Dispute Resolution.

My Fund has in place an excellent Rule to enable disputes arising in regard to the interpretation and application of the Rules to be disposed of internally and with some speed and relatively inexpensively It reads as follows

"any dispute which has arisen in regard to the interpretation or application of these Rules shall be decided by the Board , whose decision shall be final and binding on the Employers, Members, Pensioners and any other persons claiming to be entitled to a benefit under these Rules provided that if any party to the dispute is dissatisfied with the Board's decision, the Board shall at Fund expense refer the dispute to Senior Counsel whose decision shall be binding on all parties".

The wording appears unequivocal and whereas my Board has complied with the Rule by responding to the dispute it has up to now flatly refused to allow any of their decisions considered unsatisfactory by disputants to be referred to Senior Counsel. There is always some legal reason supported by an opinion by the Fund's attorneys for refusing to take this step. It has got to the point that a Member has now lodged a complaint for adjudication on the grounds that it is for Senior Counsel and not the Board to decide if Senior Counsel has the jurisdiction to finally decide a dispute he raised in terms of this Rule. The reason for the vehement opposition to the application of the proviso by Employer-Appointed Trustees is fairly transparent in that the Board or majority thereof are not willing to risk a final decision by Senior Counsel which could affect Employer interests. This has left disputants with no alternative but to lodge the dispute for adjudication by the Adjudicator.

However the Adjudication route is hopelessly unsatisfactory and not much more than an exercise in futility. The Adjudicator is years behind with his caseload and if he eventually determines in favour of the disputant, the Board will simply appeal the decision all the way to Bloemfontein if necessary. Apart from this the Board has the means to intimidate disputants by threatening them with costs if they lose the action. The Board will also employ the best and most expensive legal advisors at Fund (Member) expense whereas disputants are basically on their own and realistically stand little chance against this juggernaut. The adjudication route is probably more suitable for class actions rather than for individual actions

It is recommended as essential that an internal dispute mechanism be legislated in regard to disputes arising from interpretation and application of the Rules by the Board with right of appeal to an agreed Senior Counsel for final decision who would also have the right to decide his jurisdiction in order to exclude the Board from blocking the appeal to Senior Counsel.

Governance.

The key to a sound and uncontroversial administration of a Pension Fund lies in good governance. It is probably true to say that if the governance is wrong everything is wrong. Good governance comprises ethical values and a clear definition of the duties, responsibilities, authorities and relationships, for the Board as a whole, each Trustee, the Chairman of the Board, the Principal Officer and the Secretary. Essential for this purpose is a need for job descriptions to enable all Trustees, the Chairman and Officers to be aware of their position and accountability. The Board of my Fund flatly refuses to allow job descriptions. The object is fairly transparent in that this enables accountability to be avoided as well as enables the non-executive Chairman of the Board (an Employer - Appointed Trustee) to exercise de facto control of the Fund and its Officers in a Chief Executive capacity which is totally unacceptable.

(a) The Chairman of the Board.
The Rules of my Fund provide for a Chairman of the Board to be elected by the Board for a one year period but there is no requirement for a job description to set out the extent and limitations of the Office. Invariably the Chairman will be elected by the Appointed Trustees with the support of the Employee-Elected Trustee.

The normal and principal purpose of the Chair is to preside even-handedly over Board meetings, ensure meetings are properly constituted in terms of the Rules, that a valid quorum is present , that proper notice of the meeting including its purpose (the agenda) has been timeously served on the Trustees in writing as required by the Rules, that items put forward by Trustees for inclusion on the agenda are on the agenda for confirmation by the Board, that Member concerns have been placed on the agenda , that adequate time has been allowed for the agenda to be dealt with, and to ensure that all decisions taken by the Board are indisputably within the Board's powers and authority provided by the Rules and to sign the minutes recording decisions as correct. Unless these functions and limitations are spelled out by way of a Board -approved job description the Board is not in a position to require the Chairman to be accountable for his conduct of the Chair. The result is that the Chairman is virtually free to act as he pleases and dominate the proceedings which is not the purpose of the Office.

As a further safeguard against abuse of the office I advocate that legislation provide that the office be rotated annually between nominees of the Elected Trustees and Appointed Trustees.

(b) The Principal Officer.
The Act (Section 8) requires that every fund shall have a principal executive officer. The Rules of my Fund provide for the Employer to appoint the Principal Officer but the Employer has stipulated(in my opinion improperly) that the responsibilities of the office are to be limited to statutory duties as set out in the Pension Funds Act and the Rules.

This seems to be contrary to the wording of the Act but protests have been ignored. The

effect has been that the office has been reduced to little more than a post office role with the Chairman assuming a de facto executive responsibility. The role of the Principal Officer is however critical to good governance and needs to be defined.

Apart from being the focal point between the Members and Board and vice versa, and being responsible for the day to day administration of the Fund and being accountable therefore to the Board, the Principal Officer should be something of a trained expert on the Rules/legislation and be in a position to provide the Chairman and Board with impartial objective guidance or able get legal advice thereon. Trustees are not generally expert on the Rules/Act and in practice have to be able to rely on the Principal Officer rather than the Chairman for legal guidance to avoid Board decisions being exposed to dispute/complaint. This is not happening in the case of my Board and the result is one costly complaint after another over the Board's interpretation /application of the Rules. Sound internal control however requires that the role of the Principal Officer be independent and not under the dominance of the Chairman or Board. As the Principal Officer is required to sign the financial statements as being in order in every respect , his /her views on the conduct of the Fund cannot be ignored by the Chairman/Board.

It is recommended that Section 8(1) of the Act be enlarged to spell out unequivocally what is required of the Principal Officer . If the Registrar is to be given power to sanction Trustees such power needs to be extended to sanction the Principal Officer for neglect of duty to the Fund.

(c)Secretary.
The role of the Secretary revolves around meetings and the minutes thereof. It nevertheless needs to supported by a job description setting out his relationships to the Board and the Chairman. In particular preparation of the minutes for approval of the Board at the next meeting must be the sole responsibility of the Secretary and not be subject to influence by the Chairman. In the case of my Fund the Secretary prepares the draft minutes but instead of sending these to each member of the Board for comment sends them to the Chairman who edits them. The problem with this system is that in practice the Chairman assumes responsibility for the minutes. By the time the edited minutes ultimately reach the Trustees some two months later they have forgotten exactly what was said at the meeting and are unable in particular to readily determine what has been omitted.

(d) The Board.
The duties and responsibilities of the Board are set out in section 7 of the Act but clearly

need to be amplified by a code of conduct incorporating ethical values formulated by the FSB only and not by the Board itself or any other body such as the Institute of Retirement Funds. In my experience major differences arise because of misunderstanding of Board powers or lack thereof as well as to exactly what authority has been provided by the Rules to enable the Board to act. The most common problem area in the case of my Fund is failure to understand that the Rules only allow the Board to act within the Rules for the benefit and protection of the Members and that the Board have to be able to demonstrate to Members that their actions fall within those parameters. The legislation needs to spell this out.

(e) Training and Qualification of Trustees and Officers.
It is probably true that appointees to the Board by the Employer will be of a senior calibre and capable of meeting what is required of a Trustee as well as ensuring that the interests of the Employer will not be neglected. This is not the case for Elected Trustees some of whom over the years in my experience have been hopelessly too lightweight for their responsibilities to the Fund and to the Members who relied on them. Whilst it would not be possible to legislate in a democratic election for whom the Members should vote certain safeguards should be considered.

(1) that it be compulsory for all Trustees to undergo a standard training course within three months of election/ appointment to the Board and to pass some sort of independent test set by the FSB to measure their understanding and knowledge of the Rules and legislation as well as their ability to cope with their responsibilities as Trustees.
(2) that means be found to discourage Members from voting for candidates they know and like as persons rather than voting for candidates who have the experience and ability to represent Member interests equitably as well as match the quality of Trustees appointed by the Employer. Publication to Members of full election manifestos would be helpful in this regard.

Code of Conduct

A legislated and unambiguous code of conduct is essential for good governance with provision for sanctions for infringement. However if the Board by simple majority as in the case of my Fund is allowed power to sanction so-called offenders such as by fining or suspending them then the code is wide open to abuse by the majority of the Board. Sanctions should only be approved by the FSB along with other powers to remove Trustees and Officers. An alternative safeguard against abuse by the Board majority, would be for decisions on sanctions to be unanimous with alternates filling in for the "accused".

Furthermore the appointment of an independent compliance officer should be legislated to whom Trustees could refer for advice and guidance before the event and who would have power to prevent the Board from hearing a complaint that was frivolous or vexatious or if there was no case to answer. This to avoid abuse of the code by the majority of the Board against any minority Trustee.

Communications with the Members.

In the case of my Fund, the Board periodically issues a publication to Members. Whilst this publication contains useful articles of general interest, including the performance of investments, it actually tells the Members nothing of substance concerning their rights, the solvency of the Fund, disputes raised and other matters which are of real interest to the Members. The reason is that this is a Board publication and that with Appointed Trustees with the assistance of an Employee Trustee in control, no way are Members going to be put in possession of information to enable them to stand up and question the Board on its conduct of the Fund.

It is recommended that the legislation make provision for the Elected Trustees to be able to report to the Members independently of any Board publication if they are not satisfied the Board Report is sufficiently transparent.

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Control of the Fund.

A Pension Fund is controlled by the Board who administer the Fund in accordance with the Rules and legislation.

In practice the Fund is controlled by Trustees comprising a majority of the Board. Theoretically with Employer Appointed Trustees and Elected Member Trustees each comprising 50% of the Board neither Grouping should be in a position to dominate the Board. This is a desirable situation as it obliges the Board to take equitable and reasonable decisions. However in practice Elected Member Trustees who are also Employees tend to provide a built-in majority for the Employer-Appointed Trustees when it comes to voting on differences of opinion which arise between Member and Employer interests and where fiduciary duty to the Fund does not apply.

It is all very well proposing that Employees who are also Member Elected or Appointed Trustees may not be victimised if they vote against Employer interests on the Board but this is not realistic nor is it practicable as no Employer would subject an Employee Trustee to pressure in that manner, directly or indirectly. Realistically we live in an age of no job security where Employees are dependent on the Employer for a career and annual salary increases.
Employees who are also Trustees are thus hopelessly compromised in relation to their discretionary powers. In such circumstances they will of course not support Member interests against Employer interests and in the case of my Fund have never done so. The effect has been that Pensioner -Elected Trustees although “representing” 95% of the Members in the case of my Fund have been marginalized into a state of permanent minority.

Possibly the answer lies in prohibiting Employees from being elected by the Members to the Board on grounds of conflict of interest.

Democratic Elections

Section 7 (1) gives Members the right to elect at least 50% of the Board but Section 7(2) gives the Board the right subject to Registrar approval of an amendment to the Rules the right to determine the constitution of the Board.

In the case of my Fund the Board with FSB support, approved an election rule providing for the separate elections of Trustees nominated by the Pensioners/Beneficiaries and by the Active Members. At the time of this rule amendment in 1998 an objection was lodged with the FSB on behalf of the Pensioners on the grounds that with the Active Member Trustee only representing about 8% of the Members of the Fund instead of 25% in terms of numbers, the election was grossly undemocratic.

Pensioners felt strongly that for election purposes a Member is a Member and not a Pensioner or serving Member and that Members should vote in Elected Trustees on the basis of one person one vote for candidates who would represent all the Members of the Fund. The FSB turned down the objection on the grounds that Active Members should be separately represented on the Board. The result was disastrous for Pensioner interests as they were effectively marginalised on the Board as the Active Member Trustee in a conflict of interest situation as an employee of the Employer consistently voted with the Appointed Trustees to provide a built-in Board majority with the Appointed Trustees.

Notwithstanding a subsequent reduction in the Active Member component of the Fund to about 5% of the Membership, the Board or majority thereof has persistently refused to amend the Rules to obviate the undemocratic weighting.

Representation.

Section 7A(1) of the Pension Funds Act provides that Members of a Fund shall have the right to elect at least 50% of the Members of the Board. One of the objects of this provision as set out in the "Memorandum on the Objects of the Pension Funds Amendment Bill 1995", was to provide for the representation of Members of Funds on Pension Fund Boards and in sufficient strength as would obviate the previous ability of Employer -Appointed Members of Boards to control/dominate the Pension Funds.

However this purpose, in the case of my Fund, has been undermined particularly by the Employer- Appointed Trustees, who claim that all Members of the Board only have a duty to the Fund and not to the constituency that elected/appointed them. This claim seems to be supported by 5.1 of the proposals which states that many Trustees fail to appreciate that they owe their primary (fiduciary) duty to the Fund as a whole and not to the constituency who appointed or elected them. This statement unless qualified will certainly be interpreted as meaning that Elected Trustees do not and may not represent the Members of the Fund on the Board. If any Elected Trustee professes to doing so, as happened in the case of my Fund, the Employer- Appointed Trustees will claim, backed by a legal opinion to that effect, that such Trustee/s are in conflict with the Fund. They will then insist that any such Trustee recuse himself from participating in discussions affecting the interests of the Members and voting thereon.

This situation needs to be clarified unequivocally in the legislation as it is resulting in confusion and frustration over the role and purpose of being elected by the Members to the Board. If the legislation in effect provides that Member-Elected Trustees do not represent the Members then this would serve to defeat the object of Section 7A and effectively disempower the Members. In the case of my Fund and as a result of a Member-Elected Trustee (myself) insisting that I was elected to serve in a representative capacity, subject always to the Rules and legislation, I was actually suspended from acting as a Trustee. As a result Members of the Fund are starting to query the point of their electing 50% of the Board. Furthermore hard to find quality candidates willing and able to serve as Elected- Member Trustees are balking about accepting nomination for election. Their concern is that if elected they can be legally constrained from using their discretionary voting/bargaining power on the Board to promote the interests of the Members subject to the Rules and legislation, they would really be just wasting their time.

Whilst I believe it fairly clearcut that all Trustees do have a common and overriding primary (fiduciary) duty to the Fund this only applies where appropriate. For example all Trustees obviously have a duty to the Fund to ensure that all monies due to the Fund are collected in terms of the Rules, that Fund investments are safeguarded and managed prudently without putting the solvency of the Fund and thereby the interests of the Members and Employer at risk and that the Fund is administered strictly within the Rules and legislation.

Fiduciary duties to the Fund however need to be defined in order not to be confused with

duties of Trustees towards their constituents i.e .those who elected /appointed them. Representative duties arise in the exercise of discretionary powers provided the Board by the Rules and which have no bearing on any fiduciary duty to the Fund per se. Typically this type of situation will arise when it comes to having to deal with the competing interests of Members and the Employer in regard to surplus not required by the Fund.

My view and recommendation is that provided there is no conflict between the interests of the Fund and the interests of constituents, Trustees should be free in terms of legislation to openly (as opposed to deviously) promote the interests of the constituency they represent and bargain/negotiate /compromise to achieve this end. This is surely what representation is all about and certainly what is realistically expected of Elected Trustees by the Members who elected them and also of Appointed Trustees by the Employer who appointed them.

However there is more to the issue of representation than just casting votes in the Board Room. Representation requires that Appointed / Elected Trustees are expected by constituents

(1) to consult with them on important issues that affect them and at least gain some knowledge and understanding of constituency expectations.

(2) to periodically report back to constituents either at compulsory reportback meetings with constituents or by direct periodical reporting.

In order to achieve this legislation needs to specifically provide for

(a) right of access by Appointed/Elected Trustees to constituents including access to the membership lists (the Board of my fund does not allow Elected Trustees access to the Membership lists nor are nominators of prospective candidates for election to the Board allowed access to the membership lists (voters rolls) which makes it difficult to canvass election votes on a manifesto as would be normal in a democratic election)

(b) right of access by Members to Elected Trustees as well as by the Employer to Appointed Members for factual information, to express concerns and to present complaints received from Members/ Employer to the Board.(Realistically of course the Employer already does have access to any Employer-Appointed Trustee and is being kept fully in the picture on matters that impact on the Employer, correctly so, in my opinion.)

(c) an end to the secrecy and lack of transparency in the conduct of the Fund except and only in respect of privacy laws affecting the Members except with their consent. While

legislation provides Members with limited rights to access the Financial Statements and last Actuarial Report, this is far too inadequate. It effectively enables the Employer - Appointed Trustees to control information and the accountability of the Board to the Members. Information is power and if Members can legitimately be kept in the dark with Elected Trustees powerless to intervene, there is no way the Members can be put in a position to demand accountability or stand up for their rights as suggested by the Minister that they should be doing. I see no reason why an open house policy subject to personal privacy laws should not be legislated with Members /Employer being allowed to attend Board meetings as observers if they ask to do so.

Another relevant aspect causing confusion which needs to be clarified in the legislation is the question as to who owns the Fund. Normally as in the case of any "trust" involving trust assets, the beneficiaries own the trust subject to the Trust Deed and upon termination the assets are distributed to them. Members of a Pension Fund are the only beneficiaries of the Fund and as such are the only stakeholders. The Employer and Former Members are not beneficiaries in terms of the objects of a Pension Fund and its Rules but have rights including creditor rights in terms of the Rules and legislation which must be respected by the Board. They should however more appropriately be referred to as rightsholders rather than stakeholders as the term stakeholder implies ownership on a par with the Members (Beneficiaries) which is not the case.