



Our Reference: 36866/09

10 November 2009

Mr Phillip Sweeney  
12 Highland Way  
HIGHTON VIC 3216

Dear Mr Sweeney

**CCSL LIMITED (ACN 104 967 964)**

Thank you for your recent letters to ASIC providing further information about your dispute with CCSL Limited (ACN 104 967 964) (CCSL). ASIC's enquiries into this matter have taken longer than expected, and I apologise for the delay in responding to you.

You have requested ASIC's assistance to compel CCSL, which acts as the trustee of your former superannuation fund, the Elders IXL Superannuation Fund and later the Foster's Superannuation Fund, to provide you with a copy of the Trust Deed that was in force when you commenced employment with Carlton and United Breweries Limited, later Foster's Group Limited, on 25 March 1985.

You have provided ASIC with your letter of engagement with Carlton and United Breweries Limited dated 25 March 1985. This letter states that you will be eligible to join the Elders IXL Superannuation Fund after a qualifying period of six months. This would mean that you joined the Fund as it was constituted on or around 25 September 1985.

As you are aware, following your initial request for assistance, ASIC made contact with CCSL about this matter. CCSL has advised ASIC that it initiated a search of its records and the archives of the previous trustee and has uncovered a copy of an executed Trust Deed dated 26 August 1986 which contains the rules of the Elders IXL Superannuation Fund dated 19 August 1985. The information before ASIC indicates that these are the rules that are relevant to your request, and CCSL has advised that it has provided you with a copy of the Trust Deed.

I understand that you are seeking a copy of the Trust Deed to assist with understanding the calculation of salary for your defined benefit superannuation entitlement. You consider that your salary has been undervalued as it does not reflect your total remuneration or taxable income in the final three years of your employment. You also state that the Trustee has admitted to using 'cash salary' to calculate your entitlements, as opposed to 'the yearly rate of remuneration', which is the term used in the Trust Deed in your possession.



**ASIC**

Australian Securities & Investments Commission

Level 24, 120 Collins Street  
Melbourne VIC 3000  
GPO Box 9827 Melbourne VIC 3001

Telephone: (03) 9280 3200  
Facsimile: (03) 9280 3444

10 November 2009

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ASIC has assessed your complaint about CCSL's conduct and considers that it relates primarily to a dispute about your personal circumstances, for which you are able to pursue your own private action. ASIC must consider whether to take regulatory action in relation to a particular case would be in the public interest, and ASIC does not generally take action on behalf of individual complainants or to recover compensation for individuals. For these reasons, ASIC has determined not to take any further action against CCSL in relation to your specific concerns at this time.

ASIC is unable to provide you with legal advice, and I would encourage you to continue to seek your own independent legal advice about remedies that may be available to you to resolve your dispute.

You have advised ASIC that you previously raised this matter with the Superannuation Complaints Tribunal (SCT), which determined it did not have jurisdiction to consider your complaint. The SCT cannot consider a complaint that 'relates to the management of a fund as a whole', which would include complaints about the definition of income which applied to all members of the fund. However, a personal dispute about how a definition of income is *applied* to a member's personal entitlement under a defined benefit scheme *may* be considered by the SCT. You may, therefore, wish to raise this matter again with the SCT again, ensuring that you describe the matter in *these terms*. The SCT can also seek information from superannuation trustees.

#### **ASIC's responsibilities in relation to superannuation**

In your letters, you have also requested information on the division of responsibilities between ASIC and the Australian Prudential Regulatory Authority (APRA) in relation to superannuation.

Disclosure by superannuation funds and fund trustees is the primary area of ASIC jurisdiction in relation to superannuation, in addition to the enforcement of the consumer protections for super fund members. In effect, this means ASIC administers the regulatory requirements for superannuation funds and fund trustees to the extent that they relate to disclosure. ASIC is also responsible for a fund trustee's compliance with determinations of the SCT and duty to establish complaint management arrangements.

Beyond these functions, APRA is generally responsible for the oversight of a fund trustee's operations and obligations, including its requirements to retain certain relevant documents. I note that you have also raised a complaint with APRA about this matter.

ASIC is aware of your complaint against CCSL and intends to conduct further confidential consultations about its operations in a broader context. The information you have provided has been included on ASIC's confidential internal database and will be available for consideration as part of this process.

Please be aware that there are restrictions upon when ASIC may make public comments in relation to its operational activities. These restrictions are set out in ASIC's *Regulatory Guide 47 'Public Comment'*, and protect the confidentiality of information reported to ASIC and the integrity of ASIC's investigation and enforcement activities. For these reasons, I am unable to comment on what, if any, action ASIC may take in the future.

10 November 2009

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**Commonwealth Ombudsman**

If you have concerns about ASIC's management of your matter, you can lodge a complaint with the Commonwealth Ombudsman. The Commonwealth Ombudsman cannot review or re-determine ASIC's decision, but does have the power to investigate misconduct, or review the manner in which a decision has been made to ensure that it was done fairly and in accordance with the law.

The contact details for the Commonwealth Ombudsman are as follows:

Commonwealth Ombudsman  
PO Box K825  
Haymarket NSW 1240

Telephone: 1300 362 072  
Website: [www.comb.gov.au](http://www.comb.gov.au)

If you have any questions in relation to this letter please contact me on 03 9280 3530.

Yours sincerely



**Greg Hackett**  
**Misconduct & Breach Reporting**  
**Stakeholder Services**



**ASIC**

Australian Securities & Investments Commission

Our Reference: CCU-10\0195  
Your Reference:

Level 24, 120 Collins Street  
Melbourne VIC 3000  
GPO Box 9827 Melbourne VIC 3001

Telephone: (03) 9280 3200  
Facsimile: (03) 9280 3444

2 July 2010

**COPY**

Mr Phillip Sweeney  
12 Highland Way  
HIGHTON VIC 3216

Dear Mr Sweeney

Thank you for your letter dated 25 April 2010 and previous letters to ASIC concerning your dispute with CCSL Limited and Foster's Group Limited about your superannuation payment from the Foster's Group Superannuation Fund.

As you are aware, ASIC made contact with Foster's Group Limited in February 2010 requesting information about its calculation of your salary for your defined benefits entitlement with your permission. That information has finally been received and ASIC has now assessed that information in addition to that provided by you in respect of your complaint.

#### **Background**

It is understood that you were employed by Carlton and United Breweries Limited (CUB) in 1985, and became a member of the Elders IXL Superannuation Fund shortly thereafter. As a result of the Foster's Group Limited (Foster's) acquiring the CUB business, you were transferred into the Foster's Group Superannuation Fund (the Fund).

Our enquiries have revealed that in 1985, Carlton United Breweries, adopted a Total Remuneration Policy and invited management staff to participate. Under the policy, employees received a total remuneration package that allowed them to choose, within certain parameters, the mix of benefits (including packaged items such as motor vehicle expenses) and cash that they received. Within the package, the superannuation component was set as 18% x Superannuation Salary. Superannuation Salary was defined in the relevant policy document as gross cash plus voluntary before-tax superannuation contributions

Foster's have informed us that under the package, members were able to adopt a strategy of minimising their superannuation payment over a period of time by making minimising their gross cash amount by maximising packaging options like cars. Members were then able to opt out of such packaging options, and generally would do

so leaving three years prior to ending employment; 3 years being the period over which Final Average Salary for Defined Benefit purposes was calculated.

It is understood that you participated in that policy from August 1992, and that in the years prior to your redundancy, you elected to package two cars and car parking as part of your Total Remuneration Package.

#### **Conduct of the Trustee of the Fund**

I note that you were made redundant on 18 October 2006. The applicable trust Deed governing your benefit entitlement is that dated 31 March 2006 (Trust Deed). Rule 2.3 of the Trust Deed provides for Resignation benefits (Rule 2.3.6), the resignation benefit being the Member's Reserve. Rule 2.1.3 defines the Member's Reserve as follows:

Member's Reserve in respect of a member means the product of (i)(ii) and (iii); where:

- (i) Is the Member's Benefit Multiple;
- (ii) Is the Member's Final Average Salary; and
- (iii) Is the factor set out in Table 1.

I note that in previous correspondence you have only disputed amounts under item (ii).

Rule 2.2.3 defines Final Average Salary as follows:

"Final average salary in respect of a member means the Member's average salary during the three years of the Member's service immediately prior to the Member's ceasing to be an employee."

Rule 1.1.1 defines Salary as follows:

"Salary means in relation to a Member the yearly rate of remuneration advised by the Employer for the purpose of determining Benefit payments and Contributions under the rules excluding, unless the Principal employer otherwise directs, any overtime, directors fees, special grants, allowances, or other amounts . . ."

I note that remuneration is not defined in the trust Deed. "Salary" is as advised by the Employer, and the Trustee has no discretion to substitute a different amount without the approval of Employer. Accordingly, the Trustee has calculated your benefit in accordance with those rules and the salary advised by the Foster's Group, and there is nothing to suggest that the Trustee has acted improperly or failed to fulfil their duties as Trustee in this regard.

#### **Conduct of Foster's**

In your correspondence you have raised concerns relating to discrepancies between group certificates and the amount advised to the Fund by Foster's as your superannuation salary. ASIC has been advised by the Foster's Group that the discrepancy in these amounts reflects the bonus paid under the Short Term Incentive Program (STIP). Foster's have informed ASIC that STIP has never been included in the definition of salary used for the purposes of calculating benefits for defined

benefit members. On this basis, there is nothing to suggest any misconduct on behalf of Foster's in relation to superannuation amounts advised to the Trustee.

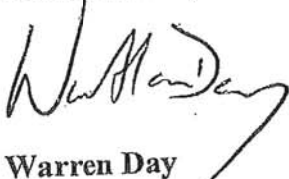
Concerns you have raised regarding the terms of your employment and the effect of the Total Remuneration Policy adopted by Carlton United on those terms are issues of a private contractual nature, and, absent any evidence of misconduct, ASIC has no jurisdiction to intervene in this regard. As previously advised, if you feel that your rights have been affected, you may wish to seek legal advice as to what avenues of action may be open to you.

**Going forward**

In light of the foregoing ASIC considers that it has given due consideration to the issues you have raised in relation to Foster's and that our enquiries in this regard have concluded. Any further correspondence will be considered and assessed but may not be responded to. If you are not satisfied with our decision then you should raise the matter with the Commonwealth Ombudsman.

Nevertheless, if you wish to discuss the contents of this letter, please contact me on (03) 9280 3502.

Yours sincerely



**Warren Day**  
**Senior Executive**  
**Stakeholder Services**



ASIC

Australian Securities & Investments Commission

Our Reference: [REDACTED]

17 November 2014

[REDACTED]

Level 7, 120 Collins Street,  
Melbourne VIC 3000  
GPO Box 9827, Melbourne VIC 3001  
DX 423 Melbourne

Telephone: +61 3 9280 3200  
Facsimile: +61 3 9280 3444  
www.asic.gov.au

Dear Mr [REDACTED]

### **Your allegations of trustee fraud**

Thank you for your letter dated 16 October 2014 addressed to Mr Greg Medcraft, Chairman of the Australian Securities and Investments Commission (ASIC). The Chairman has requested that I respond to you.

### **Your concerns**

You have raised concerns about the operation of historic trusts that we understand were established to pay retirement benefits to employees. You have referred to two trusts, which you call the Elders IXL Superannuation Fund and the Elders-GM Women's Provident Fund.

We understand that you believe that the trust deeds for these trusts at various times through their history contain clauses entitling beneficiaries to generous benefits, including a pension for life and a survivorship pension for spouses. We also understand that, historically, membership of the Elders IXL Superannuation Fund was limited to male employees, and the Elders-GM Women's Provident Fund was limited to females.

Your most recent correspondence makes the following allegations:

- Approximately \$100 million has disappeared from this Elders IXL Superannuation Fund, and that this Elders-GM Women's Provident Fund has disappeared;
- Fraudulent changes were made to the trust deed for the trusts; and
- Deeds of variation made in the 1980s did not comply with requirements set out in the original trust deed to validly vary the trust, and therefore they are not effective.

You have also advised that you are reporting this matter to ASIC as a 'whistleblower', and seek compensation for the alleged fraud. ASIC's records indicate that we recently corresponded with you in relation to similar concerns.

## **Background**

While the material you have provided to ASIC about the history of these trusts is unclear, it is our understanding that a private trust, that later may have become the superannuation fund you call the Elders IXL Superannuation Fund, commenced in 1913. The trust was to pay retirement benefits to certain senior employees of a number of companies that were eventually taken over by Foster's Group Pty Ltd, as it is now known (**Foster's Group**).

We understand that this trust became the general employee superannuation fund for Foster's Group employees, and it is now constituted as the AusBev Superannuation Fund (**the Fund**). The Fund has recently undergone a successor fund transfer into the Carlton & United Breweries Superannuation Plan, a sub-plan of the Plum Superannuation Fund, which has PFS Nominees Pty Ltd (ACN 082 026 480) as trustee (**the Trustee**).

ASIC does not enforce trust law nor do we regulate or register private trusts, and we have no historic records of the Elders IXL Superannuation Fund or the Elders-GM Women's Provident Fund. We have relied on the information you and others have provided to draw these conclusions about the status of the trusts. As such, we cannot confirm the details about the trusts' history and we are not aware of how the Elders-GM Women's Provident Fund may have been wound up.

## **Participation in whistleblower program**

You have advised that you wish to participate in ASIC's whistleblower program.

As you may know, the *Corporations Act 2001* (**Corporations Act**) grants certain legal rights and protections to whistleblowers, which is a specifically defined class of people. From the information you have provided to ASIC, you do not fall within the 'whistleblower' definition contained in the Corporations Act. This is because your concerns relate to the conduct of current and former trustees for these trusts, and we understand that you are not a current employee or office holder of the relevant trustee.

If you would like to learn more about whistleblowers and the rights and protections available to individuals providing information to ASIC, please read ASIC Information Sheet 52 *Whistleblowers and whistleblower protection*, available from our website.

Please note that the law does not give ASIC any special standing or specific powers to act on behalf of people who fall within the statutory whistleblower definition in relation to their legal rights and protections as whistleblowers. We also do not provide personal legal advice. Accordingly, if you believe that these rights may apply to you, we strongly encourage you to seek legal advice about your personal circumstances.

## **ASIC's consideration of your concerns**

ASIC has considered the information you have provided about the alleged fraud by the trustees operating these trusts occurring up to the 1980s, and that the variations to the trusts may be ineffective.



### *Access to fund documents*

ASIC's records indicate that you previously raised concerns with ASIC about your requests to the Fund's trustee for access to certain trust documents. There is a power in the Corporations Act allowing certain superannuation fund members access to certain documents about the fund from the superannuation trustee (section 1017C of the Corporations Act). ASIC's specialist Investment Managers and Superannuation team made inquiries with the trustee about your concerns. However, the team's inquiries did not reveal sufficient evidence of breaches of the trustee's obligations to warrant further regulatory action. This was because the documents that you had requested from the trustee were outside of the scope of this provision.

### *Rights under earlier trust deeds*

As these earlier trusts have been replaced by or incorporated into the Fund's current governing rules, it appears that the clauses in the earlier trust deeds are no longer in force and do not give rights such as the pension you refer to. In addition, it is unclear whether the colleagues you allege are entitled to this pension were members or beneficiaries of the trust, before it became the Fund. Moreover, as ASIC does not enforce trust law, we are unable to comment on whether deed variations are legitimate or how to resolve questions about allegedly ineffective deed variations. These are questions about legal rights, and ASIC cannot provide legal advice to members of the public.

If you believe you are a beneficiary of a historic trust, and have concerns with the way the historic trustees have operated, you may wish to seek legal advice about whether you can pursue your concerns under trust law. This includes whether subsequent variations to the trust may be ineffective.

### *Fraud allegations*

We have also considered your allegations of fraud by the trustee occurring up to and during the 1980s. The basis of these allegations is unclear, and the material you have provided does not evidence fraud. We note that ASIC did not exist at this time. Further, ASIC is statute barred from taking criminal action in relation to conduct occurring more than five years previously.

For these reasons, ASIC is unable to take further action in relation to this and other matters raised about the Fund and these historic trusts.

ASIC has considered the concerns you have raised, and responded a number of times in relation to these matters. We are unable to assist you further with your concerns and our consideration of this matter is concluded. ASIC does not intend to correspond further with you in relation to these same issues. This means that we will not be responding to any further letters about these funds.

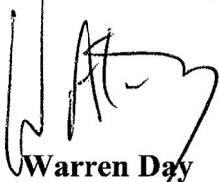
### **Commonwealth Ombudsman**

If you remain dissatisfied with ASIC's handling of your report of misconduct, you may raise a complaint with the Commonwealth Ombudsman. The Commonwealth Ombudsman cannot review or re-determine ASIC's decision; however, it does have the power to investigate misconduct or review the manner in which a decision has been made to ensure that it was done fairly and in accordance with the law.

The contact details for the Commonwealth Ombudsman are as follows:

Commonwealth Ombudsman  
GPO Box 442  
Canberra ACT 2601  
Telephone: 1300 362 072  
Website: [www.ombudsman.gov.au](http://www.ombudsman.gov.au)

Yours sincerely

A handwritten signature in black ink, appearing to read 'Warren Day', written over the printed name.

**Warren Day**  
**Senior Executive Leader**  
**Assessment & Intelligence**