

February 2002

The Pickering Enquiry

The Association made the following submission to the Pickering Enquiry.

Enquiry Constitution

The Association Directors are extremely concerned that a further Enquiry is being set up so closely on the heels of the Myners Report, which has yet to receive the Government's final approval and we are also disturbed that pensioner scheme members' interests are not being properly represented in such Enquiries. Mr Pickering is a past Chairman of the National Association of Pension Funds which is an employer-led organisation and the pension scheme interests seem to be represented by the TUC and trades unions.

Our experience in the Electricity Supply Industry is that, with the closure of end salary schemes resulting from the recent changes in the economic situation, employers may need again to resume contributions after several years of contribution "holidays". ESI employers have a statutory and contractual duty to employees to make such contributions but their reaction has been to close the schemes to new employees with almost no response from the trade unions. They have consistently been more afraid for the continued employment of their members and the longer-term problems of unstable arrangements (money purchase schemes) have gone unchallenged. The trade unions do not therefore adequately represent pensioners' interests; these can only be properly represented by direct member participation in a totally independent Enquiry.

Who Owns the Funds?

The Enquiry will be aware of the recent case of Laws and Mayes v National Grid and National Power which reached the House of Lords last year. Although the electricity employers established a right to a share in any surpluses, the actual ownership of pension funds remains undecided; the Human Rights case for pensions being regarded as deferred pay and for members to obtain "property" rights in their schemes was not argued in the House and therefore not decided in the Lords. It is essential that any enquiry into pension schemes should focus in an unbiased way on these matters before the lawyers pocket another £2.5 million in bringing the case into Europe. This Association supported Messrs. Laws and Mayes throughout their case and continues to do so. We strongly recommend that these two important outstanding issues be considered by the Enquiry team and that members be afforded these rights without delay.

Money Purchase Schemes

We are sure that the Enquiry team will be aware of the very poor annuity pensions currently available to those unfortunate enough to have been forced into money purchase schemes. The backlash from this will do little to encourage current and future employees to join such schemes. Successive governments have emphasized the need for employees to provide for their future, rather than rely on the state and taxation system. Our view is that legislation is needed to oblige money purchase scheme employers to guarantee a minimum specific pension related to years of service. This would, of course, be unpopular with employers but would be in line with economic need and it would slow the demise of end salary schemes.

Who Administers The Schemes?

Most schemes are administered by trustees and Laws and Mayes v Nat. Grid/Power reinforced this view. However, the Daily Mirror scheme was also nominally run by trustees and audited by Coopers and Lybrand, a previously reputable but subsequently much criticised City firm. Section 16 of the Pensions Act 1995 makes inadequate provision for member nominated trustees, who should at least equal the number and voting capacity of employer trustees. Similarly, there is a need for an independent chairman, possibly for an independent trustee, and for auditors/actuaries to be appointed equally by the employer and scheme beneficiaries. Section 32 of the Act appears

to ignore the fact that the employer invariably has totally superior voting rights in such matters, making little change since the Maxwell days. If the employer has superior voting rights in the trustees' meetings the trustees are not administering the scheme.

Scheme Rules.

In all ESPS schemes and most others, the employer has control of the scheme rules, either by the scheme constitution or by superior voting power at trustee meetings. This enables employers to change scheme rules at will, often to the detriment of scheme members. Sections 67 and 68 of the Act refer to the power of trustees to modify schemes but again overlook the employers' voting superiority. We submit that further safeguards are necessary to ensure that employers meet their contractual obligations to schemes and that they do not avoid responsibility by changing scheme rules. The notion that trustees control pension schemes is total misconception; in most cases the employer is firmly in control through his appointed trustees.

Employer Contributions.

Our Council believes that once an employer has entered into a contract of employment with staff to make contributions to a pension scheme, such contributions must be made. Changing the rules to avoid such responsibility owes much to Robert Maxwell but, unfortunately, is still legal. This loophole must be closed.

The Pensions Ombudsman

We hope that the Enquiry will consider the present role of the Pensions Ombudsman. As it stands now, he can hear and decide cases brought to his notice by aggrieved scheme members. This is a valuable "poor man's lawyer" process from which many members benefit. However, our experience in the Laws and Mayes case shows that, if a wealthy employer with a considerable liability at stake invests in an appeal to the High Court, a David and Goliath situation ensues. Costs spiral, in our case to £2.5m, and these are totally unaffordable to the normal scheme member. The Ombudsman takes no part in defending his decision to the superior courts and applicants are therefore abandoned to the normal judicial system. Our Council urge the Enquiry to consider whether more can be done to strengthen the powers of the Ombudsman in such cases and to curtail the employers' right to contest his decisions.

The Courts

You will appreciate that we do not believe that the Judiciary in this country can deal with pension matters in an equitable and fair manner and we have recently written to the Lord Chancellor to express our total lack of confidence in his Department's ability to deliver justice in such cases. The reply was unhelpful and we now believe that many of these matters must be resolved politically by changes to the UK Law.

Summary

In addition to the principal subjects already mentioned above, the attached following sets out a more detailed list of pension scheme matters which this Association wishes to see implemented and is currently pressing for.

Recommendations to the Pickering Enquiry

- (a) a halt to current employers' attempts to extract or divert pension fund moneys to owners and shareholders;
- (b) the urgent need for members who have contributed to any pension fund to have adequate representation in the management and control of that fund;
- (c) the rules of all contributory pension funds must be agreed jointly between members and employers with necessary arbitration clauses in event of difficulty;
- (d) the ability of either party to change rules whether prospectively or retrospectively must also come within (c) above;

- (e) member trustees must be elected to funds in the representative proportion to retired, active, and deferred members and provision should also be made for widows, spouses etc to be represented;
- (f) all management decisions in contributory schemes should be made jointly; each committee or level of management having an independent chairman; voting rights and consequential liabilities to be shared equally;
- (g) no employer should be permitted to withhold contributions properly due to the fund or to withdraw or divert such funds without trustee agreement;
- (h) employers who retire staff earlier than at normally recognised ages must be required compulsorily to contribute a requisite sum to the fund in compensation for the additional expense incurred by earlier payment of benefit;
- (i) facilities must be provided for all members to be able to call for extraordinary meetings in the event of necessity; all schemes should be required to hold an Annual General Meeting, with individual member invitations;
- (j) the Annual Report and Accounts must be sent to all members and its content must include uninhibited comment by member trustees;
- (k) Regulations should be made to allow members' legal costs to be borne by pension schemes where any Ombudsman or court's decision is being appealed and/or where the subject matter is likely to affect a majority of members;
- (l) taxation of pension scheme investments must cease if more employees are to be encouraged to join private and occupational pension schemes;
- (m) all legal opinions taken by employers and trustees in respect of pension matters must be shared within the trustee group to ensure that all trustees are properly informed of their liabilities and duties;
- (n) pension schemes must provide for minimum annual increases of 3%. (the Inland Revenue acceptance level) and must be required to fully index link to the RPI or to wages;
- (o) arrangements must be promulgated for individual members to be able to contact trustees directly if they wish to do so;
- (p) individual trustees should be able to seek independent legal advice whenever necessary to their functions and, collectively, the trustee body must appoint a separate legal adviser, totally independent of the employers;
- (q) where large Associations such as the AESP are formed by members discontented with the management of their Scheme, provision should be made for recognition of such bodies by the employers and in the Ombudsman process;
- (r) where schemes have already been broken up or where this is contemplated by an employer or group of employers, all members should be balloted to ensure their agreement to such changes or to the continuation of their present scheme;
- (s) in cases where employee contributions have been universal and of identical proportion, no pension scheme should be permitted to offer differential benefits to employees, pensioners or dependents of the same scheme;
- (t) in all pension schemes the appointment of auditors must be confirmed by members at properly called and constituted Annual General Meetings to prevent employer interference in financial funding; and
- (u) shareholders and other owners must be made fully aware of potential liabilities arising from legal actions taken by company managements, particularly where such consequences might adversely affect profitability;

- (v) the provision of information concerning the value of pension funds in company Annual Reports should be confined to a statement of the value of the Fund and any company liability to the Fund; the value of the Fund should not show as a standard held asset in the company Balance Sheet; and
- (w) employers operating money purchase schemes should be obliged to provide a minimum guaranteed benefit related to service with their organisations.