

CHAPTER 1

EMPLOYEES PRODUCTIVITY AWARD SUPERANNUATION

Background

1.1 The Employees Productivity Award Superannuation fund (EPAS) is an industry superannuation fund for people in the hospitality industry in Queensland. The fund has approximately 26,000 members, most of whom are young hospitality workers. The Committee understands that the fund was established in the late 1980s and that it is a public offer fund with an independent corporate trustee. The Committee also understands that Mr Gerald Parker was appointed as a director of the trustee company EPAS Ltd in 1996. It was reported that the value of the fund had been reduced from \$27 million in 1997 to \$18 million when the fund was frozen in 1998.¹ Members are believed to have lost 51 per cent of their entitlements.²

1.2 The Committee understands that the Hotel Motel Accommodation Association of Queensland (HMAA Queensland) was involved in promoting the fund to potential members. In response to a Committee request for further information, HMAA Queensland stated that it had ‘no connection with the EPAS fund’, but that as EPAS was listed as one of the options in Queensland industrial awards and agreements, ‘as such this was advised to our members when seeking information as to their options’. HMAA Queensland stated that it sought advice about the fund from an industrial advocate in 1987, and that EPAS ‘appeared to have advantageous benefits over other available funds, such as lower administrative charges, higher death and disability cover etc’. EPAS thus became ‘a popular choice’ of HMAA Queensland members to meet their superannuation guarantee obligations.³

1.3 A submission to the Committee from Voyager Resort Ltd,⁴ an employer which had contributed to the fund on behalf of 26 of its employees, said that its concern was first raised in 1995 when returns ‘began to dip’. The company detailed the following financial information about the fund’s performance.

1 *The Courier Mail*, 24 April 2000, p. 7.

2 ASIC “ASIC seeks \$10 million from EPAS, Directors and Auditors” *Media Release*, Thursday 20 April 2000.

3 Submission No. 67, p. 1.

4 Submission No. 43, p. 1.

Table 1.1: EPAS – Returns to members 1993-1998

| Year | Return |
|-------------|---------------|
| 1993 | 9.75% |
| 1994 | 10.50% |
| 1995 | 8.00% |
| 1996 | 9.00% |
| 1997 | 4.25% |
| 1998 | -43.00% |

1.4 In subsequent evidence to the Committee in June 2000, Mr Heaton, Company Secretary and General Manager of Voyager Resort Ltd, stated that the fund's last annual statement (as at 30 June 1999) reflected an opening balance that had decreased by a further 13 per cent and showed a nil credit rating for the fund.⁵

1.5 Voyager Resort Ltd's submission alleged various poor investment decisions by the trustees of the fund:

- One of the fund's investments in O'Hara's Resort in Launceston appeared, in Voyager Resort's opinion, to be 'a transaction lacking good advice [or a] reasonable valuation'. The vendor was allegedly also known to the then trustees.⁶
- The purchase price of another of the fund's investments in industrial property in Queensland was, in Voyager Resort's opinion, inflated by \$2.5 million.
- Details of substantial 'asset management fees' (\$450,000 in 1997 and \$535,000 in 1998) and consultancy fees (over \$37,000 in 1997 and 1998) paid to individual trustees were not forthcoming upon enquiry to the fund.

1.6 Mr Heaton told the Committee that APRA had started to look at the fund in 1995 (although the Committee notes that the responsible body would in fact have been the former ISC, from which APRA took over in 1998):

The warning bells were there at that time, but the fund as an investment tool for retirees continued to travel in the wrong direction.⁷

5 Committee Hansard, p. 522.

6 The Committee notes a media report that the Launceston property was bought in 1995 for \$2.4 million and nearly \$5 million was spent on refurbishment, although the property was subsequently valued at \$2.04 million (*The Examiner*, 25 February 1999, p. 16). A later media report stated that \$6.04 million had been lent to develop the property but that only \$135,000 had been repaid (*The Courier Mail*, 27 April 2000). The property was sold in 2000.

7 Committee Hansard, p. 522.

1.7 The Committee understands that in 1995 the former ISC decided, following a visit to EPAS and an internal report, to try to rehabilitate the trustee rather than putting a replacement trustee in place.

1.8 In August 1998, the trustee EPAS Ltd advised APRA of a ‘significant adverse event’,⁸ namely the large negative return for 1997/98 and a subsequent freeze on withdrawals from the fund.⁹ In September 1998, the fund administrators advised members that the trustees had decided to close the fund and freeze the assets.¹⁰

1.9 HMAA Queensland stated:

This came as a shock to the association and its members as many of our employer members were also members of the fund as employees of their own properties. Many of our members had used the fund to put aside significant additional funds for their retirement. This was as devastating to the employers as it was to the employees.¹¹

1.10 The Committee understands that EPAS Ltd sought legal advice as to whether members should be transferred to a successor fund, but after receiving this advice decided the option was not viable. In January 1999 EPAS Ltd advised members of its revised plans to:

- re-open the fund to new members;
- conduct a sale of assets using external professional advice; and
- continue the freeze on contributions prior to June 1998, but allow all post-July 1998 contributions to be rolled out of the fund at a member’s request.¹²

1.11 EPAS Ltd resigned as trustee in May 1999 and was replaced by Trust Company Superannuation Services Ltd. ASIC reported that the new trustee had ‘carried out a review of the fund and has focussed on maximising the fund’s assets’.¹³ In October 1999 the new trustee had issued a media release (also mailed to members), advising of its proposals to improve the fund’s viability, introduce member investment choice and implement the asset realisation program.¹⁴ In December 2000, the fund’s annual report for the year ending June 2000 advised members, amongst other things, that the asset freeze for fund members as at 30 June 1998 would continue, subject to review by the board every six months, but most likely until the asset realisation

8 As required by SIS Act s. 106.

9 Submission No. 109, p. 5.

10 Submission No. 67, p. 2.

11 Submission No. 67, p. 2.

12 Submission No. 109, p. 5.

13 ASIC “ASIC seeks \$10 million from EPAS, Directors and Auditors” *Media Release*, Thursday 20 April 2000.

14 Submission No. 109, p. 5.

program was complete.¹⁵ Member choice of investment had been introduced during that financial year. APRA noted that the annual report identified four single investments as each representing more than 5 per cent of fund assets, but did not specifically identify the sale of the O'Hara's Resort property.¹⁶

1.12 Following an investigation into the fund's losses, ASIC commenced civil proceedings in the Queensland Supreme Court in April 2000 against the former trustee EPAS Ltd, its directors and the 1995-1996 auditors of the fund.¹⁷ The matter has not yet been heard.

1.13 ASIC has alleged that between 1994 and 1999, EPAS Ltd and its directors approved the investment of fund assets in mortgage loans that included:

- imprudent and speculative trustee investments;
- loans which were not made on an 'arm's length' basis because there were undisclosed fees and profit sharing interests of directors;
- loans which were not always based on independent valuations;
- loans which were not based on a reasonable debt to equity ratio;
- loans which were approved without adequate security or borrower inquiries; and
- loans which were approved in the absence of an investment strategy that complied with the law relating to superannuation funds.¹⁸

1.14 ASIC is seeking declarations that EPAS Ltd and its directors must restore trust assets of more than \$10 million plus interest which was lost or diminished as a result of investment decisions.

1.15 ASIC has also alleged that the auditors, Head, Cheel Thompson, were negligent in preparing their 1995 and 1996 audits of EPAS, that their work did not comply with Australian Auditing Standards, and that there were material overstatements of the investments and related accrued interest in the fund accounts.

Issues

1.16 An obvious concern in this case study, as in other evidence discussed in the Committee's First Report, is the competence of some trustees to perform their duties effectively. As Mr Heaton stated in evidence to the Committee:

15 Submission No. 109, p. 6.

16 *ibid.*

17 The action has been taken under ASIC's governing legislation, the *Australian Securities and Investments Commission Act 1989*, under which ASIC can start an action in the public interest on behalf of the past and present trustee.

18 ASIC "ASIC seeks \$10 million from EPAS, Directors and Auditors" *Media Release*, Thursday 20 April 2000.

If you are a trustee of a fund, you need to understand that you have got a heck of a responsibility to look after members' funds and you do not go out willy-nilly shaking hands and doing deals. How good is the business acumen of some of these people who are running funds with multimillion dollars in cash?¹⁹

1.17 Another key complaint was that the EPAS fund trustees did not provide timely information or respond to complaints from members, and that APRA and ASIC subsequently also were remiss in making information available. HMAA Queensland referred to its frustration in getting adequate information from the trustees and later from APRA:

We sought answers from the trustees and invited the Chairman, Mr Gerald Parker to address our 1998 Annual General Meeting. We continued to provide information to our members as it was available, however we became increasingly frustrated by the lack of action and the continued failure to meet promised time lines for the release of information.

We have continued to seek a resolution to the situation since then by contact with the various trustees and correspondence to APRA and ASIC. It appeared that as the association was not a member of the fund we would not be assisted in our inquiries. Contact and correspondence to APRA by this association was not answered.²⁰

1.18 In evidence, Mr Heaton from Voyager Resort Ltd also expressed frustration at the lack of communication to members from the second trustee which had assumed responsibility for the fund:

I asked a number of questions. My main one was: where are we? I also asked: what is happening with the realisation of the assets? Can you tell me what the trading figures are for O'Hara's Resort in Tasmania? I got the same old answer that that was commercially privileged information. That is the same answer that the EPAS trustees were feeding me from the time we had a problem with working out why the fund was not performing ... Saying it is commercially privileged information to a member of a fund in which you have a vested interest is not good enough.²¹

1.19 The Committee understands that one outcome of the EPAS case was APRA's reconsideration of its procedures for handling complaints by fund members about trustees, and in particular ensuring that such complaints were dealt with by APRA rather than being referred back to the very people about whom fund members were complaining.

19 Committee Hansard, p. 531.

20 Submission No. 67, p.2.

21 Committee Hansard, p. 522.

1.20 In relation to property valuations, Mr Heaton suggested that better control measures were required:

There is far too much autonomy given to trustees as it is, let alone allowing them to seek out valuations and then lend members' money out on those properties.²²

1.21 The Committee notes that issues relating to inadequate property valuations form part of the current court proceedings against the former trustees. The Committee discusses property valuations further in Chapter 5 of this report in relation to solicitors' mortgage schemes. The competence of auditors is also clearly an issue, given that the fund's auditors in 1995 and 1996 are currently subject to court action by ASIC.

1.22 Other issues concern members' awareness of their choice of appropriate superannuation funds and the remedies available to them should they be dissatisfied with their fund's performance. Mr Heaton noted that EPAS was the only superannuation fund that his organisation 'ever had any contact with', although he could not say how the first contact had been made.²³ As noted above, HMAA Queensland advised the Committee that EPAS was 'one of the funds' listed as an option in the industrial awards and agreements commonly used by its members. However, the Committee did not receive any evidence to suggest that other fund options were widely promoted amongst employees in the hospitality industry.

1.23 A related matter is the extent to which fund members were willing or able to pursue the matter when the fund's financial problems came to light. Mr Heaton told the Committee that, while a group of EPAS fund members had formed and 'hundreds' of members now contacted him to get information and updates on EPAS, initially most members did not seem to care about taking action:

... in the early days when this first happened and we got that news that we were 43 per cent in [the] negative, the main reaction was, 'Well, we've lost our money,' and I do not accept that ... I think you have got to be tenacious about it.²⁴

Possible solutions

1.24 While it is difficult for the Committee to comment in detail on matters which are currently before the courts, possible solutions to some of the problems raised in evidence can be identified.

22 Committee Hansard, pp. 529-530. Mr Heaton suggested that a public service body should assume this responsibility.

23 Committee Hansard, p. 526.

24 Committee Hansard, p. 531.

1.25 First, there are strong suggestions that APRA needs to be more active in response to complaints from fund members, and to improve its oversight of trustees' actions, particularly in relation to guidelines on fund investments such as diversification of assets. Mr Heaton suggested a statutory requirement:

... that, if the superannuation fund is purchasing an asset in excess of five per cent of the total portfolio, the matter has to be looked at by some party who is definitely at arm's length from the people negotiating the deal ...

1.26 Mr Heaton also suggested in evidence:

I believe more stringent ratios of liquidity also need to be instigated in funds and controlled by either APRA or somebody to ensure that liquidity levels never go lower than a percentage – possibly 30 per cent.²⁵

1.27 Second, it would seem valuable if funds provided more information to their members, in particular by disclosing more details about investment performance and fees. Access to more information is valuable in empowering members to take appropriate action where the fund's financial performance is inadequate. Efforts to ensure the information flow improves are particularly important in an industry with a workforce characterised by many young casual workers.

Conclusion

1.28 The Committee is concerned to learn of the circumstances surrounding the losses incurred by members of the EPAS fund. The losses appear to have been the result of poor performance by some trustees, some property valuers and some auditors. This case points to the need for APRA to improve its performance in the oversight of trustees, in particular by ensuring that more appropriate investment strategies and loan arrangements are entered into.

1.29 The EPAS case also highlights the importance of trustees improving the quality and timeliness of information provided to fund members and the need for APRA to deal with complaints about trustees in a more appropriate way. The Committee believes that trustees must ensure there is better and more frequent communication with fund members about the performance of their fund.

1.30 In its First Report on this term of reference, the Committee made a number of recommendations aimed at ensuring that trustees adhere to the standards expected of them in the administration of substantial sums of money invested by members.²⁶ The Committee notes that APRA is planning to introduce tighter guidelines on fund investment strategies and that this may mitigate the risk of fund failure in the future.

25 Committee Hansard, p. 529.

26 See especially Chapter 3 of that report.

1.31 The Committee commends ASIC for taking action against the fund's former trustees and auditors, as it is only by such action that people can be held accountable, the losses to fund members potentially be recouped and community confidence in superannuation savings and assets be restored. The Committee will await the outcome of ASIC's proceedings with interest.

1.32 The Committee is concerned, however, that such legal proceedings may take many years to resolve. Such delays do not assist good administration and the cause of justice. In a rapidly changing business world, comprised of many sophisticated players, technological advances are progressing at a more rapid rate than any advances in the legal processes. Exploring ways to bring about more timely legal outcomes is a major challenge for the legal system.

1.33 The Committee notes that the passive approach reportedly adopted by many EPAS fund members when problems first came to light may reflect in part their youth, the transitory nature of much of the hospitality industry and the consequent small amounts presumably accumulated by many individuals. It may also be due to the general lack of awareness by many people of their superannuation entitlements and their options to take remedial action. The Committee considers that there is a need for greater efforts to educate and empower consumers, particularly where efforts by contributing employers to get information may be refused on the grounds that they are not fund members.

1.34 The Committee believes that, while there may be some constraints on the information that can be provided where investigations are continuing, APRA should also increase its efforts to improve the flow of information to members who make inquiries or complaints. Fund members who in some cases have invested substantial savings for their retirement should be adequately briefed about ongoing developments. It is, after all, their money, and in this case study it has been reported that members have lost over half their investment.