Senate Select Committee on Superannuation and Financial Services

Main Inquiry
Reference (a) + (c)

Submission No. 52 (Supplementary to Submission No. 29)

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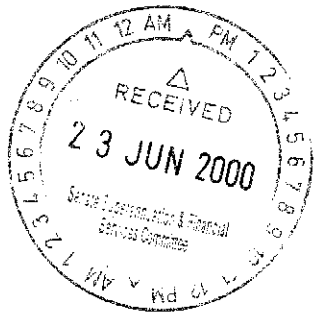


20 June 2000

Ms Sue Morton
Secretary
Senate Select Committee on Superannuation and Financial Services
Parliament House
Canberra ACT 2600

Dear Ms Morton,

I am writing in response to matters raised with me by Committee members at the hearing on 15 June.

First, the reference in the ACTU submission to a suggestion that the ATO has budgeted $2m for a campaign on choice of fund is drawn from the Committee's report on the "Roundtable on Choice of Superannuation Funds" (March 2000). The report states at page 23:

"The Committee is aware that the Australian Taxation Office is currently considering the issue of an education campaign, but that the Government's position on this is not yet finalised. According to a recent article in the media, the ATO may have budgeted $2 million for initial work in this area. (Australian Financial Review, 25 January 2000, p32) *The commentator observed that this is well short of the $40 million recommended by ASFA."*

Second, Senator Sherry asked a number of questions concerning the inclusion of certain funds in Queensland state awards.

It should be recalled that a number of funds were established in Queensland in response to a threat from the Bjelke-Peterson Government that it would legislate to prevent national funds operating in Queensland.

On 29 September 1989 the Queensland Industrial Conciliation and Arbitration Commission issued a Declaration of Policy on the subject of award superannuation provisions. A copy of the Declaration is attached. The meaning of "approved fund" for the purposes of inclusion in an award is set out in clause 4 of the draft superannuation clause commencing at page 1109 of the *Gazette*.

The clause makes it clear that the Commission's preference is for multi-employer funds with joint union/employer management. Exceptions are provided for in circumstances including where there is agreement between an employer and a union or where an employer has been making contributions prior to the date of the Declaration. In these cases, it would appear that the fund would apply only in respect to that employer.

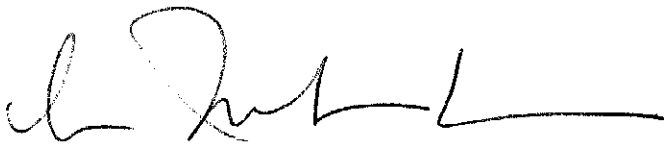
EPAS is a public offer fund which, pursuant to section 93 of the Superannuation Industry (Supervision) Act 1993, is required to either have an independent trustee or comply with the equal representation rules. EPAS purported to have a trustee board comprising four independent directors; that is, representative of neither employers nor employees.

EPAS is one of the nominated funds in the state award applying to motels in Queensland, apparently as a result of insistence by the Motels Association, although it would appear that the fund does not satisfy the criteria in the Commission's Declaration.

Third, Senator Allison asked for information concerning the number of proceedings in relation to enforcement of the SGC prosecuted under the Workplace Relations Act, and the number of disputes taken to the Commission in relation to superannuation.

I will endeavour to obtain more information in relation to this; however, the existence of award provisions and the possibility of enforcement through the award system allows unions to more effectively persuade employers to comply. I am also informed that funds refer to award obligations in their own arrears processes, and this is more effective than a threat of eventual ATO action.

Yours sincerely,



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The Queensland Government

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QUEENSLAND INDUSTRIAL CONCILIATION AND ARBITRATION COMMISSION

Industrial Conciliation and Arbitration Act 1961—1989
s. 11 — application for declaration of policy

Trades and Labour Council of Queensland

AND

The Crown and Others

(No. B258 of 1989)

The Australian Workers' Union of Employees, Queensland

AND

The Crown and Others

(No. B306 of 1989)

DECLARATION OF POLICY

OCCUPATIONAL SUPERANNUATION

COMMISSIONERS LEDLIE, BOUGOURE, NUTTER
29 September 1989

Superannuation — Declaration of Policy — Wage Fixing Principles — Applicatoin — Contributions — Definitions — Approved Funds — Challenge of a Fund — Fund Selection — Enrolment — Record Keeping — Exemptions.

DECISION

These were two applications before us each of which was amended during the proceedings to seek a Declaration of Policy that—

1. All Awards and Industrial Agreements of the Commission contain provisions relating to a 3% contribution to occupational superannuation; and

2. The basis of such superannuation entitlements be in the form of detailed provisions which were proposed.

The former application sought a General Ruling as a first alternative though this element of the claim was abandoned during the early stages of the proceedings.

At the outset Mr R.H.Steinitz challenged the validity of the second of the mentioned claims insofar as the authority of the Secretary of the applicant Union had not been filed with the Registrar as provided by the Rules of Court. A previous pronouncement of the Industrial Court of Queensland had held that such a requirement was mandatory and not merely directory. However on the day of the challenge the President of the Industrial Court, His Honour Mr Justice Moynihan, issued a decision in matter C11 of 1989 (Daryl Samuel Manley of B.S.& D.M.Manley Grain Growers and The Australian Workers' Union of Employees Queensland), which the Commission accepts as authority for the proposition that this requirement of the Rules is not mandatory. In the light of that decision and pursuant to clause 2(h) of the First Schedule we exercised discretion in favour of the applicant and over-ruled the challenge.

The proceedings attracted a number of respondent parties whose view points were of a wide range. As well, several interveners sought and were granted leave to present material for our consideration.

It is not our intention to attempt to summarise the contents of 505 pages of transcript and some 62 exhibits, we have nevertheless had regard for all material presented in reaching our conclusion.

The respondents and interveners were generally not opposed to the concept of occupational superannuation or the need for Award provisions to cater for it. Some strenuously opposed the need for a Declaration of Policy arguing that a case by case approach was desirable and that undue expectations would be created by the release of a Policy Decision. Others urged that a Declaration would remove some of the confusion and uncertainty which was seen to have developed. Whilst supporting the need for a Policy Declaration others were emphatic that —

— the primary development of occupational superannuation should continue to be by way of negotiation between the parties with a view to reaching agreement with arbitration available as a last resort;

— any resultant agreement between the parties should be acknowledged and approved by the Commission provided that the contents of that agreement do not offend the Wage Principles; and

— any resultant Declaration should offer clear guidelines for general application which nonetheless should give scope to the parties to tailor Award provisions for specific needs yet recognise that departures therefrom should be allowed where special and compelling circumstances existed.

Jurisdiction

There were also several contentions put to us which questioned the jurisdiction of the Commission to respond to the claims before it. We recall that neither applicant seeks an Award variation and that each of them seeks a Policy Declaration appropriate to be used when specific claims are made. We are confident that neither the requests by the Applicants nor the decision we have arrived at place us in conflict with the provisions of the Trade Practices Act 1974 or the Industrial (Commercial Practices) Act 1984—1987. We are satisfied that the subject of occupational superannuation is adequately within the context of an "Industrial Matter" within the meaning of the Act.

Because of the nature of the relief sought by the applications we reject the contention that we should not respond to the claims on the ground that there is no actual Industrial Dispute in issue before us.

We have reached the conclusion that a Declaration of Policy should result from these proceedings and that the detailed provisions contained therein should be availed of for general application. We also accept that in appropriate cases either by agreement or by arbitration departures may be made therefrom within the scope of the Wage Principles where special and unusual circumstances are shown to exist. We have no difficulty in accepting that it is appropriate that claims for occupational superannuation should be the subject of discussion between the parties and that negotiations which result in agreement are the preferable means of addressing all relevant issues. We reaffirm that arbitration should be seen as a last resort and would add that agreement reached between the parties which does not offend the Wage Principles or the Commission's Policies should be given substantial weight. We also accept that if an agreement reached between the parties does offend such Principles or Policies, they should be afforded the opportunity to re-negotiate that agreement to conform therewith.

We also accept that provision should be made in any occupational superannuation provisions for exemptions to be considered in limited cases.

In determining the nature and extent of a Policy Declaration on this subject we have had regard to the amended applications before us and the range of material and viewpoints that have been expressed. We also bear in mind that on 29 April 1988 this Commission issued a decision in principle in respect of a claim for occupational superannuation under the Teachers' Award — Non-Governmental Schools (128 QGIG 209/14). Whilst that decision was given in the early stages of the development of Occupational Superannuation clauses we must be mindful of the fact that the parties in many instances could have applied themselves to the subject of Occupational Superannuation having regard to the viewpoints expressed in that decision. We recognise that some instances will have occurred where existing schemes have been enhanced to incorporate the 3% Occupational Superannuation contribution though one witness in the proceedings before us suggested that the prospect of increasing emphasis upon Occupational Superannuation in future years would discourage employees from making adjustments to pre-existing superannuation schemes.

Terminology

The words "Scheme" and "Fund" were used in the proceedings as apparently interchangeable terms. We have chosen to rely on the latter term and have incorporated a definition which we believe meets all requirements. We have also defined "Approved Fund" to simplify drafting necessary in a later clause which deals with the types of Funds which are "Approved Funds".

Contributions

Reference was made by a number of parties as to the earnings upon which the level of contributions should be calculated. We have framed a definition of "Ordinary Time Earnings" which would apply in most situations. Any matters of detail not encompassed therein can be dealt with in individual cases.

Though different views were put to us as to the regularity of the payment of contributions by the Employer we have framed wording which also recognises the wording of a particular Trust Deed.

It was evident that as to existing Award clauses there is considerable variation as to the eligibility of certain employees, particularly juniors and casuals in terms of the number of hours worked as is sufficient to make a 3% contribution purposeful. We are prepared to adopt one of the suggestions offered which was that an earnings level equivalent to 35% of the Guaranteed Minimum Wage be a prerequisite. This minimum level of earnings should be read in conjunction with a definition of "eligible employee" which further specifies a qualifying period of service as to hours/weeks of work in combination. Whilst we see these proposals in conjunction with one another as being appropriate in most circumstances we also recognise that there are particular areas which may require separate consideration. These have in other proceedings been canvassed in relation to casual employment of juniors who are still engaged in full time education. As well the incidence of labour mobility has been recognised as a factor to be taken into account. These and other features can be dealt with as necessary when applications to vary awards are being considered.

In that regard we would include a proposal canvassed as to regularly employed casuals who perform the same type of work for more than one Employer within an identifiable small group of Employers. Such an issue seems inappropriate to a broad response.

Selection of Funds

Before proceeding to the more detailed aspects of the matters before us we record that considerable discussion occurred over the question of 'freedom of choice'. As well, with reference to the making of superannuation contributions undue attention was devoted to the emotive term of 'employee's money'.

As to the latter it seems clear to us that the Occupational Superannuation Principle envisages an eligible employee attaining an entitlement funded by his Employer. In that respect it differs little from other Award benefits which could be similarly categorised. We can understand that traditional superannuation (whether mutually funded or not) was not an award provision, was largely if not solely funded by the Employer and usually initiated by him.

As a consequence, the Employer's interest in all relevant aspects of such a scheme including the placement of funds was understandable. We do not see the concept of 'freedom of choice' in relation to Occupational Superannuation Funds as extending to the interest of the Employer, except as may be necessary to ensure that he is not obliged to contribute to a multiplicity of funds.

As to employees any such concept must have limitations, for to apply 'freedom of choice' on other than a collective basis could result in a multiplicity of funds being selected by employees.

Further, the creation of Occupational Superannuation entitlements on an award-by-award basis has the capacity to impose a range of obligations in instances where an Employer is bound by a number of awards. To the extent that the respective award provisions adopt different approaches to funds selection, compliance with those awards could oblige an Employer to contribute to a multiplicity of funds contrary to the intentions of the Commission's decision which endorsed Occupational Superannuation within the Wage Principles.

We believe this situation must be addressed and have done so by acknowledging any Fund in existence at the time an award obligation as to Superannuation is created where that Fund has been approved by an Industrial Tribunal and has practical application to the majority of award employees of that Employer regardless of whether the Awards be of this Commission or the Australian Industrial Relations Commission.

As to the selection of a Fund a range of views was put to us. Apart from the preferences expressed by those urging nomination of funds there were submissions that we should not list any fund as to do so would be disadvantageous to other prospective funds. It was also put that Occupational Superannuation contributions should be able to be paid into any Fund approved under the Occupational Superannuation Standards Act 1987. We reject these contentions largely on the grounds that industry or multi-industry Funds, preferably under joint Employer/Union management are seen as a preferred response to Occupational Superannuation obligations. Further, that we do not see the concept of freedom of choice as to a selection of a Fund as extending to the Employer. He should be safeguarded against award based obligations to pay contributions to a multitude of funds. That is not to say that an Employer with a diversified workforce would necessarily resile from making payments into more than one fund, rather that he should not be required to do so.

We note that none of the claims before us seeks an exclusive right to recognition of a particular Fund though some of the parties seemed to believe that was the case. We believe that it is not desirable that this decision or the accompanying draft Policy clause

nominate any particular Fund for inclusion in any award provision. Except where the Commission determines it is appropriate to specify a Fund or Funds the number and extent of approved Funds is a matter for determination by the Commission on an award by award basis.

We are satisfied that in the determination of an "industrial matter" the Commission has jurisdiction which can extend to a requirement that payment of superannuation contributions be made into a particular Fund or type of Fund. (See South Australian Full Industrial Court decision 13 April 1989 No I 30/1989 re Shop Assistants.) We also accept that the specification of a precise Fund by arbitration is a matter of the exercise of discretion based upon the merits of material evidence presented.

Considerable discussion took place before us as to the cost efficiency of various types and sizes of funds in which it was contended that the largest Funds were not necessarily the most efficient. Within this exchange it was disclosed that a combination of relative advantages or disadvantages can arise depending upon a range of factors. Administrative costs variability was canvassed including evidence that in some cases such as a 3% Accumulation benefit being "bolted on" to an existing voluntary defined benefit scheme could minimise these costs where the existing Employer based Scheme already meeting administrative costs continued to do so. Similarly the method and effectiveness of purchasing cover including "death and disability" and investment of funds were also the subject of debate with witnesses.

The discussion also included the benefits to employees of Funds which were not commission based as against those which are and in respect of some of which commission is apparently payable not merely for initial years but can be on all renewals for the duration of the Fund in recognition of "servicing". It was also put to us that an evaluation of a Fund performance should primarily have regard to the net yield on a long term basis rather than a piecemeal comparison of factors such as administrative costs.

We accept that these and other relevant factors should be considered by employees in coming to majority decisions as to which of the Approved Funds within an Award should be selected. Having reached the conclusion we have as to the specification of Funds we do not find it necessary to make any findings as to the cost efficiency of Funds in particular.

We recognise that the National (and in turn State) Wage Principles decisions acknowledge the benefit of multi-industry Funds, particularly those with joint sponsorship. Whilst we see such Funds as desirable for inclusion in a relevant award provision we also see merit in employees having, by way of a majority decision, an option to choose between at least two Funds which could include a Union nominated and an Employer nominated Fund. Preferably these would be industry or multi-industry based and involving joint union/Employer management. The industry basis could conceivably be on a National, State or regional level.

It is not our intention to make any detailed stipulation as to these. It is sufficient to state that in the consideration of any particular award, either by consent, or as a last resort by arbitration in appropriate cases scope should exist to acknowledge an approved Fund established for the purposes of a definable industry group. Hopefully this will not lead to an undue number of Funds though it is evident that certain of our State Awards have multi-industry coverage. Illustrated before us were several professional areas of employment which might qualify for acknowledgment in this regard.

In justifiable circumstances it may be preferable to have award recognition of genuine industry based Funds extend to employee/management Funds and not be restricted to Union/Employer managed Funds.

We record that without specific mention in the draft Policy clause we do not believe there should be an impediment to parties to an award with a "nexus", seeking to have comparable superannuation provisions to those of the other award. In the absence of agreement such a matter is capable of being determined on its merits.

Without seeking to destabilise an apparently settled position which should exist once the initial process of Fund selection has occurred, we recognise that in the course of time the long term performance of a Fund may be clearly disappointing. In such circumstances scope should exist for employees through their Unions where relevant to consult with their Employer with a view to re-appraisal of the existing Funds available in terms of the award provisions and the consequent re-direction of contributions where so determined by majority decision of employees. Access to such re-appraisal should be restricted to the circumstances envisaged and subject to those circumstances being clearly established. Such a process should not be availed of capriciously or with any regularity. We hesitate to prescribe the frequency of availability of such access. On balance We have decided that upon this provision having been exercised it should not again be available until at least a period of three years has elapsed.

Whilst we believe there should be limited recourse to these provisions we see them as desirable. We would have less concern for the need to specify the frequency of access to these provisions where parties were in ready agreement about the matter. Accordingly we propose that an Industrial Agreement made between the parties may be available without the foregoing time constraint.

This aspect was not raised by either applicant nor was it canvassed before us in these terms. It arises from the range of views submitted to us as to Funds which ought to be available for placement of contributions and a belief that a Fund selection decision taken by employees at a given point in time cannot presume to remain valid over time if a drastic change in circumstances occurs.

A further matter not discussed before us was that of a succession of a business. Without expressing a final view it would seem reasonable that employees apparently satisfied with a Fund to which their contributions are being directed should not have that position questioned merely because a new Employer acquires the business in which they are employed. This may well be a relevant issue where a "cut-off" date provision has been satisfied as to the contributions being made by the initial owner of the business. In such a case if the relationship of the Fund and its members remains, the Fund should be equally valid as to the new Employer unless eligible employees exercise a choice available to them under the Award. In cases of acquisitions or mergers the broader provisions of the draft clause may be relevant, or as warranted, particular matters could be examined on their merits.

Majority Decisions

We have been asked to ensure that a ballot is held by independent means in determining that majority decisions are fairly taken. Whilst we accept that unfair practices can occur we stop short of this suggestion. There are several forms of redress available where there is evidence of misuse of award provisions including those pertaining to superannuation.

Cut Off Dates for Recognition of an Established Fund

The applicants and certain major respondents in acknowledging the existence of Funds by which some Employers are already providing Occupational Superannuation to their employees without an Award requirement to do so also argued that a cut off date should be prescribed beyond which no new Fund could claim to be an established Fund. They posed various cut off dates including retrospective ones. Other parties objected to the concept including those who supported the proposition that any Fund meeting the requirements of the Occupational Superannuation Standards Act 1987 should be available in terms of any resultant award provisions.

It became evident that those urging a cut off date were mindful of and concerned with what they saw as the vigorous pursuit of Employers by some Insurance Salesmen intent upon signing up parties into Funds ahead of an award obligation to make contributions. Many existing Awards and our resultant proposals ensure that employees who at the time an award entitlement to Occupational Superannuation is created are members of an established Fund may by majority decision elect to transfer to another Fund recognised under the Award.

Bearing in mind our decision not to respond to proposals that any Fund should be available we believe that a cut off date should be applied as to any established Fund. An appropriate cut off date which would not disadvantage existing Funds would be the date of this decision. That in no way suggests any review should be made of any earlier cut off date that may be specified in an existing award clause. It follows that we reject as a matter of policy an award by award determination of a cut off date.

In considering this question we are mindful that a Full Bench decision of 29 April 1988 referred to earlier, acknowledged that some Employers may have responded to Occupational Superannuation requirements by improving an existing Fund to the extent of 3% contributions or its equivalent. In adopting a cut off date as stated we would see that also applying to any such existing Scheme but not so as to preclude any such improvements being utilised after that date to meet the obligations of Occupational Superannuation.

It should be evident that the cut off date specified namely 29 September 1989 ensures the recognition of an established Fund to

which an Employer was already making regular and genuine contributions of 3% of Ordinary Time Earnings on behalf of at least a significant number of award employees on or prior thereto. It should equally be evident and appreciated that where contributions are made outside of the specific criteria outlined above the making of such contributions by an Employer will not satisfy the requirements of the Superannuation clause set out in the Policy statement now issued.

Challenge of a Fund

We believe it unnecessary to require parties to file an application to establish before the Commission that an existing Fund satisfies the award provision as to the making of genuine contributions prior to the cut off date. The making of contributions by an Employer to such Funds will carry with it an onus of proof upon any challenge being made. We also determine that an eligible employee being a member or potential member of a Fund as well as an Industrial Union whose registered list of callings incorporates any of the classifications of employees to whom a relevant Award applies may by notification of a dispute challenge any Fund on the ground that the Fund does not meet the requirements of the clause. We do not impose any time limit on that challenge. At the same time, and having regard to the proposed clause 7(e) , we believe, upon a successful challenge being made, discretion should be available to the Commission to recognise in whole or in part any past contributions paid into that Fund.

Further, that the exercise of discretion may be the subject to any recommendation, direction or order that the Commision may make.

The outcome of the current review of Section 97 provisions of the Act could have a bearing upon the future relevance of such a provision. Accordingly, it should as necessary be subject to reconsideration at the appropriate time.

Fund Objections Based on Religious or Conscientious Grounds

For reasons that were detailed before us it was argued that any Statement of Policy should recognise the right of Employers and employees who are members of the religious fellowship known as the Brethren to elect to contribute to an approved occupational Superannuation Fund of their specific choice. Mr Barton was not averse to the proposal subject to the relief being applied to persons who satisfied the requirements of Section 47A of the Act and attained a Certificate thereunder. We believe that this request should be met and appropriate wording considered for insertion into those Awards claimed to be relevant. We also accept that the holding of a Certificate pursuant to Section 47A should be the determining factor as to access to a Fund other than those that may be cited in an award. In the light of the material presented including the assurances expressed in exhibit 59 we believe that as to any such Employer, employees who are not members of the fellowship and accordingly not holders of a Section 47A Certificate can nonetheless be incorporated into such a Fund.

Having regard to the provisions of Section 47A extending to genuinely held conscientious beliefs distinct from those applicable to the Brethren we believe an alternate form of wording may also be appropriate in relevant cases.

Enrolment

Several issues need to be considered in relation to formalising the membership of an eligible employee within a Fund. Included in these is the circumstance where an employee declines to complete and sign an Application Form. Within the submissions presented for the applicants there was a recognition of the need to address this matter as well as a concern that any resultant provision should not lend itself to misuse such as would deprive an employee of an entitlement. Within the several paragraphs we have framed are clear proposals applicable in turn to an Employer and his employees directed to securing a completed and signed Application Form. Failure by an eligible employee to submit that Form within 28 days of receipt by him calls for a written advice by the Employer to the employee informing him that his entitlement could be jeopardised unless the completed Form is returned within 14 days. Failure of the employee to submit the completed Form within that prescribed period absolves the Employer from an obligation to make contributions until such time as a completed Form is received. A further written advice is required from the Employer to the employee if a completed Form has not been submitted with six months of the initial request. In both instances copies of those written advices are to be forwarded to the Chief Industrial Inspector and the Secretary of an Industrial Union whose registered list of callings incorporates the classification of the employee. Further, where an Employer fails to supply an eligible employee with an Application Form as required his obligation to pay contributions extends back to the date of an award variation (or from the date of the employee becoming an eligible employee if that occurs thereafter) provided that an eligible employee completes, signs and returns an Application Form within 28 days of having been provided with one. Failure by the employee to respond within that period will invoke the process already outlined above.

Unpaid Contributions

Several of the proposals before us urged that within a Policy Statement we cater for a situation where an Employer, for one reason or another, fails to comply with an award requirement to pay contributions on behalf of an eligible employee. In this regard we appreciate that Occupational Superannuation is a recent development and that with a progressive and orderly extension of this requirement into awards, individual Employers may lack knowledge of their award obligations as to their employees or at least certain categories of employees. This is more likely to be the case where they do not avail themselves of membership of an Employer or Trade Association or alternate forms of advice.

By the very nature of Occupational Superannuation the entitlements thereunder accrue from contributions payable by an Employer in the interests of an (eligible) employee. Such contributions would appear not to fall within the various categories to which Section 97 of the Act refers. e.g. Section 97(1) with its requirement to pay to an employed person "the price or rate" fixed by an award and Subsections (2) and (5) wherein reference is made to money (earned or) payable to an employee and in Subsection (7) by way of "money to which an employee is entitled". Whilst by way of an award provision an employee may have a right to have Occupational Superannuation contributions paid in a prescribed manner by his Employer on his behalf he is not entitled to payment of the equivalent value, so that neither the concept nor its funding requirement would appear to be caught up with the provisions of Section 97. If that be so the right of an employee whose contributions are not paid by the Employer to resort to an action under Section 113 remains relevant as for any breach of an award.

It was suggested to us that where contributions remained unpaid an Employer should continue to be liable to make the appropriate contributions retrospectively to the date of eligibility of an employee plus an amount equivalent to the guaranteed rate of return that the contributions would have attracted in the Fund had they been paid on the due dates. Further, that such payments ultimately made should be the extent of the Employer's liability.

Whilst the proposal sets out to offer a practical remedy to a situation of unpaid contributions it seems that it would also have the effect of cutting across any common law action which might otherwise be available. Such an avenue may have greater relevance to a claimant or his estate in circumstances where 'Death and Disability' cover was incorporated into a Fund to which contributions had not been paid as required. We do not accept that an award provision as suggested should purport to oust any available common law action and that an Employer should assume responsibility for safeguarding himself against the implications of such an action.

The concerns we express as to the applicability of the enforcement provisions in Section 97 of the Act have also been noted by the Department of Industrial Affairs. We note the Departmental proposal to set up a Tripartite Committee on Occupational Superannuation. It is of interest that the Terms of Reference of the Committee are:—

(a) to examine the enforceability of and the giving effect to decisions and pronouncements of the Industrial Commission on occupational superannuation.

(b) to consider and examine the role and responsibilities of Superannuation Fund Trustees (Managers) in relation to contributions ordered by awards.

(c) to consider what, and if any, legislation changes might be required to give full effect to award provisions on superannuation.

(d) to consider whether Section 102 of the Industrial Act could be used as an alternative to additional legislation to recover outstanding contributions.

(e) to report to the Chief Executive, Department of Industrial Affairs within one month or such extended date as might be necessary to give effect to the above.

Whilst we recognise the problem which results from the short comings of Section 97 there are limitations to the proposals put to us. Pending the outcome of the Tripartite Committee Investigations and any consequential revision of the existing legislation we decide that we will acknowledge, as an interim provision, the

proposal put to us except that it will be qualified so as not to intrude upon any common law remedy where "Death and/or Disablement" or like cover is in issue.

Record Keeping

Similarly neither the provisions of Section 126 of the Act nor separate Award clauses where they exist extend to a requirement to keep appropriate records as to superannuation, including contributions paid. A suitable subclause has been included in the policy draft.

Exemptions

We accept there should be limited scope for exemptions from an award provision of this nature and we have prescribed accordingly.

Occupational Superannuation and Existing Employer Based Schemes

We are not prepared to prescribe that 3% superannuation be in addition to any existing superannuation arrangement for several reasons. Reference has already been made to the 1988 Teachers case decision (supra) and the prospect of scope existing —

> ". . . . . for a contention that existing superannuation benefits are at such a significant level (or have been so advantageously reviewed since the pursuit of claims that led to the creation of the Superannuation Principle) that they should not now be further adjusted, or be subject to a lesser adjustment. . . . . ." (at p. 214).

Whilst experience to date have led to deferment of contributions rather than lesser contributions or exemptions we are not prepared to over-rule any unknown possibilities in the manner sought. We adopt from the decision cited the comment that —

> "The mere existence of an Employer based superannuation scheme does not of itself provide an indemnity against the claim." (at p. 213).

Existing Awards

Both this decision and the accompanying draft clause result from applications seeking a Statement of Policy to minimise the confusion said to arise from contradictory provisions between awards. They should be seen as providing clear guidelines for application in future Awards and Industrial Agreements with scope to argue for departures therefrom where circumstances warranting an alternative can be established.

We do not by this decision urge the alteration of any existing award arrangements. Rather it is for the parties thereto to consider their respective positions in the light of this decision.

Operative Dates

The operative dates for each actual award variation should where necessary be determined by the Commission having regard to the requirements of the Act. It follows that we do not accept that a Policy Statement should prescribe a common operative date from which other individual decisions would apply.

DRAFT CLAUSE

SUPERANNUATION

(1) ***Application***

In addition to the rates of pay prescribed by this Award, eligible employees, as defined herein, shall be entitled to Occupational Superannuation Benefits, subject to the provisions of this clause.

(2) ***Contributions***

(a) *Amount.*— Every Employer shall contribute on behalf of each eligible employee as from (blank date/s) an amount calculated at 3% of the employee's ordinary time earnings, into an Approved Fund, as defined in this clause. Each such payment of contributions shall be rounded off to the nearest ten (10) cents.

(b) *Regular Payment.*— The Employer shall regularly pay such contributions to the credit of each such employee in accordance with the requirements of the Approved Fund Trust Deed, but in any event at least once each calendar month.

(c) *Minimum Level of Earnings.*— No Employer shall be required to pay superannuation contributions on behalf of any eligible employee whether full time, part time, casual, adult or junior in respect of any week during which the employees ordinary time earnings, as defined, do not exceed 35% of the Guaranteed Minimum Wage for the Southern Division, Eastern District as declared from time to time.

(d) *Absences from Work.*— Contributions shall continue to be paid on behalf of an eligible employee during any absence on paid leave such as annual leave, long service leave, public holidays, sick leave and bereavement leave, but no Employer shall be required to pay superannuation contributions on behalf of any eligible employee during any unpaid absences except in the case of absence on Workers' Compensation. In the case of Workers' Compensation the Employer shall contribute in accordance with paragraph (a) hereof whenever the employee is receiving by way of Workers' Compensation an amount of money no less than the award rate of pay.

(e) *Other Contributions.*— Nothing in this clause shall preclude an employee from making contributions to a Fund in accordance with the provisions thereof.

(f) *Cessation of Contributions.*— An Employer shall not be required to make any further contributions on behalf of an eligible employee for any period after the end of the ordinary working day upon which the contract of employment ceases to exist.

(g) *No Other Deductions.*— No additional amounts shall be paid by the Employer for the establishment, administration, management or any other charges in connection with the Fund other than the remission of contributions as prescribed herein.

(3) ***Definitions*** —

(a) "*Approved Fund*" means a Fund approved for the purposes of this Award by the Industrial Conciliation and Arbitration Commission as one to which Occupational Superannuation contributions may be made by an employer on behalf of an employee, as required by this Award. Such approved Fund may be individually named or may be identified by naming a particular class or category.

(b) "*Eligible employee*" shall mean any employee who has been employed by the Employer during 5 consecutive weeks and who has worked a minimum of 50 hours during that period. After completion of the above qualifying period, superannuation contributions shall then be made in accordance with subclause (2) hereof effective from the commencement of that qualifying period.

(c) "*Fund*" means a Superannuation Fund as defined in the *Occupational Superannuation Standards Act 1987* and satisfying the superannuation fund conditions in relation to a year of income, as specified in that Act and complying with the operating standards as prescribed by Regulations made under that Act. In the case of a newly established Fund, the term shall include a Superannuation Fund that has received a notice of preliminary listing from the Insurance and Superannuation Commissioner.

(d) "*Ordinary time earnings*" shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including shift loading and leading hand, in-charge or supervisory allowances where applicable. The term includes any over-award payment as well as casual rates received for ordinary hours of work. Ordinary time earnings shall not include overtime, disability allowances, commission, bonuses, lump sum payments made as a consequence of the termination of employment, annual leave loading, penalty rates for public holiday work, fares and travelling time allowances or any other extraneous payments of a like nature.

(4) ***Approved Funds*** —

(a) For the purposes of this Award an Approved Fund shall be:—

(i) (A Union nominated Fund, preferably an industry or multi-industry Fund with joint Union/Employer management.)

(ii) (An Employer nominated Fund, preferably an industry or multi-industry Fund with joint Union/Employer management.)

(iii) Any named Fund as is agreed to between the relevant Employer/Union(s) parties to this Award (Industrial Agreement) and as recorded in an approved Industrial Agreement.

(iv) In the case of a minority group of employees of a particular Employer, any Industry, Multi—Industry or other Fund which has been approved in or by an Award of an Industrial Tribunal and already has practical application to the majority of Award employees of that Employer whether under a Queensland State Award or a Federal Award.

(v) (In an appropriate case) As to employees who belong to the religious fellowship known as the Brethren, who hold a Certificate issued pursuant to Section 47A of the *Industrial Conciliation and Arbitration Act 1961—1989* and are employed by an Employer who also belongs to that fellowship any Fund nominated by the Employer and approved by the Brethren.

(vi) (In an appropriate case) Any Fund agreed between an Employer and an employee who holds a Certificate issued pursuant to Section 47A of the *Industrial Conciliation and Arbitration Act 1961—1989* where membership of a Fund cited in an Award would be in conflict with the conscientious beliefs of that employee in terms of Section 47A.

(vii) In relation to any particular Employer, any other established Fund to which that Employer was already actually making regular and genuine contributions in accordance with subclause (2) hereof on behalf of at least a significant number of that Employer's employees covered by (this) Award/Industrial Agreement as at 29 September 1989 and continues to make such contributions.

Provided that the making of a deposit, an initial or other contributions subsequent to 29 September 1989, but on a retrospective basis, in respect of any period up to and including 29 September 1989, shall not under any circumstances bring a Fund within the meaning of this provision. The mere signing and submission of any nomination for membership documents to Trustees of a Fund prior to 29 September 1989 does not bring a Fund within the meaning of this provision.

(5) ***Challenge of a Fund***

(a) An eligible employee being a member or a potential member of a Fund, as well as an Industrial Union whose registered list of callings incorporates any of the classification/s of employees to whom this Award applies, may by notification of a dispute challenge a Fund on the grounds that it does not meet the requirements of this clause.

(b) Notwithstanding that the Commission determines that a particular Fund does not meet the requirements of this clause, the Commissionmay in its discretion and subject to any recommendation, direction or order it may make, recognise any or all of the contributions previously made to that Fund as having met the requirements or part thereof of subclause (2) up to and including the date of that determination.

(c) In the event of any dispute over whether any Fund complies with the requirements of the clause, the onus of proof shall rest upon the Employer.

(6) ***Fund Selection***

(i) No Employer shall be required to make or be prevented from making, at any one time, contributions into more than one Approved Fund. Such Fund, other than a Fund referred to in paragraphs (iv), (v), (vi) and (vii) of subclause (4)(a), shall be determined by a majority decision of employees.

(ii) Employees to whom these provisions apply who as at the date of this variation are members of an established Fund covered by subclause (4)(a)(vii) hereof shall have the right by majority decision to choose to have the contributions specified in subclause (2) hereof paid into a Fund as provided for elsewhere in subclause (4) hereof in lieu of the established Fund to which subclause (4)(a)(vii) has application.

(iii) The initial selection of a Fund recognised in subclause (4) shall not preclude a subsequent decision by the majority of employees in favour of another Fund recognised under that subclause where the long term performance of the Fund is clearly disappointing.

Where this provision has been utilised and as a result another approved Fund is determined, access to a further re-appraisal of the Fund for the purpose of favouring yet another Fund shall not be available until a period of three years has elapsed after that utilisation of this provision;

Provided that the provisions of this clause do not preclude the making at any time of an Industrial Agreement within the terms of subclause (4)(a)(iii).

(7) ***Enrolment***

(a) Each Employer to whom this clause applies shall as soon as practicable as to both current and future eligible employees —

(i) notify each employee of his/her entitlement to Occupational Superannuation.

(ii) consult as may be necessary to facilitate the selection by employees of an appropriate Fund within the meaning of subclause (4) hereof.

(iii) take all reasonable steps to ensure that upon the determination of an appropriate Fund each eligible employee, receives, completes, signs and returns the necessary application forms provided by the Employer to enable that employee to become a member of the Fund.

(iv) submit all completed application forms and any other relevant material to the Trustees of the Fund.

(b) Each employee upon becoming eligible to become a member of a Fund determined in accordance with this clause shall —

(i) complete and sign the necessary application forms to enable that employee to become a member of that Fund;

(ii) return such forms to the Employer within 28 days of receipt in order to be entitled to the benefit of the contributions prescribed in subclause (2) hereof.

(c) Where an Employer has complied with the requirements of paragraph (a) hereof and an eligible employee fails to complete, sign and return the application form within 28 days of the receipt by him of that form, then that Employer shall—

(i) advise an eligible employee in writing of the non—receipt of the application form and further advise the eligible employee that continuing failure to complete, sign and return such form within 14 days could jeopardise his entitlement to the Occupational Superannuation benefit prescribed by this clause.

(ii) in the event that an eligible employee fails to complete, sign and return such application form within the specified period of 14 days be under no obligation to make any Occupational Superannuation contributions in respect of such eligible employee excepting as from any subsequent date from which completed and signed application form is received by the Employer

(iii) in the event that an eligible employee fails to return a completed and signed application form within a period of six months from the date of the original request by the Employer, again advise that eligible employee in writing of the entitlement and that the receipt by the Employer of a completed and signed application form is a pre-requisite to the payment of any Occupational Superannuation contributions.

(iv) at the same time as advising the eligible employee pursuant to placitum (iii) hereof submit both to the Chief Industrial Inspector, Brisbane and to the Secretary of an Industrial Union of Employees whose registered callings incorporate the classification of the eligible employee a copy of each letter forwarded by him to the eligible employee pursuant to placita (i) and (iii).

(d) Where an Employer fails to provide an eligible employee with an application form in accordance with paragraph (a)(iii) hereof he shall be obliged to make contributions as from the date of operation of this clause or from the date an employee became an "eligible employee" if that occurs thereafter provided that an eligible employee completes, signs and returns to the employer an application form within 28 days of being provided with the application form by the Employer. Where an eligible employee fails to complete, sign and return an application form within such period of 28 days the provisions of paragraph (c) hereof shall apply.

(e) *Unpaid Contributions.*— Subject to section 97(12) of the *Industrial Conciliation and Arbitration Act 1961—1989* and to subclause (5) hereof, where the discretion of the Commission has been exercised, should it be established that the Employer has failed to comply with the requirements of subclause (2) of this clause in respect of any eligible employee such Employer shall be liable to make the appropriate contributions retrospectively to the date of eligibility of the employee, plus an amount equivalent to the rate of return those contributions would have attracted in the relevant approved Fund, or as necessary a Fund to be determined by the

Commission under subclause (4) hereof, had they been paid on the due dates.

The making of such contributions satisfies the requirements of this clause excepting that resort to this provision shall not limit any common law action which may be available in relation to death, disablement or any similar cover existing within the terms of a relevant Fund.

(8) *Record Keeping*

The Employer shall be required to maintain records of time worked for the purposes of establishing the employee's entitlement to Occupational Superannuation, and of payments made to the approved fund in similar form to time and wages records required to be kept in accordance with Section 126 of the *Industrial Conciliation and Arbitration Act 1961—1989*, and shall have such records available for inspection by an Industrial Inspector or Officer of the Union, authorised pursuant to Section 136 of that Act.

(9) ***Exemptions***

An Employer may apply to the Commission for exemption from all or any of the provisions of this clause in the following circumstances:—

(a) Incapacity to pay the costs associated with its implementation, or

(b) Any special or compelling circumstances peculiar to the business of the Employer.

L.N. LEDLIE, Commissioner.
R.W. BOUGOURE, Commissioner.
B.J. NUTTER, Commissioner.

Appearances:

Mr T. Barton, for the Trades and Labor Council of Queensland on behalf of affiliated Unions.

Mr N. Timo, for The Australian Workers' Union of Employees, Queensland.

Mr C. Ketter, for the Combined Industrial Unions Committee.

Mr J. Redsell, with him Mr B. Parmenter, for the Crown.

Mr G. Muir and Mr S. Pawlowski, for the Queensland Confederation of Industry Limited, Union of Employers.

Mr P. Naylor and Mrs H. Blucher, for the Retailers' Association of Queensland Limited, Union of Employers and the Hardware Retailers Association of Queensland Union of Employers.

Mr P. McKendry, for the Queensland Hotels Association, Union of Employers.

Mr M. Belfield and Miss K. Payne, for the Metal Trades Industry Association of Australia, Queensland Branch, Union of Employers.

Mr J. Crittall and Mr M. Vining, for the Queensland Master Builders' Association, Union of Employers.

Mr I. Turner, for the Australian Mines and Metals Association Incorporated.

Mr C. Barrett, for the Motor Trades Association of Queensland, Union of Employers.

Mr G. Power, for the Local Government Association of Queensland (Incorporated).

Mr M. Coonan, for the Australian Federation of Civil Engineering Contractors, Queensland Branch, Industrial Union of Employers.

Mr R.H. Steinitz, for the Real Estate Institute of Queensland Limited and Morrow Australia Limited.

Mr R.J. Livingstone of R.J. Livingstone & Associates Pty. Ltd., for the Institute of Chartered Accountants in Australia, The Australian Society of Accountants, The Queensland Grain Growers' Council, The Anglican Diocese of Brisbane, The Queensland Nursery Industry Association Industrial Union of Employers, The Totalisator Administration Board of Queensland, Tancred Brothers, The Queensland Motels and Accommodation Association Inc., The Endeavour Foundation, The Queensland Spastic Welfare League, E.P.A.S. Limited, Allied Independent Security Group Limited, The General Aviation Association, Union of Employers, Gold Coast Bakeries and Greyhound Coaches Pty. Ltd.

Mr G. Garard, for The Queensland Chamber of Fruit and Vegetable Industries Co-operative (Union of Employers) Limited.

Mr R. Rushton and P. Osmond, for Clients of Managed Superannuation Services Pty. Ltd.

Mr R. White, for the University of Queensland.

Mr A.O. Grant, for The Registered and Licensed Clubs Association of Queensland, Union of Employers, The Royal Queensland Bowls Association, The Queensland Golf Union and The Australian Dental Association, Queensland Branch.

Mr J. Lawson, for the Queensland Law Society Incorporated.

Mr D. Hoffman and Mr J. Welch, for the T.A.B. Agents' Association of Queensland Union of Employers and Life Underwriters' Association of Australia.

Ms A.J. Coulthard, for the Institute of Chartered Accountants on behalf of Morris, Fletcher & Cross.

Mr N. Ruskin, Agent for six Colleges of Advanced Education and the Queensland University of Technology.

Mr P. Sherwood, for Mirage (Operations) Pty. Ltd.

Operative Date: 29 September 1989
Decision — Superannuation — Policy Declaration.

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