

DEPUTY PRESIDENT JOHNSON: I'll take the appearances please. Mr Richard Brown.

MR R. BROWN: If the commission pleases, BROWN, R., appearing for the TCCI, on behalf of the employer, Stable Investments Pty Ltd.

5 DEPUTY PRESIDENT JOHNSON: Thank you, Mr Brown. For the HSUA.

MR C. BROWN: If the commission pleases, C. BROWN, appearing for the Health Services Union of Australia, Tasmania No. 1 Branch.

DEPUTY PRESIDENT JOHNSON: Thank you, Mr Brown. Mr Richard Brown, it seems a quaint expression doesn't it, but I have to avoid not being able to understand
10 the transcript at some later stage if I just stick to Mr Browns all the time. This is your first appearance before me, and I don't know whether it's your first in this commission or not, but let me say welcome anyway.

MR R. BROWN: Thank you.

DEPUTY PRESIDENT JOHNSON: And perhaps if you would like to commence with
15 your submission.

MR R. BROWN: Thank you, commissioner. It is my first submission for this commission so I'll now commence. The application before us today is on behalf of Stable Investments Pty Ltd who, through David Goldsmith from Legal & General and their employees, wish to amend who their superannuation contributions are made to.
20 And in doing that, under section 32(1)(b) subsection, we would like to tender some documents regarding that Legal & General is a complying superannuation fund. And also we would like to tender stat decs on behalf of the employer and each employee stating that they were -

DEPUTY PRESIDENT JOHNSON: Just before you get to that point, Mr Brown. Mr
25 Chris Brown have you been given copies of these documents?

MR C. BROWN: No, I haven't. I'm just getting copies now, thank you.

DEPUTY PRESIDENT JOHNSON: The statement concerning complying super fund I'll mark as exhibit TCCI.1, subject to any objection that you may have on the part of HSUA, Mr Brown.

30 MR C. BROWN: No, objections.

DEPUTY PRESIDENT JOHNSON: The statutory declarations, do you have those?

MR C. BROWN: I do, thank you, Mr Deputy President.

DEPUTY PRESIDENT JOHNSON: Perhaps since I interrupted you, Mr Richard Brown, you might care to continue with your description of those documents please.

35 MR R. BROWN: Sir, as you can see from the first exhibit in regards to a complying superannuation fund, that Legal & General Superchoice, as a sub group of Legal & General Superannuation, is a complying superannuation fund, and has elected to become a regulated superannuation fund.

40 In regards to the stat decs, you will see that the stat dec on behalf of the employer indicates that he is happy for the employees as listed: Helen Holmes, Cheryl Broadby, Annette Marlow, to transfer their superannuation contributions from Tasplan to Legal

& General Superchoice. And in respect to the employees statutory declaration, it states:

The decision to change my Superannuation Fund has been made after full disclosure of all details of my present position and of my new arrangements.

5 So therefore we believe that the employees were given full and ample opportunity to look at their current arrangements and also have regard to the possible new arrangements through Legal & General Superchoice. We therefore submit that the award be varied to include the subclause, Part 3, as listed on Appendix A of the application, which stated that in adding the third part to subclause (c):

10 *The following employers are exempt from contributing to TASPLAN or HESTA, but shall observe all other provisions of this clause and shall make the contributions in accordance with subclause (e) to the following approved fund.*

And those listed there are the first ones, being Stable Investments Pty Ltd, and Fund being Legal and General Superchoice.

15 DEPUTY PRESIDENT JOHNSON: Mr Brown, who is Mr Gregory Saunders?

MR R. BROWN: Mr Gregory Saunders was a - have you got his personal statutory declaration there?

DEPUTY PRESIDENT JOHNSON: Yes.

MR R. BROWN: Greg Saunders is actually - it was a mistake and probably I
20 shouldn't have given you that one. He is the farmhand on Dr Bernard Einoder's hobby farm, so that will not need to be a part of the application. I apologise for that error.

MR C. BROWN: So that ones out is it?

MR R. BROWN: That's out, yes.

DEPUTY PRESIDENT JOHNSON: The statutory declaration from Mr - Dr Einoder, is
25 that how that's pronounced?

MR R. BROWN: Einoder.

DEPUTY PRESIDENT JOHNSON: Einoder. Will be marked, subject to any objection from you, Mr C. Brown, TCCI.2. And the three statutory declarations from the employees, I will mark as a bundle again subject to any objections, TCCI.3.

30 Before I invite Mr Chris Brown to comment. Mr Brown, you might care to enlarge on the nature of the materials and advice given to the employees from which they were expected to form the views and which comprise the basis of the statement that they make in their statutory declarations that relates to full disclosure of all details.

MR R. BROWN: I believe that what they were given in regards to that information,
35 was a plan in terms of what was available through Legal & General Superchoice to them and the recent performance of that. The details of that performance, I don't have before me today, commissioner. But they were also given the information pack in regards to Tasplan as being their current fund. And having due consideration to those I believe they have elected to contribute to the Legal & General Superchoice. We were
40 not involved in negotiations directly with this, it came to us as an end result following as mentioned David Goldsmith, from Legal & General, and the employees don't have intricate knowledge of exactly what information was given, other than the

overviews of the two different plans were provided to them and were given time to consider which one they would wish to join.

DEPUTY PRESIDENT JOHNSON: And do you know how much time they were given to consider?

5 MR R. BROWN: I'm not sure exactly, all I do know is that - as you can see from their stat decs they were signed in June, and I think it was at least a two week period before they were required to come back after having consideration to the - and the request.

DEPUTY PRESIDENT JOHNSON: Thank you, Mr Brown. Mr. Chris Brown.

10 MR C. BROWN: Thank you, Mr Deputy President. The union's view normally in these circumstances is that the superannuation funds are in fact the funds of the employees and therefore it should be the employees' choice collectively, taking account of what the administration requirements are on the employer. But it should be their choice as to ultimately which fund their superannuation is paid into. Awards usually, and this instance is no exception, do nominate, you know, which funds in the first instance
15 super should be paid into.

In the case of the Medical Practitioners Private Sector Award, the relevant award in this case, the award nominates that contributions should be made into either Tasplan or into HESTA. Having said that I also note that this initiative appears to have come from the employees themselves rather than from the employer, and that they have
20 signed statutory declarations saying that they have examined the performance of both funds and they make their choice freely. The actual details of how that occurred obviously seem to be a bit sketchy, but if we take it on face value then the process seems to have been one that in itself we have got no objections to. The only point that we would raise is that in the Medical Practitioners Award, under the Superannuation,
25 or the Occupational Superannuation clause, which is clause 20, and subclause (c), which is Exemptions, it says:

The Tasmanian Industrial Commission may grant an exemption to an employer from making contributions into TASPLAN or HESTA in the following circumstances:

30 Now it outlines two circumstances. The first is that:

Where the fund subject to the exemption application is an approved fund (as defined) which was established prior to 1 January 1990 and occupational superannuation contributions equivalent to 3 per cent of ordinary time earnings (as defined) were being on behalf of employees in the establishment covered by this award prior to 1 January 1990 and have continued to be paid since that date;

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The second one is the one that is of particular interest to me, and that is:

Where an employer can demonstrate special and compelling circumstances to justify the use of an approved fund other than TASPLAN or HESTA.

40 What appears to have happened in this case is that it is Tasplan, and the proposed fund Legal & General fund, which are the two funds where information was given to the employees regarding performance, and it would appear that no information regarding the HESTA scheme was in fact given to employees.

The HESTA fund has been performing extremely well in recent times, and in particular in the last year where the latest interest rates show that the HESTA core pool was attracting 17.5 per cent, the HESTA share pools was attracting 20.5 per cent and the HESTA cash plus plan was attracting 12.95 per cent. They seem to be fairly
5 extraordinary returns on that particular superannuation fund and I'm just wondering whether employees were in fact given the benefit of that information so that they could make that decision.

Having said all of that I must also say that we do not have any members at this particular site, and therefore have not had an opportunity to talk to any of the
10 employees regarding what their - how this process was adopted and whether they in fact did want to have a look at the HESTA plan itself. So I think under normal circumstances certainly if we'd had members there, I think we would have been insisting that HESTA was one of the plans that was examined alongside the other two, because the award quite clearly says that the employer has an obligation to
15 demonstrate that there is a special and compelling circumstance to justify the use of an approved fund other than Tasplan or HESTA. If the commission pleases.

DEPUTY PRESIDENT JOHNSON: Thank you, Mr Brown. Mr Richard Brown.

MR R. BROWN: Commissioner, in response to Chris's submission there in regards to the employees having access to the HESTA plan, it is my belief that they did not have
20 that. The reasons behind that I don't know other than this - it appears to me that this submission in terms of them wishing to change contribution funds is that it was at the instigation of the employees themselves. So therefore we would submit that the employees were happy that they understood that they had the option to look at all funds and that Legal & General Superchoice was the fund that they selected in this
25 instance. I can if required get more information in regards to the employees' requests for information from Legal & General Superchoice and follow that through, if the commission wishes. If the commission pleases.

DEPUTY PRESIDENT JOHNSON: Mr Richard Brown, I hope I'm not being pedantic when I say that I think you ought to do that. I would customarily expect in an
30 application of this nature that there would be tabled copies of documents and materials that have been submitted to the employees, simply because that shows the level of compliance with the procedural fairness requirement of making sure that the employees are fully involved. It's one thing for them to swear by statutory declaration that they have been fully informed, and I wouldn't disbelieve that for a second, but the
35 policy of what 'fully informed' means in the circumstances is something that we ought to have some evidence on.

So I would invite you to get copies of the materials that have been sent or given to the employees. Secondly, I think that you should indeed ascertain the steps that the
40 employees and the employer, for that matter, took to inform the employees of the HESTA scheme and its performance. I don't suppose one can reasonably expect Legal & General to have done something like that and I don't infer any criticisms in that regard. But irrespective of whether the employees are members of an organisation or not they are nonetheless bound by this particular award in the circumstances and this commission should uphold the provisions of the award and ensure that they are
45 complied with.

So for those reasons - those two reasons I go a bit further than what you offered to do. I think in the circumstances I will invite you to obtain the additional materials on both
50 counts. I don't expect that that will take you very long to do and when you have those materials in hand you might let me have them and let Mr Chris Brown have them. And then at the convenience of the parties I will have another brief hearing and we may be able to bring this matter to a conclusion.

MR R. BROWN: No problems with that, Mr Commissioner. I'll undertake this afternoon to contact David Goldsmith, of Legal & General, and Dr. Bernard Einoder, as the proprietor of Stable Investments Pty Ltd, to ascertain exactly what information was provided to the employees and if necessary provide them with the details of HESTA as well as the Tasplan contributions rates and performance rates, and we'll report back to you as soon as I have that information.

DEPUTY PRESIDENT JOHNSON: Yes. Mr Chris Brown, do you have any further submissions in respect of this matter today?

MR C. BROWN: No further submissions. Thank you, Mr Deputy President.

DEPUTY PRESIDENT JOHNSON: In that case, I will adjourn the matter sine die. But leave reserved to the applicant to have the matter restored to the list at some future convenient time.

HEARING ADJOURNED SINE DIE