



**ASIC**

Australian Securities & Investments Commission

Our Reference: CCU-10\0195

Your Reference:

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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**