CHAPTER 10:

INTERACTION BETWEEN SG AND AWARD SUPERANNUATION

Background

10.1 This Chapter examines the interaction between SG and award superannuation.

10.2 Award superannuation emerged from an industrial relations framework. It evolved from the National Wage Case of September 1983. The effect of that decision culminated in an agreement in September 1985 between the Australian Council of Trade Unions (ACTU) and the Federal Government to apply to the Australian Conciliation and Arbitration Commission for a 3% productivity increase to be taken as superannuation contributions with an intended commencement date of 1 July 1986.

10.3 The High Court subsequently held that the ACTU superannuation claim was an industrial matter and the then *Conciliation and Arbitration Act 1904* (now the *Industrial Relations Act 1988)* was amended to require the Industrial Relations Commission to take into account, in arriving at national wage case decisions, increased superannuation contributions made by employers.

10.4 As outlined in Chapter 2, the Government decided to introduce a mandatory superannuation scheme, which commenced on 1 July 1992. However, the award superannuation system was not dismantled when SG was implemented which has resulted in these two superannuation systems operating concurrently. The result is that employers may be required to comply with both superannuation systems simultaneously.

10.5 The evidence to the Committee in the course of this inquiry has been that the liability of the employer under each system can be markedly different. This position is further exacerbated by variations in the requirements of individual superannuation award provisions.

10.6 Consequently, the inconsistencies arising from the joint operation of the two arrangements has led to significant administrative difficulties. Indeed, evidence received by the Committee indicates that the relationship between SG and award superannuation has been quite fragile.

10.7 Of particular relevance to the issues discussed in this Chapter is the decision handed down on 7 September 1994, by the Full Bench of the Australian Industrial Relations Commission (AIRC) on a Superannuation Test Case dealing with the question of what provisions, if any, awards of the Commission should contain with respect to employee superannuation. The Test Case established standards which the Commission can incorporate in awards on application. This case is discussed in detail at the end of this Chapter.

10.8 In short, evidence has been provided to the Committee concerning the conflict in differing thresholds, contribution rates, earnings bases and frequency of payments.

Differing Thresholds

10.9 The threshold for SG legislation is $450 per month. However, award thresholds can vary from one award to another and may be defined in terms of salary dollars earned or the length of service, or both.

10.10 Several submissions identified the confusion surrounding these different thresholds as contributing greatly to the administrative burden of meeting superannuation obligations.

10.11 The extent of this problem is perhaps best illustrated by the evidence given by Mr Richard Calver, Victorian Farmers Federation, on how differing thresholds affect primary producers:

> Under [the Pastoral Industry Superannuation Award] there are no qualifying number of hours. The three per cent employer contribution required to be paid under that award must be paid for all employees covered by the award from the first dollar earned, yet under a sister award, the Wool Classers and Shearing Staff Employees Award, there is a minimum qualifying period of 80 hours worked in a financial year. Once the 80 hours are worked, again the three per cent contribution under the award becomes payable from the first hour, not the 81st hour.
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> Then the farmer also needs to record whether or not the workers reached the monetary threshold now of $450 per month under the SG legislation. That might affect the payment of the one per cent additional to those awards or it might affect the entire SG requirement. So, for a very small superannuation contribution, the farmer has got to cope with the provisions of no minimum payment [threshold] at all under the Pastoral Industry Superannuation Award, he has got to cope with logging the number of hours under the Wool Classers Award and then he has got to keep a monetary record. It could be that the same casual employee did different work for the

> same farmer that would require that person to be paid under those three different awards. I do not think it an exaggeration to say that the SG process is held up to ridicule.[1]

10.12 The Committee heard similar evidence from Mr David Goodear, Jacques Martin Industry, that anomalies exist in the liquor industry where employers are confused as to whether the lower limit is the SG specification of $450 a month or $290 a month, because the award in some states specifies $290.[2]

10.13 Ms J. Willmott, of Nedlands, Western Australia, succinctly outlined the problems arising from conflicting thresholds as being:

> Our award stipulated that if a person worked 10 hours per week after a qualifying period of three months we must contribute 3%. We must therefore test each person's total income each month to see if they qualify for the Superannuation Guarantee and if they do not then we must look to see whether they qualify for the lesser amount of 3%.[3]

10.14 An example of the implications this confusion was articulated by the Australian Liquor, Hospitality & Miscellaneous Workers Union (ALHMWU). It submitted that:

> many employers now feel justified in taking the stance that even though the award provides a minimum level of $250 per month, the SGC gives them a higher minimum of $450 per month and accordingly they are advising employees that no superannuation benefit is payable unless they earn in excess of that figure.[4]

10.15 The threshold differences were further exemplified to the Committee in a submission from the New South Wales Nurses' Association which provided that although the State-based award in New South Wales prescribes a threshold of $1,744 per annum, the newly established public sector First State Superannuation Scheme has a once-only threshold of $450.[5]

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1 Evidence, p 225

2 Evidence, p 134

3 SGCREV Sub No 13

4 SGCREV Sub No 40

5 SGCREV Sub No 26

10.16 An insight into why award thresholds vary was given to the Committee by Ms Ann Drohan, ALHMWU. Ms Drohan explained that:

> in our sector... the award has been designed around the type of work that our members do... the reason that the $250 minimum was struck was partly because they worked for more that one employer.[6]

10.17 Chapter 7 reports the considerable debate on whether the SG threshold should be increased or decreased. In this Chapter the Committee has explored the threshold in the context of the coexistence of the SG and award superannuation systems.

10.18 This evidence suggests that many awards have a different and mostly lower threshold, and the lowering of the $450 per month SG threshold, as recommended by the Committee in Chapter 7, will ensure a greater degree of uniformity between the award and SG systems exists and a greater coverage of low income earners is achieved.

10.19 However, inconsistency, albeit to a lesser extent, will remain between the $200 per month thresholds for most awards and the lower quarterly SG threshold recommended by the Committee.

10.20 The Committee notes that the decision arising from the AIRC Superannuation Test Case has provided a means by which the AIRC may further address this inconsistency. This is dealt with in the Committee's recommendation at the conclusion of this Chapter.

Contribution Levels

10.21 The level of SG contributions is being increased, at a predetermined rate, to 9 per cent for the 2002/03 and subsequent financial years. The phase-in scale for small employers, with a payroll of less than $1 million, is lower in the earlier years than the scale for large employers. Apart from this slightly different phase-in scale until 1996/97, SG contributions are uniform for all employers and across all industries. By contrast, award contributions vary from award to award.

6 Evidence, p 252

10.22 Mr Rosario, of Westscheme, gave an account to the Committee of how confusion surrounding award requirements has led to non-compliance with SG. Mr Rosario told the Committee he had encountered much difficulty during May 1994 in communicating the impending increase in the SG contribution rate. [7]

10.23 The Committee also heard evidence from Mr Troy, Australian Road Transport Industrial Organisation (ARTIO), that the use of flat dollar contributions under some awards exasperates the complexities associated with contribution levels. Mr Troy explained that for a given, flat dollar contribution some employers could be paying less than is required under SG whilst, at the same time, other employers contributing under the same award could be paying more than is required. [8]

10.24 The interaction between the contribution levels for SG and award superannuation manifests the problem that employees can end up with two superannuation funds for the one employment relationship.

10.25 This anomaly affects the New South Wales Nurses Association (NSWNA), which submitted that disparity exists between the Commonwealth SG threshold and aggregation provisions and those applying under the State-based occupational superannuation award, the latter providing for the first 3% component of the overall current 5%.[9] Mr Maratheftis, NSWNA, highlighted this problem when he told the Committee that approximately 5% of employers have created their own complying superannuation funds to which they contribute SG amounts over and above the awards requirements. The result is that employees have one employer, but two active superannuation accounts. [10]

10.26 To alleviate this situation, Mr Maratheftis suggested that the Treasurer's comments about SG complementing rather than replacing awards warrants an amendment to SG legislation to make employers contribute to superannuation funds nominated under the principal the industrial award prior to the commencement of SG.

7 Evidence, p 319

8 Evidence, p 167

9 SGCREV Sub No 26

10 Evidence, p 31

10.27 Although the continued phasing-in of SG is likely to mean some inconsistencies in this area will remain, the Superannuation Test case has given the AIRC the jurisdiction to hear applications to vary the superannuation provisions of awards.

Earnings base definition

10.28 The SG legislation sets out definitions for earnings bases which are used for calculating superannuation contributions. Award superannuation definitions of earnings bases can vary from award to award and from those of SG legislation.

10.29 Various submissions to the Committee addressed the administrative problems that have occurred because of inconsistency between the definition provided by SG and those provided by some awards for the earnings base. Some awards use a flat dollar amount which eliminates the need for an earnings base for award superannuation purposes. Other awards have varying earnings bases. This situation has been compounded by the SG requirement that shortfall components must be calculated using ordinary times earnings, regardless of whether an award specifies a flat dollar contribution.

10.30 In giving evidence before the Committee, Mr Michael Monaghan, of the Australian Taxation Office, acknowledged the concerns associated with the use of flat dollar earnings bases because the *Superannuation Guarantee (Administration) Act 1992* was really designed around employers contributing on the basis of the earnings of an individual employee. Mr Monaghan explained that historically, the standard employee and flat dollar earnings bases were not in the original legislation, but they were introduced as a result of negotiations at the time of the passage of the bill.[11]

10.31 Mr Davies, of Mayne Nickless, gave the Committee an account of this from an employer's perspective:

> When the superannuation act was enacted it did not recognise flat rate contributions but rather required all SGC support to be measured as a percentage of notional earnings. The majority of our employees are covered by the Transport Workers (Superannuation) Consolidated Award 1987 which requires the company to make a contribution to the TWU fund of $17 per week in respect of the employee basic wage. Following a series of

11 Evidence, p 609

> meetings, the government agreed to amend the act so that the TWU fund would have to recognise a notional earnings base. The new section 25A which came into force in December 1992 was a result of this agreement. [12]

10.32 Mr Davies also gave evidence to the Committee that inconsistent definitions of earnings bases in SG and the Transport Workers (Superannuation) Consolidated Award 1987 created considerable a administrative burden. Mr Davies articulated:

> When Superannuation Guarantee Ruling No. 93/D1 was issued by the Australian Taxation Office on 27 May 1993, it was clear that the Australian Taxation Office had interpreted section 25A to mean that we would need to use two earnings bases to measure our SGA contributions in respect of each transport award employee. Taking figures for the past year to illustrate this, we see that the $17 contribution is 4.45% of the base wage, so we must make a top-up contribution to meet our 5% of SGA obligation in respect of each TWU employee. But the remaining 0.55% contribution must be based on the employee's ordinary times earnings... We estimate that approximately 7,000 additional SGA calculations were made in 1992-93 and 1993-94 financial years, owing to the use of two earnings bases. [13]

10.33 Mr Davies acknowledged that the Treasurer's Statement of 28 June 1994 foreshadowed legislation to rectify the problem with section 25A. From 1 July 1994, SG legislation would provide that the amount of flat rate contribution would be measured against a standard employee earnings base. Mr Davies assumes that this amendment will apply to both full-time and casual employees and asked that the Committee endorse the amendment proposed by the Treasurer.[14]

10.34 Whilst endorsing the Treasurer's proposed measures to rectify this problem with section 25A, Mr Davies highlighted another problem. He explained that, among other things, section 25A requires an award to be operative prior to 21 August 1991 before a flat rate contribution notional earnings base can be recognised. [15]

10.35 In discussing this situation, Mr Davies submitted to the Committee:

> The relevant unions are agreeable to varying the award so that a classification of employees is named and a recognised notional earnings base

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12 Evidence, p 149

13 Evidence, p 149

14 Evidence, p 149

15 Evidence, p 149

> be created. We believe that if an employer reaches agreement with a union to amend an award that does not presently contain all the elements of section 25A, but after the amendment would meet the requirements, then there is no reason why section 25A should not apply to effect a notional earnings base for that award.[16]

10.36 The Australian Chamber of Manufactures (ACM) also had serious concerns with the ramifications for employers under awards making the flat rate contributions.[17] The ACM did not consider that the insertion of section 25A fully addressed the problem. Its concern is about a ruling by the Tax Office that the award rate for the "standard" employee becomes the notional earnings base only for determining what percentage the flat rate represents:

> If the flat dollar, when expressed as a percentage for the employee, is less than the employer's SGC percentage for the employee, the excess percentage must be measured against another earnings base... The problem is compounded in the case of part time and casual employees, and juniors and apprentices, because the relevant awards contain lower flat rate amounts for other than full-time adult employees... there is no provision for any apportionment of the contribution for a person paid at a lower rate than full-time adults. Accordingly, the notional earnings base is the <u>same</u> as for full-time adult employees.[18]

10.37 Although the *Taxation Law Amendment Act (No 4) 1994* remedied the anomaly in relation to part-time employees, the ACM submitted (in relation to what was then the Taxation Laws Amendment (No 4) Bill) that the situation concerning part-time employees working more than 30 hours per week, casuals, juniors and apprentices has not been addressed. The ACM regards this as 'highly unsatisfactory', considers section 25A as 'extremely complex' and one which 'has created an administrative nightmare for employers and will almost certainly result in widespread confusion and involuntary non-compliance'.[19]

10.38 Mr Brian Troy, ARTIO, gave the Committee an account of how the road transport industry had dealt with the problems associated with flat dollar contributions.[20] The union rejected a proposal from the ARTIO in early 1994 for an increase in the flat dollar award contribution from $17 to $21 on the basis that it would be best for majority of their members to remain with the SG percentage.

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16 Evidence, p 148

17 SGCREV Sub No 61

18 SGCREV Sub No 61

19 SGCREV Sub No 61

20 Evidence, p 168

For example, a flat $21 would disadvantage the higher paid worker who, in some cases would receive $26 to $28 under the SG percentage. To facilitate this approach, a small amendment was made to the trust deed of the TWU superannuation fund to ensure that section 25A would not apply. SG now applies, with the minimum flat dollar, which exists under the award, now acting as a minimum, rather than a standard rate of contribution.

10.39 Mr Troy also recommended that the Treasurer's proposal to amend SG legislation from 1 July 1994, to provide that there is only one earnings base for flat dollars, be backdated to cover the first two years of the operation of SG.[21]

10.40 The Committee heard a view from Mr Richard Calver, Victorian Farmers Federation (VFF), that recognition of a flat dollar earnings basis would not be a 'sufficient solution'. Mr Calver suggested the best approach would be for SG to eliminate award superannuation where the entitlements were coexistent, but did, however, recognise that such an approach would almost certainly give rise to industrial disputes. Mr Calver told the Committee that the VFF supported the National Farmers' Federation approach that SG legislation should be amended to ensure that its coverage and application are established as statutory terms which override awards.[22]

10.41 A contrary view was expressed by the ARTIO who recommended in their submission to the Committee that SG legislation be amended to provide that, where a federal award provides for a system of superannuation contributions that are reasonably comparable to SG requirements, then the awards will operate to the exclusion of SG.[23]

10.42 The Institute of Actuaries of Australia (IAA) submitted that there are 'a number of significant problems with the use of Ordinary Time Earnings as the earnings base... particularly... in the case of defined benefit funds'.[24]

10.43 The Committee notes that, subsequent to the submission being forwarded, this issue was addressed by the Treasurer in his Statement of 28 June 1994.[25] Nevertheless, the IAA gave evidence that the changes

21 Evidence, p 167

22 Evidence, pp 226-232

23 SGCREV Sub No 50

24 SGCREV Sub No 53

25 The Hon Ralph Willis, MP, Treasurer, *Superannuation Policy - Statement of Measures*, 28 June 1994

announced in the Treasurer's Statement do not go far enough as they cover only a small proportion of the problem issues.[26] The IAA suggested that the SGAA be amended so that 'the existing earnings base provision is independent of employers, so that it just depends on the funds having been there at August 1991'[27] and for Tax Office approval of 'successor funds set up as genuine replacements to earlier funds'.[28]

10.44 A further issue in the award superannuation arena was raised by Mr G.M. Strickland, of Tennant Creek, Northern Territory. Mr Stickland submitted that under an enterprise agreement with his employer, the notional earnings base for employer contributions is a 'base rate' of earnings which is less than gross yearly earnings. Mr Strickland's concern is that because of this method of calculating contributions, his retirement benefit will not be in accordance with his earning capacity.[29] The employer and employee agree that the contributions are in accordance with the enterprise agreement. Although this matter is one of industrial relations, it illustrates another area of superannuation in which confusion and grievance can arise.

10.45 The Committee acknowledges the confusion surrounding varying definitions for earnings bases and notes that the AIRC now has authority to ensure that awards specify an employee's earnings which, for the purposes of SG legislation, will operate to provide a 'notional earnings base'. The Committee therefore concludes that inconsistencies with earnings bases are now a matter for parties to raise before the AIRC.

Frequency of Payments

10.46 The SG provisions on frequency of payments are as follows:

- during its first year of operation (1992/93) employers could make payment on an annual basis.
- during subsequent years, employers could make payments on a quarterly basis.

26 Stephen Partridge, Evidence, p 476

27 SGCREV Sub No 53

28 SGCREV Sub No 53

29 SGCREV Sub No 108, Supplementary SGCREV Sub No 108

10.47 However, quarterly payments were postponed for the 1993/94 year. The Treasurer's Statement of 28 June 1994 further provided that:

> The present annual contribution requirement for the SG will be maintained in 1994-95 and subsequently until the SG regime is more settled and established. The requirement for quarterly contributions under the SG will then be introduced with 12 months notice to employers.[30]

10.48 Despite these changes to the frequency of SG contributions, many award contributions remain payable on a monthly basis. Mr Jeffrey Carr, of ALHMWU, raised the point that monthly payments ensure workers are provided immediate access to death and disability insurance and start accruing interest on their contributions immediately. Mr Carr also suggested that six-monthly statements enabled the employee to check that payments are being made correctly.[31]

10.49 The Maranoa Graziers' Association questions the frequency of payments under the awards and recommends a quarterly payment system. They submitted that the main benefit of a quarterly payment system would be to streamline the procedure, in line with the already established tax system. They added that this would require an alteration to the industrial awards which pertain to the rural industry.[32]

10.50 The introduction of a quarterly payment system was also supported by the Australian Council of Trade Unions which suggested that it would resolve a number of problems currently faced by funds, including:

- monitoring compliance is difficult with an annual payment;
- death and disability cover in most cases cannot be maintained where an annual payment is made; and
- annual statements to members show nil because the payment is received after the end of the financial year.[33]

10.51 The Committee is pleased to note that the AIRC also has the authority now to facilitate the process of making contribution rates of awards more consistent with those provided by the SG legislation.

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30 The Hon Ralph Willis, MP, Treasurer, *Superannuation Policy - Statement of Measures*, 28 June 1994

31 Evidence, p 249

32 SGCREV Sub No 1

33 SGCREV Sub No 107

Recent Developments

Superannuation Test Case

10.52 In its submission to the Committee, the Commonwealth Treasury stated that the Government's position on the interaction between SG and award superannuation is that most of the difficulties could be addressed through a process of harmonisation. In particular, the Government recommended to the AIRC that the superannuation provisions of awards should be reviewed with a view to amending or removing those that provide for a lower standard of practice than the SG.[34]

10.53 On 7 September 1994, the full bench of the AIRC handed down a Superannuation Test Case decision dealing with the question of what provisions, if any, awards of the Commission should contain with respect to employee superannuation.

10.54 A useful summary of the outcome of the Superannuation Test Case was provided in a submission from the Department of Industrial Relations (DIR).[35] DIR stated that the main outcome of the test case was the AIRC had a continuing role to play in the application of superannuation. Moreover, DIR's submission explained that where application to vary award provisions as far as they relate to quantum of employer contributions and employees covered, the AIRC determined that it would:

- vary the award by inserting a clause stating: 'Superannuation legislation - The subject of superannuation is dealt with extensively by legislation including the *Superannuation Industry (Supervision) Act 1993* and the *Superannuation (Resolution of Complaints) Act 1993*. This legislation, as varied from time to time, governs the superannuation rights and obligations of the parties';
- if appropriate, ensure that the award contains a specification of an employee's earnings (for example, 'ordinary time earnings') which, for the purposes of the SG Act will operate to provide a 'notional earnings base'; and

34 SGCREV Sub No 96

35 SGCREV Sub No 94

- if the award is to prescribe a 'flat dollar' amount of employer contributions, ensure that appropriate amounts are inserted so as to give effect to the levels of contribution required from time to time under the SG Act.

10.55 The AIRC also determined that it would continue to deal with applications in respect of choice of fund matters and such matters would be regarded as part of the safety net award wages and conditions. Any specification of a fund will carry with it the obligation on an employer to pay contributions at such intervals (for example, monthly) as required by the fund.

Section 150A Review

10.56 The insertion of section 150A of the *Industrial Relations Act 1988* in March 1994 was the result of the *Industrial Relations Reform Act 1993* which requires that the award system operate effectively at enterprise level.

10.57 The AIRC has an obligation under section 150A to review each of its awards every three years to consider if they are deficient, in respect of the provisions of paragraph 150A(2), and take action to remedy any such deficiencies.

10.58 The AIRC provided in its decision in the 'Safety Net Adjustment and Review Case', of 21 September 1994, that a set of detailed principles by which awards can be reviewed will best be developed by conducting a pilot award review programme.

10.59 The pilot award review program involving 14 awards, currently underway, is to be completed by August 1995. The AIRC will then reconvene to determine, among other things, the principle on which the continuing review of awards should progress.

Conclusion

10.60 The Committee recognises the extent of the administrative burden generated by the inconsistent interaction of the requirements for SG and award superannuation and notes that the outcome of the AIRC Superannuation Test Case has provided a means by which many of these inconsistencies may be resolved.

10.61 However, the Committee is concerned at the time involved in such a process as each award, or group of awards, has to be individually brought before the AIRC. The Committee believes the removal of inconsistencies would be expediated if the Government investigated and made submissions to the section 150A review on the most appropriate means by which SG and award superannuation inconsistencies can be removed. That submission should be based upon the principle that award and SG superannuation converge at the earliest possible time.

Recommendation 10.1:

The Committee recommends the Government submit to the section 150A AIRC review of awards. This submission should outline the means by which SG and award superannuation inconsistencies can be removed.