer costs, as required by clause 11.

In the first half of this extract from Mr McDonald's advice he has gone out of his way to put on the record that he was relying on a single document and its accuracy. SA Superannuants and Richard Vear had described this situation by saying 'The quality of the Crown Law advice that all rule changes are entirely valid can be no better than the quality of the calculations used to generate the values contained in the Explanatory Memorandum.' Referring to this statement Mr Bingham says in paragraph 109:

> 109. I consider that this statement is misconceived. As outlined above, I agree with the Crown Solicitor that the rules were validly made. In my view, there was no legal obligation requiring that the rules should not reduce employer costs.

With his statement made in paragraph 109 Mr Bingham would appear to be saying that the Crown Solicitor has given advice that there was no legal obligation requiring that the rules should not reduce employer costs. But in paragraph 35 Mr Bingham had presented another extract from the Crown Law advice of Mr McDonald which read:

> The purpose of the power granted to the Treasurer by clause 11 was to enable the reduction or complete avoidance of an increase in employer costs (ie, an increase in employer contributions to the fund) which would have otherwise resulted from the shortfall created by the imposition of a significant tax liability on the fund. The power

> in clause 11 did not extend to the making of a rule that provided for a total reduction in gross benefits which was greater than that which is required to avoid an increase in employer costs. Put another way, the power in clause 11 could not be used to insert a rule which had the effect of decreasing employer costs.

The last sentence in this extract shows clearly that the Crown Law advice of Mr McDonald rules out the possibility of Crown Law agreeing with Mr Bingham that clause 11 allowed the Treasurer to insert rules having the effect of bringing about a reduction in employer costs.

In paragraph 117 Mr Bingham suggests that Mr McDonald is not likely to have been misled because he would have been capable of deciding what facts were needed for him to give valid advice and then able to ensure that Treasury provided him with those facts. On this point Mr Bingham says:

> 117. Nonetheless, I observe that the assertion by SA Superannuants that the Crown Solicitor was misled suggests that the Crown Solicitor was not able to determine for himself the facts necessary in order to provide the requested advice. Based on my reading of Mr McDonald's advice, I see no reasonable basis for this suggestion.

It is not the responsibility, or the right, of a solicitor to determine what additional facts a client must supply before advice is given. If Treasury sought its advice telling Mr McDonald that he was to give the advice taking account only of the Explanatory Memorandum then Mr McDonald would have had to do this or decline to give the advice. He would have to have very good reasons for refusing to give the advice. Even if Mr McDonald was aware of the 1998 and 2004 Mercer Reports he could not insist on taking them into account in giving his advice if Treasury was instructing him not to do so because it judged them to be not relevant. He could, however, make it clear that in giving his advice he was relying on a single document provided by the client and the accuracy of the figures contained in that document. This is what Mr McDonald did.

The holding back of the 1998 and 2004 Mercer Reports is not the only way in which the Department misled the Crown Solicitor. In paragraph 107 Mr Bingham provides content of a memorandum to Crown Law dated 4 September 2007 and written by Mr Deane Prior. This memorandum refers to the SA Superannuants' claim that the EISS rules for reducing pensions are invalid by saying:

> We believe that by stating the rules are 'invalid', they really mean the rules are more 'unfair' than not legal. This is because the rules reduced pensions such that the amount of the net after tax benefit of the pension paid from an untaxed arrangement was the same as the net after tax benefit received from the pension paid from a taxed arrangement. The concern is that tax rates have changed since the rule was introduced.

Here Mr Prior is clearly representing the position of SA Superannuants as if we were concerned only about compliance with 11 (3) which was the matter covered by the Jacobi advice. SA Superannuants has always agreed that the rules met the requirement of 11 (3) and we have always represented the rules as being invalid because of non-compliance with 11 (2).

Mr Bingham had reported our acceptance of compliance with 11 (3) in paragraph 13.

13. SA Superannuants does not dispute that the Treasurer's decision to vary the EISS rules complied with one essential obligation under clause 11, namely that after tax benefits for existing members were not lower than would have applied if the scheme remained untaxed. However, SA Superannuants asserts that the decision did not comply with another obligation imposed by clause 11, namely that the costs to employers should not reduce as a result of a variation of the rules. For the reasons explained below, I do not agree that such an obligation in fact existed.

It is disappointing to see that Mr Bingham has not connected our position as he sets it out himself in 13. with Mr Prior's quite different representation of that position to the Crown Solicitor.

Mr Prior's 4 September 2007 memorandum shows that Treasury had been representing Crown Law advice from Mr Chad Jacobi provided on 25 January 2006 as advice that the EISS rules inserted by the Treasurer were valid without qualification.

In response to his memorandum of 4 September 2007 Mr Prior got advice from Mr Stephen McDonald that Mr Jacobi's advice was only about compliance of the EISS rules with sub-clause 11 (3) and not about their validity in other respects. Mr McDonald's advice did address the issue of compliance with 11 (2) saying that this provision had been complied with assuming that the results of calculations reported in the Explanatory Memorandum of 27 June 2002 were correct.

SA Superannuants wrote to the Crown Solicitor expressing its concerns about his office having been misled. The substance of the reply is accurately reported in the extract that Mr Bingham provides in paragraph 119.

118. I note also that SA Superannuants has advised me that it took up an earlier proposal which I made to it, that it should ask the Crown Solicitor whether he considers that he was misled. The response to that request[83] indicates that the Crown Solicitor did not consider this to be the case. However, SA Superannuants asserts in its response to my provisional report that it believes this response refers to the advice given on 25 January 2006 by Mr Jacobi about clause 11(3); rather than advice given by Mr McDonald on 28 November 2007 about clause 11(2).

119. I see no reason to interpret the Crown Solicitor's response as being limited in this way. SA Superannuants provided me with a copy of this response. The substance is contained in the following paragraphs:

> I have reviewed the matter and I note your concern that my office was not adequately instructed when it advised the Department about the method of calculating superannuation pensions under the Electricity Corporations Act 1994. As you will appreciate, any advice that was provided was privileged and the Department does not propose to waive that privilege.
>
> I can assure you, however, that I am satisfied that no fraud has been perpetrated upon the Crown Solicitor in relation to this matter. Further, I am of the view that the nub of the Association's concern lies in an interpretation of the effect of clause 7 (sic) of Schedule 1 of the Act. That provision did not have the effect of limiting the Treasurer to the making of rules, in an ambulatory sense, that would result in no net detriment to superannuants. The obligation as properly construed as one that is satisfied at the point in time that the entitlement is calculated. I think that this reveals that the underlying difference between the Association's position and that of the State is one of statutory construction and not of actuarial calculation.

There are two matters in the reply we got from the Crown Solicitor that led us to conclude that it dealt with advice Crown Law had given on compliance with 11 (3) (the Jacobi advice) but not on compliance with 11(2) given by Mr McDonald.

The first is use of the expression ‘ambulatory sense’. It is the case that since 2002 tax rates for personal income have been reduced. The effect of this is that some members who commenced their pensions soon after 2002 found themselves in receipt of pensions smaller than would have been the case if they had commenced the pensions later. These members raised the question of whether they were entitled to an increase in their pension to take account of the detriment they were experiencing as a result of changes in personal income tax rates occurring after their pensions had commenced. This matches Crown Law’s use of the term ‘ambulatory sense’. It also matches the advice of Mr Jacobi.

The second is the description of the difference between the positions of the State and SA Superannuants as one of ‘statutory construction’ and not ‘actuarial calculation’. By saying this the letter from Crown Law to SA Superannuants also appears to be referring to the advice of Mr Jacobi and not that of Mr McDonald.

Mr McDonald provided advice (refer paragraph 36) that said:

> The extent of the reduction in gross benefits resulting from the insertion of the new rules has been justified actuarily in the Explanatory Memorandum which has been provided to me. I am not in a position to provide advice as to the accuracy of the actuarial calculations underlying the assertions in that Explanatory Memorandum. However, assuming that the assertions are correct, it appears that, had the Treasurer determined to insert a rule providing for a lesser reduction in gross benefits, that rule would have resulted in a shortfall in the fund such that, in order for the benefits to be paid to members, it would have become necessary to increase employer contributions to the fund. It follows that the rules which the Treasurer did insert were rules which had the effect of reducing or avoiding an increase in employer costs, as required by clause 11.

This makes clear that Mr McDonald gave his advice based on an assumption about the correctness of actuarial calculations. This is where there is an underlying difference between the positions of the State/Government and SA Superannuants - the Government position is that the 2002 explanatory memorandum actuarial figures are correct while the SA superannuants’ position is that the figures are not correct and the Government has no hard evidence that they are. SA Superannuants believes that the Mercer reports of 1998 and 2004 are hard evidence that the 2002 explanatory memorandum is wrong and the Government position is that these reports are not relevant to EISS.

The paragraph corresponding to 118 in the provisional report was numbered as 111 and, referring to our suggestion that the Crown Solicitor had been misled, it said:

> 111. Further, SA Superannuants’ suggestion is not consistent with my experience of the working methods of the Crown Solicitor. I note also that SA Superannuants have not advised me whether they have taken up an earlier proposal which I made to them that they should ask the Crown Solicitor whether he considers whether he was misled.

The SA Superannuants’ submission on the 2013 referral did advise Mr Bingham that we had contacted the Crown Solicitor about the possibility of his having been misled. Our submission was accompanied by copies of the correspondence that had been exchanged between ourselves and the Crown Solicitor. We pointed this out to Mr Bingham. Our submission on the 2013 referral included the following section on its page 33.

Advice from Crown Law is addressing the wrong question

Very recently, the Association Vice-President, Mr Clive Brooks received a letter from a Crown Law Solicitor dealing with the advice that Crown Law gave to DTF on the validity of the EISS rules. A copy of this letter is provided as Attachment 32. The Attachment includes Mr Brooks' reply.

The letter of the Crown Law Solicitor suggests that DTF only has advice from Crown Law that the EISS method for reducing pensions is valid notwithstanding the fact that it allows a person receiving a pension to experience an ambulatory detriment i.e. a detriment emerging after the pension commenced. This can occur as follows: people starting their EISS taxed-source pensions soon after July 2002 began with pensions that were equal in after-tax value with the untaxed-source pension and that therefore met the requirement set out in subclause (3) of Clause 11 of Schedule 1 of the *Electricity Corporations Act 1994.*But, since July 2002, marginal rates for personal income tax have become less creating the situation where the taxed-source pension recipient now has less after-tax income from his/her pension than would be the case if they were getting the pension in its untaxed-source form. **This is not the feature of the method for reducing EISS pensions that SA Superannuants and Richard Vear are saying causes it to be invalid.**

SA Superanuants and Richard Vear both agree that the requirement of subclause (3) continues to be met even if, after the commencement date, a taxed-source pension reduces in its after-tax value relative to the original untaxed-source pension. It is also agreed that the Mercer Review of 1998, and the actuarial analysis it contains, is not relevant to this question. **This was always the wrong question on which to seek Crown Law advice.**

The reason that SA Superannuants and Richard Vear have for saying that the method of calculating EISS taxed-source pensions is invalid is that it reduces employer costs and therefore does not meet the requirements of subclause (2) of Clause 11 of Schedule 1 of the *Electricity Corporations Act*. The right question to ask of Crown Law was whether a method for reducing pensions was valid if it had the effect of reducing employer costs for the pensions. The Crown Solicitor also needed to be instructed to take account of all documents dealing with the effect of the method on employer costs, not just the Explanatory Memorandum. When this right question is asked the 1998 and 2004 Mercer Reports, and the actuarial analyses they contain, become relevant. With only the Explanatory Memorandum as the indicator of the effect on employer costs the Crown Solicitor might well have assumed (or been told to assume) that compliance with subclause (2) was not the issue and then proceeded to give advice on whether subclause (3) was being complied with. This possibility is strongly indicated by the fact that the Crown Law Solicitor's letter (Attachment 32) says that the difference between the Government and the Association does not involve actuarial calculations.

This provides another example indicating that Mr Bingham did not carefully read our submission on the referral of 25 September 2013.

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Page 37, Link36: Mercer Reports of 1998 and 2004 not relevant to EISS?

In paragraph 110 Mr Bingham reports a question asked of the Minister for Finance , the Hon Michael O'Brien by the Hon Iain Evans MP. Mr O'Brien's answer is given in paragraph 111. The Minister's explanation given in 111 might be part, and even the main part, of Mr Bingham's reason for saying that the Mercer reports of 1998 and 2004 are not relevant to EISS because of differences between the main State Superannuation Scheme and EISS. These 'differences' are described in the three dot points of 111.

> 110. SA Superannuants has advised me that on 25 May 2012, the Hon Iain Evans MP sent a letter to the Minister for Finance, in connection with this issue. He asked the following question:
>
> Is the Minister aware that the 1998 and 2004 Mercer reports were not provided to the Crown Solicitor when he was directed to provide his opinion on the validity of the EISS method for calculating taxed-source pensions. He was provided with an Explanatory Memorandum, dated 27 June 2002 and written by a co-author of the 1998 Mercer Report which, in conflict with that report, expressly stated "employer costs are not expected to change as a result of the tax changes." Does the Minister agree that the Crown Solicitor should now be provided with a complete brief?
>
> 111. SA Superannuants advises that the Minister responded:
>
> I am advised that (and for the reasons given in the response to the previous question) the 1998 and 2004 Mercer Reports were not relevant. The Explanatory Memorandum relates to the EISS scheme specifically. I am advised that there is no conflict between the statements made in the EISS Explanatory Memorandum, and statements made in the Mercer reports dealing with the main State Superannuation Scheme. The differences in the outcomes in respect of the two schemes can be explained by the following:
>
> - As at the dates that Mercer Investigated the implications associated with the main State Superannuation Scheme moving into the taxed environment, the employer liability in respect of existing pensioners was significantly under funded. Therefore, there would have been significant tax benefits to be gained in funding those employer liabilities in a managed manner over a period of many years to gain the maximum advantage.
> - As at the dates that Mercer investigated the implications associated with the main State Superannuation Scheme moving into the taxed environment, the employer liability in respect of the already accrued but not yet payable pension liabilities was significantly under funded. Therefore, there were tax benefits to be gained over time in finding those past service liabilities.
> - Furthermore, there were no existing pensioners in the EISS scheme at the date the scheme moved into the taxed environment, as they had all been transferred to the State Scheme.

The first dot point in 111 correctly states that, in 1998, existing State Superannuation Scheme Pensions were significantly under-funded allowing the possibility of tax savings being made through movement of those pensions into the taxed superannuation environment. The third dot point correctly states that at the time of EISS moving into the taxed superannuation environment there were no existing EISS pensions. Combining the first and third dot points leads to the valid conclusion that had both the State Superannuation pension scheme and EISS moved into the taxed superannuation environment tax savings would have been made from existing pensions in the case of the former, but not the latter (because there were no existing EISS pensions when that scheme moved).

This leaves the second dot point which tells us that in 1998, in the case of the main State Superannuation Scheme, ‘the employer liability in respect of already accrued but not yet payable pension liabilities was significantly under-funded’ and this allowed for significant tax benefits to be gained by funding those liabilities and shifting the scheme to the taxed environment.

When EISS shifted to the taxed superannuation environment it was also true for EISS pensions that ‘the employer liability in respect of already accrued but not yet payable pension liabilities was significantly under-funded’. Thus the Minister’s explanation for different outcomes in the case of the State Superannuation Scheme and EISS is actually an explanation of why the same outcomes were to be expected on a shift to the taxed environment. This is what SA Superannuants was trying to tell Mr Bingham with the part of its submission that he quoted in paragraph 112. This quote is reproduced immediately below. It is rather different to the account he gave in his provisional report of the same material. His account given in the provisional report is discussed at the end of this section.

> All three of the dot points above are correct statements but they do not support the position that the Mercer Reports of 1998 and 2004 are irrelevant to EISS. The second dot point outlines a characteristic that EISS shared with the State Pension Scheme. The difference in outcomes of applying the EISS method to the State Pension Scheme, as opposed to EISS, is not that savings were to be made in the first case and not the second. The three dot points taken together mean that savings were to be made in both cases with the only difference being that for EISS, the savings were made from pensions that commenced after the scheme shifted to the taxed superannuation environment. The savings must have been used to reduce employer costs for EISS pensions because members gained nothing.
>
> It does not matter if a pension scheme, at the time of its transfer to the taxed environment, has no pensioners, or has some members who are pensioners, or has all its members who are pensioners, and nor does it matter if the pension scheme is fully funded, or partly funded or entirely unfunded. In all these circumstances the EISS method for calculating pensions, after the transfer, will reduce employer costs for the pensions compared to what the cost would be if the scheme had not moved to the taxed environment. The only qualification that has to be made here is that the pension scheme must have a significant proportion of members with substantial amounts of pre 1 July 1983 service. EISS had a large proportion of its pension division members in this category and whoever provided Mr O’Brien with the answer to Question 7 would know this. (emphasis in original)

In the Mercer Report of 1998 the method proposed for reduction of State Superannuation Scheme pensions was identical to that now being used by EISS. In the 1998 report the example used to illustrate how the method would deliver savings to employers begins:

- Suppose that an employee is about to retire with an untaxed pension of $30,000 pa, with one-third relating to post June 1983 service and two-thirds relating to pre July 1983 service

It can be seen here that an employee not yet in receipt of a pension has been used to illustrate how the method for reduction of pensions will deliver savings to employers. This circumstance of a State Superannuation Scheme member would have been equally applicable to EISS pension division members. All this leaves little room to doubt that the Mercer Report of 1998 is just as relevant to EISS as it is to the State Superannuation scheme. And yet Mr Bingham was prepared to say in paragraph 115:

> 115. Further, I do not see any administrative error in the department choosing not to provide the 1998 and 2004 memoranda to the Crown Solicitor. For the reasons

> outlined above, I accept that these two memoranda concerned the broader state scheme, and that different considerations applied to the EISS.

With his statement made in 115 Mr Bingham has accepted the Treasury position and rejected that of SA Superannuants without subjecting either to any analysis.

Mr Bingham's account given in his provisional report of what SA Superannuants said about the three dot points of paragraph 111 appeared in a paragraph 106 of the provisional report and it went as follows:

> 106. SA Superannuants, in their second submission to me, acknowledge that these statements are correct, but do not agree that the 1998 and 2004 Mercer memoranda are irrelevant to EISS. They assert in effect that the Treasurer had not previously asserted that the memoranda were irrelevant, and that all he had done was to suggest that that SA Superannuants' 'interpretation of Section 11(2) , Part F of Schedule 1 *Superannuation* of the Electricity Corporations Act 1994 was incorrect'.

It is hard to understand how Mr Bingham could read what we had said in our submission and then describe it as he did in paragraph 106 of his Provisional Report.

The first sentence in 106 would seem to establish that he did read at least the first sentence of what we had said because he has paraphrased it in 106. But it is as if he stopped reading our comments after he had read our first sentence. Our next sentence was 'The second dot point outlines a characteristic that EISS shared with the State Pension Scheme'. Anyone reading this sentence would have recognized its significance. What Mr Bingham writes in the second sentence of 106 bears no resemblance to the comments we had made.

This, and other matters outlined in the material accessible through the Link34 on page 32 and Link35 on page 35, support a conclusion that Mr Bingham prepared his provisional report with only a superficial reading of the submission we had made on the Legislative Council referral of September 25 2013.

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Page 38, Link37: Ombudsman's jurisdiction and Crown law advice

In paragraph 116 Mr Bingham states that he is not able to investigate an administrative act done by a person in the capacity of legal adviser to the crown or an agency.

> 116. As noted above in relation to my jurisdiction, I am not able to investigate an administrative act done by a person in the capacity of legal adviser to the Crown or an agency to which the Ombudsman Act applies.[82] Consequently I am not able to investigate the advice provided to the department by the Crown Solicitor.

In paragraph 109 Mr Bingham had rejected the claim of SA Superannuants that the Crown Law advice that the EISS rules are valid has a quality no better than the quality of the calculation underlying the figures presented in the Explanatory Memorandum of 27 June 2002.

> 109. I consider that this statement is misconceived. As outlined above, I agree with the Crown Solicitor that the rules were validly made. In my view, there was no legal obligation requiring that the rules should not reduce employer costs.

Mr Bingham set out in paragraphs 35 and 36 what the Crown Solicitor said on the validity of the rules and on their effect on employer costs.

> 35. Second, there is advice provided by Mr Stephen McDonald of the Crown Solicitor's Office on 28 November 2007. The department has provided me with a copy of that advice also, and has authorised me to disclose its substance. The advice includes the following statement:
>
> The purpose of the power granted to the Treasurer by clause 11 was to enable the reduction or complete avoidance of an increase in employer costs (ie, an increase in employer contributions to the fund) which would have otherwise resulted from the shortfall created by the imposition of a significant tax liability on the fund. The power in clause 11 did not extend to the making of a rule that provided for a total reduction in gross benefits which was greater than that which is required to avoid an increase in employer costs. Put another way, the power in
> clause 11 could not be used to insert a rule which had the effect of decreasing employer costs.
>
> 36. Mr McDonald's advice concludes that 'on the assumption that the actuarial calculations can be justified, so that it could be demonstrated, if necessary, that the level of reduction in gross benefits effected by the insertion of Part XV into the Rules did have the effect of reducing or avoiding an increase in employer contributions and did not go beyond what was necessary to achieve that purpose … the insertion into the Rules of Part XV by the Treasurer is not invalid'. In support of this conclusion, he noted that:
>
> The extent of the reduction in gross benefits resulting from the insertion of the new rules has been justified actuarily in the Explanatory Memorandum which has been provided to me. I am not in a position to provide advice as to the accuracy of the actuarial calculations underlying the assertions in that Explanatory Memorandum. However, assuming that the assertions are correct, it appears that, had the Treasurer determined to insert a rule providing for a lesser reduction in gross benefits, that rule would have resulted in a shortfall in the fund such that, in order for the benefits to be paid to members, it would have become necessary to increase employer contributions to the fund. It follows that the rules which the Treasurer did insert were rules which had the effect of reducing or avoiding an increase in employer costs, as required by clause 11.

The last sentence of the Crown Solicitor's advice quoted by Mr Bingham in paragraph 35 could not be clearer in saying that rules could not be valid if they had the effect of decreasing employer costs. This sentence is a direct contradiction of Mr Bingham's statement in paragraph 106 – ‘In my view, there was no legal obligation requiring that the rules should not reduce employer costs.

In paragraph 36 the quote from Crown Law advice does include a statement that the rules are valid but this statement is qualified by the assumption that certain actuarial calculations are accurate and conclusions based on those calculations are correct.

A fair description of what the Crown Law advice said about the validity of the rules would be:
The rules are valid only if they do not produce the result that employer costs are reduced and actuarial calculations can be provided that establish this.

By saying, as he does in paragraph 109, that ‘…there was no legal obligation requiring that the rules should not reduce employer costs’ Mr Bingham makes a nonsense of his claim that he and the Crown Solicitor are in agreement on the validity of the rules.

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