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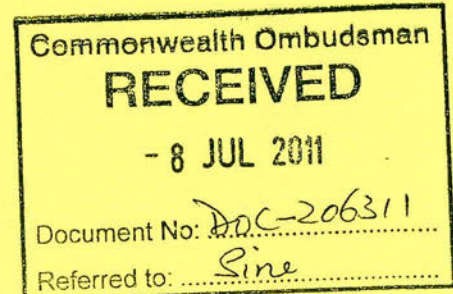
ASIC

Australian Securities & Investments Commission

Our Reference: CCU-11\0297
Your Reference: 2011-1062240

5 July 2011

Ms Elisha Hill
Senior Investigation Officer
Commonwealth Ombudsman
PO Box K825
HAYMARKET NSW 1240



Dear Ms Hill

I refer to your email of 6 June 2011 in which you advise of intention to investigate a complaint from Mr Phillip Sweeney regarding ASIC's handling of his complaint regarding obtaining a copy of Trust Deed and Rules concerning Mr Sweeney's superannuation entitlements from his former employer Carlton and United Breweries ("CUB").

Mr Sweeney has corresponded extensively with ASIC since 2009 regarding his CUB complaint and other matters that Mr Sweeney regards as related to his CUB complaint. Indeed ASIC has more than 12 files comprised of almost entirely correspondence from Mr Sweeney to various ASIC officers arising from these complaints and many other files that relate to FOI requests that arise from the same complaint. During certain periods of 2010, Mr Sweeney wrote to one or more officers in ASIC at least two times per week.

Please find below a history of ASIC's dealings with Mr Sweeney, including details of our consideration of the matters raised in your correspondence. Given the large amount of documents held by ASIC in relation to Mr Sweeney we are happy to make those files available for your inspection should you determine that access to the files would assist you in your investigation.

I would also add that in February of this year Mr Sweeney commenced proceedings in the Federal Court seeking a review of ASIC's decision to take no further action on his CUB complaint. Mr Sweeney agreed in April 2011 to withdraw those proceedings.

Mr Sweeney also applied for a review of ASIC's decision to take no further action on his CUB complaint in the Administrative Appeals Tribunal. In May 2011 Mr Sweeney also withdrew those proceedings. There are extensive documentary holdings

in relation to the litigation in the Tribunal and the Federal Court that is also available for your inspection if required.

Complaint history

1. Mr Sweeney's complaint in relation to obtaining the Trust Deed of his former superannuation fund

Mr Phillip Sweeney was 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, Mr Sweeney was transferred into the Foster's Group Superannuation Fund (the Fund).

Mr Sweeney wrote to ASIC on 31 March 2009 to seek our assistance in compelling Corporate Combined Superannuation Limited (CCSL), which acted as the Trustee of the Fund, to provide him with a copy of the Trust Deed that was in force when he joined the fund on 25 March 1985.

Mr Sweeney was seeking a copy of the Trust Deed to assist in his understanding of the basis upon which the salary component of his defined benefit superannuation entitlement was calculated. Mr Sweeney considered that his salary has been undervalued as it did not reflect his total taxable income in his final three years of employment. Mr Sweeney also asserted that the Trustee had admitted to using 'cash salary' to calculate his entitlements, as opposed to 'the yearly rate of remuneration', which was the term used in the Trust Deed in his possession.

Mr Sweeney provided ASIC with a letter of engagement with CUB dated 25 March 1985, which indicated that Mr Sweeney was eligible to join the Elders IXL Superannuation Fund after a qualifying period of six months, which meant that Mr Sweeney joined the fund as it was constituted on or around 25 September 1985.

Upon receipt of Mr Sweeney's written consent, an ASIC officer made contact with the Trustee in relation to his request, who confirmed that a copy of the current trust deed was available for Mr Sweeney to inspect at the Trustee's office. That representative also confirmed that the Trust deed and certain amendments were consolidated and redrafted into a 'plain English' style with effect from 31 March 2006, and that the Trustee may have difficulty accessing all of the older documents related to previous versions of the Trust deed, as these documents were generally the responsibility of the former Trustee. Mr Sweeney was advised of this by letter dated 12 May 2009 and invited to access the Trust Deed at the Trustee's offices.

Mr Sweeney subsequently contacted ASIC noting that the 12 May 2009 letter referred only to the current trust deed and not the deed that was in effect at the time at which he was employed. ASIC made further contact with CCSL about the matter and CCSL subsequently advised ASIC that despite an exhaustive search, it had not been able to locate an executed copy of the Trust Deed that was in force on 25 March 1985.

However CCSL informed ASIC that it had located a Trust deed dated 26 August 1986 which contained the rules of the Elders IXL Superannuation Fund dated 19 August

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1985 and that these were the rules relevant to Mr Sweeney's request. CCSL advised ASIC that it had provided Mr Sweeney with a copy of that Trust Deed.

Therefore Mr Sweeney has been provided by CCSL with copies of both the Trust deed dated 26 August 1986 and the Trust deed in effect at the time of his complaint. CCSL have advised that they cannot locate a copy of the Trust deed that was in force at 25 March 1985.

Your correspondence of 6 June 2011 asks:

- Does section 1017C of the Corporations Act operate to provide a means for Mr Sweeney to be provided with a copy of the Trust Deed extant as at 25 March 1985?
- If so does ASIC have the power to compel the Trustee to provide Mr Sweeney with that document.

Section 1017C of the *Corporations Act 2001 (the Act)* requires trustees to give members or former members information that the person reasonably requires to understand any benefit entitlements that the person may have or to understand the main features of the fund. ASIC formed the view that the trust deed was relevant for Mr Sweeney to understand his entitlement, and whether or not it dealt with the calculation of base salary for defined benefit purposes and accordingly approached CCSL to facilitate access to the documents on Mr Sweeney's behalf.

While ASIC was concerned at the length of time it took for CCSL to locate the Trust Deeds and the fact that the deed in effect in 1985 was unable to be located ASIC was satisfied that all reasonable searches had been undertaken by CCSL. The matter was considered by ASIC's (then) Superannuation Funds stakeholder team and they determined that:

- There was no evidence of systemic misconduct on the part of the Trustee; or
- There was no evidence that the difficulties incurred in locating the 1985 deed were having any further effect other than on Mr Sweeney's personal circumstances; and
- The Trustee was able to supply Mr Sweeney with documents that appeared to be relevant to his circumstances,

At that time ASIC also considered that there was insufficient evidence to indicate misconduct on the part of Foster's or the Trustee in relation to the calculation of his entitlements, and Mr Sweeney was sent a letter to that effect.

Please note that in subsequent discussions between Mr Sweeney and ASIC, Mr Sweeney confirmed that the deed itself was not the central issue of his concerns, but rather the salary upon which his superannuation benefit has been calculated.

2. Mr Sweeney's complaint in relation to the calculation of his benefit entitlement

Following receipt of the trust deed from the Trustee, Mr Sweeney made a complaint alleging misconduct on the part of both Foster's and the Trustee in relation to the calculation of his superannuation benefit entitlement and sought ASIC's intervention.

ASIC made further enquiries of the Trustee and Foster's to further assess Mr Sweeney's complaint. Those enquiries 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 of Foster's as gross cash plus voluntary before-tax superannuation contributions

Foster's informed ASIC that under the package, members were able to adopt a strategy of minimising their superannuation payments by reducing 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 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 Mr Sweeney participated in that policy from August 1992, and that in the years prior to his redundancy, he elected to car and car parking package as part of his Total Remuneration Package.

Calculation of 'final average salary'

Mr Sweeney was made redundant on 18 October 2006. The applicable trust Deed governing his benefit entitlement at the time was 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.

In his correspondence with ASIC Mr Sweeney disputed amounts calculated 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 . . . "

Remuneration is not defined in the Trust deed, rather "Salary" is as advised by the Employer. The Trustee had no discretion to substitute a different amount without the approval of Employer. Equally, contrary to Mr Sweeney's assertion, there is no legislative imperative that the amount advised to the Trustee as salary should be the same as amounts required to be advised as wages on group certificates to the Australian Tax Office (ATO). Accordingly, the Trustee calculated Mr Sweeney's salary in accordance with those rules and the salary advised by the Foster's Group, and there is nothing to suggest that the Trustee acted improperly or failed to fulfil its duties as Trustee in this regard.

Short term incentive bonus and its impact on superannuation salary

In his correspondence, Mr Sweeney raised concerns relating to discrepancies between group certificates and the amount advised to the Fund by Foster's as his superannuation salary. ASIC was 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.

The total remuneration policy adopted by Fosters

The concerns that Mr Sweeney has raised regarding the terms of his employment and the effect of the Total Remuneration Policy adopted by CUB on those terms are issues that are of a private contractual nature, and, absent any evidence of misconduct, ASIC formed the view that it had no jurisdiction to intervene in this regard.

ASIC's no further action position and issues raised in recent correspondence

Given the above, ASIC considered that it has given due consideration to the issues Mr Sweeney has raised in relation to Foster's, and that its enquiries in this regard to the complaints had concluded. Mr Sweeney was informed of this by letter dated 2 July 2010 from Warren Day, Senior Executive Leader, Stakeholder Services.

Following receipt of the letter Mr Sweeney has continued corresponding with ASIC, raising the following issues relevant to our legislative responsibilities:

Superannuation contribution calculation

In his continuing correspondence Mr Sweeney has asserted that the applicable contribution rate for his superannuation was 0%, and in that regard the Trustee and Foster's have provided misinformation to ASIC and the SCT. However, the superannuation value of 18% did not refer to contributions that members made from salary, but rather, was an amount determined by the Fund's actuary as representing the value of the superannuation defined benefit provided to staff each year. According to Foster's, it reflected the value of benefits accruing at 17.75%, and allowance for

contribution tax, administration and insurance expenses. While Mr Sweeney was able to elect the values for the other components of his remuneration, he had no such power in relation to the superannuation component, as it was automatically calculated at 18% of his elected cash proportion plus any voluntary contributions on his part.

It appears that this misunderstanding on the part of Mr Sweeney has led him to assert that accounting information submitted to the SCT and ASIC by the Trustee are incorrect and unaudited. However ASIC is of the view that there is no basis for this allegation.

Access to audited trust accounts of the Fund

Mr Sweeney has also subsequently asserted that he has a right to be provided with copies of the audited trust accounts of the Trust under section 1017C of the Act. While section 1017C requires that trustees give members or former members information that the person reasonably requires to understand any benefit entitlements that the person may have or to understand the main features of the fund, it is our view that the operation of the section does not extend to obtaining the audited trust accounts. Furthermore ASIC is satisfied from our inquiries that the Fund has complied with its reporting requirements under the Act.

Mr Sweeney further asserts that he is entitled to these accounts by virtue of statements made in the product disclosure statement (PDS) of the Fund. ASIC's view is that while the PDS states that members are entitled to "certain accounts and other documents by lodging a written request with the Trustee" this statement does not oblige the Trustee to provide a copy of the audited trust accounts to members on request.

I have enclosed key pieces of ASIC's correspondence with Mr Sweeney with this letter. As noted above if you require access to our extensive documentary holdings please let me know and we can arrange for an inspection of our files.

The operation of s1017C of the Corporations Act

In your correspondence of 6 June 2011 you ask the following:

- Does section 1017C of the Corporations Act operate to provide a means for Mr Sweeney to be provided with a copy of the Trust Deed extant as at 25 March 1985?
- If so does ASIC have the power to compel the Trustee to provide Mr Sweeney with that document?

As noted above we are satisfied on the information that has been provided to us regarding their searches for the 1985 Deed that it cannot be located by the Trustee. However if it was the case that it could be located we would be of the view that section 1017C might not operate to provide a means for Mr Sweeney to be provided with a copy of the Trust Deed from the Trustee that was in force on 25 March 1985.

At the time that Mr Sweeney first raised his request for assistance to access the document with ASIC in 2009, the power to be provided with information in subsection 1017C(2) is unlikely to have applied to his circumstances as the section

only applies to a 'concerned person' as defined in subsection 1017C(9) to be a person who is or was within the preceding 12 months, a member of the superannuation entity. As Mr Sweeney ceased to be a concerned person a year after receiving his pay out from the Fund in 2007 it is arguable that s1017C would not operate to apply to a person in his circumstances.


The power in subsection 1017C(2) only refers to information reasonably required for a concerned person to understand their entitlement. There is a question about whether Mr Sweeney reasonably requires the particular trust deed that was in force on 25 March 1985 as it may not be strictly related to his entitlement. Mr Sweeney's assertion that it is related to his entitlement is based on his belief that his employment contract entitled him to join the Fund as it was constituted on that day, even though he did *not* actually join the fund until September 1985. It is our understanding that Mr Sweeney has already received a copy of the Trust Deed that was in force on his date of entry to the Fund.

Finally, in our view the *Corporations Act 2001* does not provide ASIC with a power to compel the Trustee or to issue a direction to the Trustee that it provide Mr Sweeney with a copy of this document. Generally, were we to form a view that a trustee had breached its obligations under section 1017C, we may attempt to enforce section 1017C by commencing a criminal prosecution. Were we to be successful, this could result in the Court issuing a trustee with a penalty up to 100 penalty units. Section 1017C itself does not contain the power for a Court to order that the trustee provide the document that the concerned person reasonably requires, and for which a trustee would be in breach of the provision.

The injunction power in section 1324 allows ASIC to apply to the Court for an injunction order that requires a person to do any act or thing where it is in the opinion of the Court it is desirable to make the order. However the injunction power only applies in respect to a person in breach of the law. Similarly, it may be within the Court's general jurisdiction to order a trustee to provide a document to a person, but that would require the person to be successful in an application for the order.

While our enquiries with the Trustee and Mr Sweeney's former employer at the time that he raised his concerns with us were in part predicated on questioning their compliance with section 1017C, we did not intimate that we had formed a view that section 1017C applied to Mr Sweeney's circumstances, nor that the Trustee or employer had breached, or contributed to a breach of, section 1017C. We note that the Trustee and the employer responded to our enquiries with a view to addressing Mr Sweeney's concerns. Should you require anything further please do not hesitate to contact me directly.

Yours sincerely



Monique Adofaci
Senior Manager
Chief Legal Office
ASIC