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Motions and Debates in the Legislative Council

There were two motions passed in the Legislative Council referring the EISS matter to the State Ombudsman. The first was passed on 17 October 2012. The Government supported this motion and in his remarks the government spokesman made a reference to an unnamed former Government Officer who he (the government spokesman) claimed had been the subject of direct criticism in the submissions made to MPs. No details of this criticism were provided and, as far as SA Superannuants knows, there were no specific criticisms of this person made in the submissions to MPs.

The government spokesman made it clear that the government's position was that any criticism of this former government officer would be unwarranted. The singling out of a particular person in this way was unfortunate and all the more so because it turned out that when the State Ombudsman eventually conducted his investigation into the EISS matter he interviewed this person without putting him on oath and without recording the interview. Nor did the Ombudsman attempt to resolve inconsistencies between this person's evidence and other evidence when it would have been a simple matter for him to do so.

The 17 October 2012 motion lapsed because the Ombudsman ruled it was outside his jurisdiction. He proposed an alternative 'own initiative investigation' which was rejected by SA Superannuants.

The second referral of the EISS matter to the Ombudsman was made on 25 September 2013. This was a new referral that had been designed by SA Superannuants and Richard Vear, after consultation with the Ombudsman, to better match his views about his jurisdiction. The Government spokesman in the debate on this 25 September 2013 motion acknowledged that the referral had been designed to meet this purpose but said that the Government was opposed to it. He expressed the Government's preference for the own initiative investigation that had been proposed by the Ombudsman as an alternative to the 17 October 2012 referral.

The key questions that were not properly considered in the Ombudsman's investigation were:

1. the effect of the rule being used to calculate EISS taxed-source pensions on employer costs for the pensions. and
2. the compliance of the rule with Clause 11 (sub-clause 11 (2) in particular) of Schedule 1 of the *Electricity Corporations Act 1994*.

The investigation that the Ombudsman conducted following the referral of 25 September 2013 was effectively the own initiative investigation that he proposed as an alternative to the October 17 2012 referral and which was the Government's preference. In summary, the Ombudsman conducted an

investigation that effectively ignored the main issues behind both Legislative Council referrals and, in the course of that investigation, interviewed a key witness without putting him on oath or even recording the interview after this person had been singled out by the Government as a person of whom no criticism was warranted.

The two referrals made by the Legislative Council and the corresponding debates are reproduced below from the Legislative Council Hansard.

The 17 October 2012 motion:

That this council:

1. notes general community concern 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 S.A. Superannuants and Mr Richard Vear, a pensioner of EISS;
2. refers the following matters to the Ombudsman, pursuant to Section 14 of the Ombudsman Act 1972 for investigation and report:
 - (a) determine whether or not the method used to calculate EISS taxed-source pensions is designed to reduce employer costs for those pensions compared to what the cost would be if the pensions continued as untaxed-source pensions; and
 - (b) if it is a method designed to reduce employer costs, determine:
 - (i) whether or not the EISS Board and the Department of Treasury and Finance knew this, or ought to have known this, at the time the rule was authorised for use;
 - (ii) whether or not, since the time of the rule's authorisation, the EISS Board and the Department of Treasury and Finance have dealt honestly with the representations being made to them about the validity of the rule; and
 - (iii) whether or not it is a method that complies with the Electricity Corporations Act 1994 (as modified by the Electricity Corporation (Restructuring and Disposal) Act 1999) and the Heads of Government Agreement on Superannuation;
 - (c) if the method does not comply with the Electricity Corporations Act 1994 (as modified by the Electricity Corporation (Restructuring and Disposal) Act 1999) recommend a method for calculating taxed-source pensions that does comply with that Act and with the Heads of Government Agreement on Superannuation;
 - (d) review the Mercer Strategy reports (Review of Taxation Status of the SA Government Superannuation Funds) of 1998 and 2004, commissioned by the Department of Treasury and Finance and determine whether or not these strategy reports underpin the method of reducing EISS pension benefits to its members, as it has been applied since July 2002:
 - (i) in this matter include a review of the decision to provide the Crown Solicitor with a copy of the 2002 Mercer Explanatory Memorandum on EISS rule changes, but not copies of the 1998 and 2004 Mercer Reports on Taxation Status of SA Government Superannuation Funds. This advice was sought on the legality of the EISS pension reduction method, due to a request from the EISS Trustees, to the Treasurer Hon K. Foley.
 - (ii) in this matter, review also the advice given to the Minister for Finance that the 1998 and 2004 Mercer reports were only relevant to the State Pension Scheme and its possible transfer to the taxed superannuation environment but not to the transfer of the EISS pensions, from the untaxed arrangements that applied to the ETSA Superannuation Schemes, prior to privatisation.
 - (e) review the EISS submission, dated 4th August 2006, made as part of the 2006 public consultation process conducted by the Federal Government on its 'Plan to simplify and streamline superannuation' to determine if:

(i) this submission shows that the EISS Trustee was aware, or should have been aware, that its pension reduction method had been designed to reduce employer costs for taxed-source pensions below that for untaxed-source pensions and deliver an advantage to employers.

(ii) the EISS Trustees' changes to its 'Taxation Rules ' 29 to 31 that became effective in July 2007 were made to ensure that employers continued to receive an advantage at the expense of EISS pension division members.

(f) review the appropriateness of allowing the organisation, Mercer, to continue for so long as the sole provider of actuarial advice to EISS and the Department of Treasury and Finance on the matter of transferring untaxed funds into the taxed superannuation environment, when Mercer had compared the rights of fund members and employers in such a transfer by saying, on page 63 of its 1998 report:

'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'; and

(g) any other relevant matter .

Debate on the 17 October 2012 motion

The Hon. D.W. RIDGWAY (Leader of the Opposition) (17:18): I move:

Paragraph 1—Leave out the words 'notes general community concern' and insert the words 'notes the concerns of pension scheme members'.

Paragraph 2(b)(ii)—Leave out the word 'honestly' and insert the word 'appropriately'.

The Liberal Party has consulted with stakeholders who are affected by this particular motion and would like to have the wording slightly changed.

The Hon. G.A. KANDELAARS (17:19): I rise to indicate that the government will be supporting the amended motion. Members are aware that this amended motion relates to long-held concerns of SA Superannuants and EISS pensioners with regard to the calculations used to reduce gross benefits of EISS members, following the scheme's loss of constitutional protection at the time of the ETSA sale and its subsequent move into a taxed environment. On moving into the taxed environment, all employer-funded assets were immediately taxed at 15 per cent, and all future investment earnings accrued in the scheme were also subject to a 15 per cent tax.

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.

As the issues surrounding the formula are very complex, the government has agreed to an independent review of the formula by an actuary with technical expertise in superannuation matters, but the SA Superannuants are not satisfied with this and believe that it is more appropriate for the Ombudsman to conduct the review. In order to put the superannuants concerns and this saga to rest once and for all, and to remove any doubt about the independence of the review, the government agrees to the proposal to appoint the Ombudsman.

As I have said, while the government supports the amended motion to expedite the review and to put this saga to rest once and for all, an aspect of this motion the government rejects most strongly is the suggestion that, for some reason, the benefit reduction formula was incorrect and that it was somehow designed that way to reduce employer superannuation costs and there was inappropriateness in this matter by either the EISS board, the EISS trustee, the Department of Treasury and Finance, the former treasurer the Hon. Kevin Foley, or the Mercer organisation. Pitching the terms of reference for an independent review along these lines is far from necessary.

Further, the proposed terms of reference make reference to what information was given to the Crown Solicitor's Office when the former treasurer sought advice on the legality of the EISS pension reduction. Of course, it will be up to the Ombudsman to determine whether this needs to be part of the review.

As the government agrees to this independent review by the Ombudsman, it should be pointed out that the criticism and complaints of the SA Superannuants have been previously thoroughly investigated by the Crown Solicitor and a QC engaged by the EISS board, who have advised that the reduction to the gross pensions were determined and applied strictly in accordance with the requirements of the Electricity Corporations (Restructuring and Disposal) Act 1999.

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

The Hon. M. PARNELL (17:24): It seems that this referral to the Ombudsman is going to go through, with the support of both of the major parties. So, I want to put on the record that the Greens also support this referral going through. I acknowledge that we have received considerable correspondence from SA Superannuants. Much of the correspondence is highly technical and it does deserve a thorough investigation, and the Ombudsman is an appropriate office to conduct that investigation.

I am pleased that, on behalf of the members of SA Superannuants, there is going to be a thorough review of this particular electricity industry superannuation scheme. I look forward to seeing the results of the Ombudsman's inquiry, but, for now, the Greens are pleased to be supporting the motion.

The Hon. R.I. LUCAS (17:24): I thank honourable members for their indication of support for the motion. In concluding, I congratulate the members of SA Superannuants for the assiduous way in which they have pursued this issue over a long period of time. It is a good indication of democracy at work. They have worked hard over a long period of time and, hopefully, after an appropriate period of time for the Ombudsman, there will be a satisfactory resolution to this issue, and the SA Superannuants have indicated their willingness to accept the decision of the Ombudsman, whatever that might be.

In concluding, having congratulated SA Superannuants for their persistence and assiduousness in pursuing this issue, can I also congratulate my colleague, the member for Davenport in another place, who has carriage for this issue within the Liberal Party. He has met with stakeholders and he has negotiated with the government, and it is as a result of his hard work that there is, I would imagine,

unanimous support for this resolution and hopefully a satisfactory resolution for what has been a longstanding and complicated issue.

Amendments carried; motion as amended carried.

The 25 September 2013 motion

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

Debate on the 25 September 2013 Motion

The Hon. G.A. KANDELAARS (17:27): I rise to oppose this motion on behalf of the government. The council may recall that a motion representing the interests of South Australian Superannuants and EISS pensioners was moved by the Hon. Rob Lucas on 17 October 2012. That motion was regarding the calculation used to reduce the gross benefits of EISS members and, in many respects, they are the precursor to the motion we are discussing today. The house may recall that this calculation was implemented following the scheme's loss of constitutional protection at the time of the ETSA sale and its consequential move into a taxed superannuation environment.

The government is aware, from the debate held at that time, that SA Superannuants have a long-held view that the benefit reduction formula was incorrect and reduces the superannuation costs of the employer at the expense of superannuants therefore contravening the intent of the formula in the Electricity Corporations Act 1994, which was to go no further than to avoid an increase in employer costs.

In the Hon. Rob Lucas's previous motion, he outlined a set of terms of reference for investigation by the Ombudsman, and the government at the time supported that motion. On 23 November 2012, the Ombudsman contacted the Department of Treasury and Finance and noted that there were a number of technical difficulties associated with the terms of reference. They were said not to focus on administrative acts and did not comply with section 14(3) of the Ombudsman Act 1972. The Ombudsman recognised the clear intention of parliament that a review be carried out and sought to carry out an 'own initiative investigation'.

The investigation was to have the following parameters: 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 Industry Superannuation Scheme Trust Deed.

The Ombudsman later stated that he was advised by the SA Superannuants that they were seeking some adjustments to the terms of reference outlined in the previous motion. The Ombudsman subsequently advised the Department of Treasury and Finance that he would not proceed with the 'own initiative investigation'.

He instead wrote to the President of the Legislative Council, outlining jurisdictional difficulties of the earlier motion and decided to await further developments. This seems prudent in the face of the SA Superannuants' attempt to seek to change the terms of reference after the passing of a motion addressing their concerns in the parliament.

It therefore comes as no surprise that this new motion has been brought to this chamber by the Hon. Rob Lucas. 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.

The government therefore opposes the motion on the grounds that the Ombudsman—who, of course, is independent of government—should continue the inquiry he had proposed to instigate, following the parameters I outlined earlier. This opposition to the motion is made with the intention both to be expeditious and provide clarity to all interested parties when reviewing administrative acts of the Department of Treasury and Finance.

The Hon. R.I. LUCAS (17:33): I thank the Hon. Mr Kandelaars for his contribution to the motion. Mercifully for members, I do not intend to go over the long history of this motion. It has been before the chamber for many, many months. In our view, it is a relatively simple and straightforward matter. It has been supported by this council previously.

I would urge members who supported this particular motion previously to support this motion, in the interests of giving a fair hearing for these individuals who fought long and hard in their retirement to prosecute their case and to, in their view, get a fair hearing in relation to the issue. In our view, this is the appropriate way to go. The council, as I said, did pass a motion previously, but it was deemed that the wording in the particular motion needed to be changed, and that is the reason for the motion we have before us. I urge members to support the motion.

Motion carried.