

MEMORANDUM TO: Nigel Gray

DPM-M-05

FROM: Robin Marks

DATE: 2 November 1989

SUBJECT: SPSF

The SPSF brought on our case for a mention in the Australian Industrial Relations Commission on Friday 27 October. We were represented by Minter Ellison at this mention.

I received notice of this hearing two days prior to the date. I contacted Tony Smith who said it was merely a mention to fix a date for our definite hearing.

I enclose a copy of a letter from Tony Smith in which the proceedings are recorded. You will note that our case has now been set aside for argument on Monday 5, Tuesday 6 and Wednesday 7 February 1990 in Melbourne.

Tony Smith is arranging a conference with Brian Shaw. I have suggested that you, I and Allan Dick should be present at this conference.

Enc



he should know about the hearing, where
a dispute was found

noted
RM

MINTER ELLISON

BARRISTERS & SOLICITORS

036174621

61 3 6633412;H 1

MELBOURNE

KENNETH W. ANDERSON
RALPH C. AYLING
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ROBERT J. STEWART
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IAN L. WALKER
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OUR REFERENCE

AFS 829632

Dr Robin Marks
Anti-Cancer Council of Victoria
Keogh House
1 Rathdowne Street
CARLTON SOUTH 3053

Dear Robin

State Public Service Federation

I refer to our telephone conversation of Tuesday 31 October, and, as promised, am now attaching a copy of a memorandum prepared by Richard West of our office, who attended the directions hearing at the Industrial Relations Commission last Friday.

You will note that the Commission has ordered that this matter be set down for argument on Section 101 and Section 111(1)(g) for Monday 5, Tuesday 6 and Wednesday 7 February, 1990 in Melbourne.

I have subsequently discussed this matter with Michael Tehan and Norman O'Bryan. Michael Tehan is now taking the necessary steps to arrange a conference with Mr. Brian Shaw Q.C. and I will advise you about this as soon as possible.

Yours sincerely



ANTHONY F. SMITH

Encl.

THE MINTER ELLISON LEGAL GROUP

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YOUR REFERENCE

617 4628

1 November 1989

By Facsimile 663 3412

KPS

FILE NOTE

Client Name : Anti-Cancer Council of Victoria
 Matter No. : RDM 331961 MWT
 Date : 27 October 1989

Attendance by RAW at Australian Industrial Relations Commission -
 mentioned hearing No. 3110 of 1988.

Coram: McBean DP

Contra: David Haynes & Ron Hutchinson of SPSF
 RAW for Anti-Cancer Council of Victoria

Prior to the commencement of proceedings matter No. 3370/88, a
 related dispute involving the Architects Registration Board was
 adjourned to enable discussions between the SPSF and the Board.
 The Board was represented by Chris Lane of Price Brent.

Haynes explained that the SPSF had called the matter on for
 mention to ascertain the intention of the Council. He explained
 that a dispute had been found on 23 May 1988, and on that date
 the Council was represented by Carlson of the State Department of
 Labour who said he had no objection to a dispute being found.
 Reference was made to transcript in this respect. He further
 stated that since then a number of awards had been made with
 other bodies served with the log of claims. He went on to say
 that there had been no conference between the parties and that he
 understood there was some disagreement between Carlson and the
 Council regarding representation.

SPSF
 C. K. G. W.

He confirmed that he had some contacts with MWT by telephone but these have got nowhere. He also stated that he and Dr Gray had corresponded to no effect.

He stated that the SPSF had restrained itself from recruiting employees of the Council but that the anti SPSF attitude displayed by the Council would eventually result in some sort of disruption because they were refusing entry to SPSF officials.

He sought a direction from the Commission that there be a compulsory conference. Mr Bean DP asked him what did he believe the next step should be. He replied that he would like to see the Council involved in negotiations.

RAW submitted that the Council sought an opportunity to argue that the finding of dispute should be revoked pursuant to Section 101, principally on the grounds that the SPSF lacks coverage of the Council staff because the Council is not a state instrumentality or undertaking. In the alternative the Council sought to argue that the Commission should dismiss the matter or refrain from further hearing it pursuant to Section 111(1)(g). RAW suggested that the two matters could conveniently be heard together and argued in the alternative.

Haynes then submitted that the course suggested by RAW was futile and silly. He pointed out that the Council had not opposed the finding of the dispute in May 1988 and that 18 months had elapsed since then without any action being taken. He referred to recent decisions and in particular the Health Computing Services Case and suggested that the approach adopted by the Council was designed to cultivate delay and was frivolous and vexatious.

RAW objected to the description of the matter as being vexatious or frivolous and pointed out that the Council took the matter seriously and it was a matter in which senior Council would be involved and would probably take one to two days to be heard.

After some discussions of the record regarding dates, McBean DP
~~is to be~~ ordered that the matter be set down for argument on Section
101 and Section 111(1)(g) on Monday 5th, Tuesday 6th and
Wednesday 7th February 1990 in Melbourne. The proceedings are to
commence a 10.00 a.m. on 5th February 1990.

raw

RAW

cc. Tony Smith

raw353.930001.

S P S F Division

PERSONAL EXPENSE ALLOWANCES

The Public Service Board has announced the following new rates which are payable from 1 October 1989.

ACCOMMODATION	CAPITAL CITY RATE	OTHER PLACES RATE
Breakfast	\$10.05	\$7.05
Lunch	17.00	12.95
Dinner	28.50	22.25
Bed	86.50	42.80
Incidentals	<u>10.45</u>	<u>10.45</u>
TOTAL	\$152.50	\$95.50

PROPOSED NEW RESPONDENTS TO THE AWARD

On the 5 October 1989 the Australian Industrial Relations Commission found that a "dispute" exists between SPSF and the following employers:

Cropwatch Pty Ltd
 Richland Laboratories Pty Ltd
 Victorian Relief Committee
 Victorian Institute of Marine Sciences
 Victorian Solar Energy Council

While the terminology of a "dispute being found" is an unfortunate legal requirement, meaningful negotiations with the Department of Labour representing the above employers are progressing well. We are confident that the above employers will consent to being included in the Award, and that these formalities will be conducted in December 1989.

Employees of the above organisations are now invited to join the SPSF.

In the case of the Victorian Post Secondary Education Commission, SPSF agreed to reserve this matter until December to give the employer and the government a chance to sort out their problem as to whether or not employees will become public servants. A December date has been set for finalising this long delayed matter.

In response to a comment made within the Department of Labour, to the effect that a separate State Award for the following State Superannuation Authorities was on a very low priority, the VPSA and SPSF have retaliated to this shabby treatment of members and potential members by putting in place the procedures for creating federal award coverage and thus federal law protection of the membership interests.

As a consequence the following organisations will soon be logged for inclusion in the Victorian State Agencies Award.

- * Hospitals Superannuation Board
- * State Superannuation Board (Section 6C employees)
- * Emergency Services Superannuation Board
- * Transport Superannuation Board, and, if it remains a legal entity at the time the
- * State Employees Retirement Benefit Board.

The proposition to "log federally" has been approved by the General Secretary of the VPSA and the State Public Services Federation.

Copies of the award are available to all employees of the above organisations and VPSA Industrial Officer Ron Hutchins is available to discuss the above issues with members (tel. 654-4177).

Aluminium Smelters of Victoria Ltd (ALUVIC) has also been on the AIRC reserved list by agreement between the union and the employer.

Substantive agreement has been reached with the employer in relation to conditions of employment and at this stage the union is hopeful that remaining problems will be eliminated by consultation and agreement by December.

Two organisations have apparently chosen the long resource wasting path of disputing the inevitable. The Anti Cancer Council and Architects Registration Board continue to resist all attempts to conciliate and negotiate, and have chosen to contest award coverage.

This will involve the long and costly process of a Commission hearing involving the employer in hiring solicitors and probably barristers - a process which of course is advocated by the solicitors and barristers, who, to date, are out of their depth and are fighting a mere delaying tactic. Industrial Officers Ron Hutchins and David Haynes (SPSF) have arranged Commission hearing dates and are confident of winning award coverage for unprotected staff of those organisations. The early months of 1990 should see finalisation of this ludicrous money wasting delaying tactic on the part of the above employers. But it is nice to know these employers have that much money to spare. We will be using that knowledge to the benefit of employees after we have inevitably won award coverage.

Such confrontationist policies are foreign to this union but we have the expertise, the precedents, and the right on our side. We intend to win!!!

TRADE UNION TRAINING COURSES

The Trade union Training Authority has the following one week full time training courses available to VPSA members:

4 December - 8 December 1989

11 December - 15 December 1989

The course is titled Introductory Union Representatives Course and paid leave is available in accordance with the award.

Interested members should contact Ron Hutchins, VPSA Industrial Officer, tel. 654-4177 for further details.

RATES FOR VPSA SUBSCRIPTIONS

Fortnightly by Payroll Deduction - Adults - \$8.45

Fortnightly by Payroll Deduction - Juniors - \$5.48

Fortnightly by Payroll Deduction - Part-Time - \$5.48 - \$13,375 p.a.

Ron L Hutchins
Industrial Officer
13th November 1989

**Victorian Public Service Association, 180 Flinders Lane, Melbourne,
3000. Tel: 654 4177 Fax: 650 5150**

VPSA BULLETIN

NEW AWARD FOR HEALTH COMPUTING SERVICES VICTORIA LTD

On 5 October the Australian Industrial Relations Commission approved of the roping in of HCS-VIC Ltd into the Victorian State Agencies Award. Nineteen employers are now respondents to this award.

Negotiations are continuing with the employers for a new shiftwork clause in the award, and for inclusion of HCS in the salaries clause. It is expected that these matters will be finalised by January 1990.

AWARD RESTRUCTURE/SALARY INCREASE

In October the VPSA/SPSF served a claim on all employers aimed at achieving a 6%+ salary increase for all staff, plus additional benefits via the restructure of the award.

Preliminary discussions with the Department of Labour (representing the employers) indicate that agreement may soon be reached for the payment of the first instalment of 3% for all salaries covered by the award.

The union's claim for award restructuring is:

- * Abolition of junior rates.
- * A minimum increase in salaries of 6%, delivered in two instalments of 3%.
- * Abolition of the current classification structures and replacement with a new structure of eight grades for admin. positions, six grades for technical positions and five grades for professional positions
- * A redeployment agreement
- * Preference for union members in employment.
- * Workplace Representatives rights and duties.
- * Encouragement of union membership.
- * Payroll deduction for union subscriptions.
- * Dispute and grievance procedures.
- * Procedures for handling misconduct and unsatisfactory work performance
- * Establishing an appeals system (board of reference)
- * Establishing an agreed staff appraisal system.
- * Three per cent budget for training of staff.

- * Mobility of employment between all Victorian State Agencies.

A preliminary date for the hearing of the SPSF/VPSA claim has been set for late in November (22 or 24). Members will be advised of developments as soon as possible.

REHABILITATION AGREEMENT

Agreement has now been reached on this matter and copies of the new Rehabilitation Agreement have been made available to all workplaces covered by the agreement.

Members who require additional copies of the agreement, and/or the accompanying WorkCare and rehabilitation pamphlet, should contact Ron Hutchins at the VPSA on 654 4177.

ANNA STEWART MEMORIAL PROJECT

For the past four years the VPSA has participated in this annual two week full time training course which is designed for women union members.

The aim of the project is to encourage women to become more active in their union by providing a detailed program of information and hands-on experience on all facets of the union's organisation.

Paid leave is available for participants and members are advised to watch out for special advertisements which will be issued by the union during the December-March period.



16 November 1989

49-1562

MEMORANDUM TO: Adrienne Holzer
Robin Marks
Norman O'Bryan

cc Tony Smith

FROM: Nigel Gray

=====

A question I've thought of a number of times but haven't actually posed to you in reference to the attack on us by the SPSF is whether we might not head off their approach by forming our own inhouse staff association/union. Our terms and conditions are better than the SPSF's at this point in time so we'd have a good starting point.

Would this not be what is meant by an "enterprise union"?

mg

02 332 3645
OCT 24 14:20 ARCOM SYDNEY 02 3323645

file P.1/1



file
copies given to DR & RM + AJH.

11 OCT 1989

9 October 1989

C31310/89/DH:MC

Dr Nigel Gray
Director
Anti-Cancer Council
Cnr Victoria & Rathdowne Streets
CARLTON SOUTH VIC 3053

Dear Dr Gray

Re: C No. 31310 OF 1989

Further to our recent correspondence, I advise that the attached letter has been sent to Mr Deputy President MacBean seeking that the part of the dispute relating to the Anti-Cancer Council be brought on for hearing.

Yours sincerely

DAVID HAYNES
FEDERAL INDUSTRIAL OFFICER

C31310MC/SPSF

SPSF claim



STATE
PUBLIC SERVICES
FEDERATION

139 Queensberry Street
Carlton South, 3053
ALL CORRESPONDENCE TO:
P.O. Box 387, Carlton South, 3053
Ph (03) 347 2488
Fax (03) 347 0462

COPY

Federal Secretary: Helen Twohill

10 October 1989

C31310-89/DH:MC

Mr Deputy President MacBean
Australian Industrial Relations Commission
Level 8
Terrace Towers
80 William Street
EAST SYDNEY NSW 2011

Dear Sir

ANTI-CANCER COUNCIL OF VICTORIA
C No. 31310 of 1988

At the hearing of this matter before Mr Deputy President Hancock on 23 May, 1988 a dispute on wages and conditions was found to exist between SPSF and the Anti-Cancer Council and others. The Anti-Cancer Council did not oppose the finding of dispute and the parties were directed into conference.

Despite numerous attempts by the SPSF, the Anti-Cancer Council have refused to confer with the SPSF. As I suggested before you in the hearing on 5 October 1989, it may be that the Anti-Cancer Council wish to pursue argument pursuant to S.111(i)(g) of the Industrial Relations Act 1988.

In order to ascertain the intentions of the Anti-Cancer Council in this matter, I seek that the part of the dispute relating to them be brought on for hearing at your earliest convenience.

A copy of this letter has been forwarded to the Anti-Cancer Council.

Yours faithfully



DAVID HAYNES
FEDERAL INDUSTRIAL OFFICER

C31310MC/SPSF



AUSTRALIAN INDUSTRIAL REGISTRY

NOTICE OF LISTING

Please Print in BLOCK LETTERS

C No/s 3131088

The State Public Services Federation
-and-
The Law Reform Commission and others

re Log of claims

Listed to: mention*

before MacBean DP

Time 3:00 pm day: Date 27 October Place Nauru House
80 Collins St
Melbourne

M. C. Pherson REGISTRAR

Parties Notified

- 1. D. Haynes
SPSF
Fax (03) 347 0462
- 2. Anti-Cancer Council
of Victoria
Fax (03) 6633412

RM advises this means
"to set a date" (for
future hearing)

Member Ellison will represent
Acv.

RR	YAP	PR	1/2hr	S	?	LH	5/10/89 Adelaide	TC	Dublau
SI									
REGISTRY USE ONLY									
PN	AN	DIRN	SI	LL	CA	CT	✓	AB	1/1

McGuinness

THE ACTU got through its biennial congress in Sydney this week with its habitually good press. It seems to have come to a revelation not only to the unions, but also to most of those who regularly report the unions' views. That not everyone in Australia loves unions.

Indeed, as was revealed more than three months ago when the Australian Bureau of Statistics released its sample survey figures of union membership, the unions are losing support rapidly. Union membership is now down to 32 per cent of the private sector workforce, and declining rapidly.

Of course it is not only the unions that are declining in popularity. So also is the arbitration system. A Saulwick Poll, reported at the beginning of this month, showed that public support for the Arbitration Commission (now called the Industrial Relations Commission, which is the old Arbitration Commission without Justice Jim Staples) has declined very substantially over the past eight years. Only 50 per cent of the respondents believed that the commission should have a central role in wage-fixing, as against 69 per cent in 1981.

Half of the people questioned thought that if the commission were abolished, strong unions would get higher wages than other workers. This was not necessarily an endorsement of a system that protects strong

unions against competition. A substantial minority, 28 per cent, thought the commission favours unions, while only 15 per cent thought that it favoured employers.

And 43 per cent felt that it favoured neither. The sample was not asked the fundamental question, whether the commission was more self-serving than union or employer serving.

It is clear that both the union system and the centralised wage-fixing system are enjoying declining support. As far as the latter is concerned, it seems that the Government and the unions are determined to give the workforce no choice. They have to kowtow to the commission whether they like it or not.

Sanctions

The pilots have stated that they do not wish to subject themselves either to the present wages system or to compulsory arbitration. Therefore they are, pig-obstinate, going to be punished.

This would be a less un-savoury process if the refusal to accept arbitration had ever led to sanctions being implemented against unions that have been members of the ACTU in the past 30 years.

But in the process the unions and the commission are going to be still further discredited. It is obvious enough that neither really understands why they are losing authority and popular support.

In the case of the unions it is perfectly obvious, but difficult for them to admit. People are fed up with being pushed around by arrogant officials who have little to their credit except a history of neglecting their own work for the sake of union activism. Nowhere is this clearer than in the case of white-collar unions, where the activists are usually those who have no success, proficiency or interest in the work which their union covers.

In the case of all unions, the tradition whereby the commission gives unions monopoly rights over particular occupations is under challenge in the High Court.

A classic example is the quite extraordinary application of the Transport Workers Union (TWU) to be given coverage of the airpilots' profession now that the Australian Federation of Air Pilots (AFAP) is in the process of being broken. It does not seem to have occurred to the TWU that the fact that they have not approached a single pilot to ask whether he or she might like to be a member of the TWU instead of the federation is at all relevant.

To the TWU, the pilots, like their other members, are simply industrial cannon fodder. The present situation, created by the commission, is that workers in an industry who want to belong to a union are not allowed a choice between existing unions and new unions which they might like to form or join. There is thus no incentive whatsoever for



Unions and arbitration fall behind the times

It is the affirmative action fallacy — that to promote women because they are under-represented in upper echelon jobs just because women are 50 per cent of the population overlooks the fact that the proportion of women eligible or interested in offering themselves for such jobs is very much smaller than the proportion of men similarly interested.

The only surprising fact is that so many people are still members of unions. This sometimes is a result of residual goodwill towards the idea of unionism, and the belief that unions have, or should have, an important role, but more often union membership is a matter of passive acceptance of the status quo, part of the tradition of being in the workforce. It is not surprising, therefore, that new entrants into the workforce are much less inclined to join unions.

Women and the young have a generally sceptical and uninterested attitude to unions, as the ACTU congress realised. Typically, however, a correct perception of the basic facts has led to completely mistaken prescriptions.

The fact that most women do not care to belong to unions implies that women who do join and become active are quite atypical. Yet the ACTU proposes to encourage women who are not unionised to join unions by putting in positions of power and prominence women who clearly are not representative of women in the workforce.

The unions would do better to examine seriously the reasons why most women do not want to join, rather than repel more women by promoting those atypical women who, for reasons of personal ambition, ideology or lack of interest in their chosen vocation seek advancement through the existing unions.

Experience

The recipe for inducting young members is equally nonsensical. To try to abolish the lower rates of pay for young workers that enable them to gain employment and therefore work experience is an infallible means of creating a yet higher rate of youth unemployment.

The professional youth leaders of the union movement really underestimate the intelligence of those whom they hope to recruit: do they really think all young people are dumb enough not to realise that a campaign to raise their wages to adult rates will lead to adult workers with more experience being preferred in employ-

ment? And how then are the young ever going to get workforce experience?

The unions have realised that something is wrong. But they have not realised that the means they propose to correct for this, a greater degree of coercion and the creation of bigger and stronger unions by amalgamation, thus offering people even less choice, is the very reason why union membership is declining.

When the secretary of the ACTU boasted at the congress that when he wanted something fixed he went to his mate Paul Keating, did he not realise that such a degree of complicity and cronyism is repugnant to most people?

When the delegates at the congress voted to condemn the Government for using harsh measures against the pilots because similar measures might be used against them, did they not realise that the majority of the population would heartily applaud measures to reduce the power of the unions?

If the unions want to save their bacon, they had better start thinking very hard about how to persuade people to support them in circumstances of free choice. Because more and more the workforce, male and female, young and old, is demanding freedom to belong or not to belong to a union, freedom to choose between unions, and freedom to negotiate direct with employers when they choose.

— Padraic P. McGuinness

file SP SR



SPSF

CONFIDENTIAL

MEMORANDUM TO: Nigel Gray

DPM-M-15

FROM: Robin Marks

DATE: 27 September 1989

SUBJECT: State Public Service Federation

We have had considerable success in the data gathering about whether or not we are a Government organisation. It is very clear that the Council was established probably almost a year before we had an Enabling Act. The Act was developed to incorporate us and allow us permanence for fundraising purposes. It was never initiated by the Government, and was never intended to make us an instrumentality or undertaking of Government. The original objects and constitution of the Council have changed very little over time.

We have met with Norman O'Bryan and Michael Tehan. They are developing our case now. I have also spoken to Tony Smith who has sent through the attached fax. Tony is very keen for us to have the barrister, Brian Shaw, reconsider our position in light of Norman O'Bryan's approach. Tony is convinced that it is important for Brian Shaw's opinion to come into play here as this will be very convincing for the Commission.

Arthur Apted has spoken to the SPSF. They are very determined to have us come under their coverage. Our dispute has now been listed again for hearing in the Industrial Commission on October 18. It appears that the Union are responsible for this relisting. Arthur Apted has asked us whether we are prepared to talk to the Union at this stage. My answer was no, as any discussions with the Union would be merely about what type of award we would have, not whether or not they are to cover us. There is no point in us discussing awards with the Union at this stage. Norman agreed that this was the right approach.

Arthur Apted has arranged for a Department of Labour barrister to consider whether or not we are a Government body. We have supplied him with a list of the types of employees in the building for them to consider the diversity of the operation. This is purely a Department of Labour opinion, not the Union opinion. It is anticipated that this will not have any effect on our case before the tribunal.

I have informed Max Whiteside and Allan Dick of what is happening. There will be further work necessary before the tribunal hearing, and Norman O'Bryan will be back in touch with you about what is necessary. We are becoming more optimistic!

URGENT

MEMORANDUM TO: Nigel Gray

DPM-M-19/3

FROM: Robin Marks

DATE: 29 September 1989

SUBJECT: State Public Service Federation

Allan Dick rang this morning following my previous briefing about progress in the State Public Service Federation moves. He is particularly concerned that we develop a fall back position in case we lose the case at the Industrial Commission. He is pressing strongly that we consider the possibility of repealing our Act and becoming completely divorced from any legislation at all. He has suggested that we seek a legal opinion on the feasibility of doing this. He would like us to explore the steps that are necessary to do this **before** we appear in the Industrial Commission. We need to consider the potential gains and/or losses that will occur if we take up this option.

Allan said also that it may be necessary to convene an emergency meeting of the Executive Committee to consider our position and options in relation to this union dispute.

Allan is at his farm over the weekend and will be returning on Monday. He can be contacted before 9 am, after which he will be on the road for seven hours returning to Melbourne.

I am sorry I am away during these developments. I have been fascinated by the industrial process and have almost come to enjoy the whole battle! Good luck!



HTH will post

CONFIDENTIAL

MEMORANDUM TO: Nigel Gray

DPM-M-19/1

FROM: Robin Marks

DATE: 29 September 1989

SUBJECT: State Public Service Federation

This memorandum is an additional one to my memorandum of 27 September 1989 which is necessary following a meeting that Dorothy and I had with Arthur Apted at the Department of Labour this morning. Arthur informed us that, in contrast to what he said the other day, our dispute is actually listed in the Industrial Commission on this Thursday 5 October at 9 am in Adelaide.

We have not been notified, at any stage, of this hearing. This is due to the fact that the Department of Labour has continued to represent us in this dispute. This is also despite us saying to the Department of Labour that we don't believe that they are the people to represent us. They have not communicated with us concerning this new listing in any way whatsoever.

Our discussions today centred around the fact that we strongly believe that the Department of Labour should not represent us in this case. Arthur was quite sympathetic to the fact that it may well prejudice our case in which we are saying we are a non-Government body. He suggested that we write a letter to the Minister and get that to him as quickly as possible. I enclose a copy of this in which I request that we are no longer represented by them. He said he would do his best to make sure they cease representing us.

Arthur also said that the persons from the Department of Labour who will be acting in the other disputes which are listed (all those other statutory bodies that have got caught in this net) will tell the Deputy President of the Commission, John McBean, that they are no longer representing us. They are also prepared to say that we are seeking an adjournment of our case because we have had no time to prepare the details.

Arthur recommended that you ring Mr Deputy President McBean in Adelaide on Wednesday. You could say that we have not been notified by the Department of Labour of the impending hearing until Friday 29 September. This does not give us enough time to prepare our case. You should ask for an adjournment of the case for one month. I have spoken to Norman O'Bryan and that will give us a satisfactory period in which to develop our case. It will also indicate to the Deputy President that we are willing to go on with this case and therefore are prepared to appear in one month's time. You could say that we will be represented by our own counsel, not the Department of Labour.

Dorothy has suggested that it would be useful for someone from the Council to attend the hearing on Thursday anyway, to hear how it goes and to give us some idea of what line we should take. Dorothy has suggested that Michael Tehan might go with her. We certainly should get the transcripts from Thursday's hearing to see in what manner Deputy President McBean hears the other cases.

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have conveyed all of this to Norman O'Bryan who agrees with this line. He will also have Michael Tehan see how we are listed. It may be for a preliminary mention only. Arthur Apter said that the SPSF may not be intending to discuss our case fully in the Thursday hearing.

Dorothy will be able to give you further details of where we are in a briefing on Monday. It appears that some fairly rapid action is necessary in the first instance. Norman O'Bryan reassures me that we will have enough time to prepare our case if we go up in one month's time, and it is probably a good idea to try and go for that date if possible.

Enc



Anti-Cancer Council of Victoria



September 1989

DPM-C-23/1

The Hon Neil Pope, MP
Minister for Labour and
Minister for Youth Affairs
Level 23, Nauru House
80 Collins Street
MELBOURNE 3000

Dear Minister

As you will be aware the State Public Service Federation has lodged a log of claims against us in an attempt to gain coverage of the Anti-Cancer Council of Victoria.

We understand that this dispute is coming before the Industrial Relations Commission (Mr Deputy President McBean) in Adelaide on Thursday. As you are aware we are of the strong conviction that we are not a public sector body. We believe that continued representation by the Department of Labour could prejudice our case.

We ask that the Department of Labour does not represent us any further in this dispute. In future we shall be representing ourselves.

Yours sincerely

Dr Robin Marks
Director of Programs

S P S T
C R E P M M

MINTER ELLISON
SOLICITORS

AH
NG
RD

Historical

1936 Act.

Parl Debates

Operations

STAFF
VOLUNTEERS

Technical staff
diversity of staff.

DONORS

ACTIVITIES

Research

Advisor - Independent

Lobby Group

Finances

CITIZENSHIP - TAX EXEMPT.

GOVERNMENT

OTHER

Analogies

L.I.U.

RED CROSS

SMITHSONIAN INSTITUTION

WALTER & ELIZA HALL

HOSPITALS.

HOWARD FLORRY INSTITUTE.

NATIONAL HEART FOUNDATION.

Statute

Annual Report

Audit.

S.P.S.F. (Kalam)

SECTION

"HCS is part of the public sector of the State of Victoria. Its origin, the method whereby its governing body is constituted and the requirements and expectations of the Department of Management and Budget all support this view. Accordingly, I think that employees of HCS are accurately described as being employed in a State instrumentality or undertaking."

A similar analysis will undoubtedly occur in the case of the ACCV, probably undertaken by the same man. Accordingly, it is essential that we prepare arguments to convince him that, unlike HCS, the ACCV is not a State instrumentality or undertaking. This will require substantial historical analysis of the role, structure and functions of the ACCV. Accordingly, it would be wise for us to appoint a small team to brainstorm on these issues and develop every conceivable argument which will support our case.

Then it will be a matter of waiting for the State Public Services Federation to bring the matter on before the Industrial Relations Commission and arguing at that time that the Federation has no coverage of ACCV employees because the ACCV falls outside the rules of the Federation.

It must be borne in mind that it would be a relatively simple matter for the Federation to amend its rules so as to provide expressly for coverage of the ACCV. In this regard, you will note that the rules of the Federation already provide expressly for coverage of the "New South Wales State Cancer Council". If the rules were amended expressly to cover the ACCV, it would then be a matter of raising public interest arguments why the Federation should not have coverage of the ACCV. These issues should also be discussed by our "think tank" as it would appear inevitable that such a debate will take place in the near future.

I look forward to hearing from you further when you have had an opportunity to consider this.

Yours faithfully
MINTER ELLISON

Norman O. Ryan

S.P.S.F. Claim



14 September 1989

49-1422

Mr A.F. Smith
Minter Ellison
Barristers & Solicitors
GPO Box 769G
Melbourne Vic 3001

Dear Tony,

Herewith the latest update on our correspondence with the State Public Service Federation plus the records of the two discussions held by Dorothy Reading with Arthur Apted.

I think the time has come to take David White's advice and get our own legal opinion as to whether we are or are not a "government body".

David White's opinion was that we were certainly not - he's not exactly a layman in this situation, but he didn't give me the reasons why he thought that.

Alan Rassaby, whom has moved from the Department of Health but was involved in rewriting the health legislation, may be able to offer useful comment. I'll try to contact him and get his opinion.

In the meantime could you proceed with building an opinion as to whether we are or are not a government body.

Best wishes.

Yours sincerely,

Nigel Gray
Director

Enclosures

cc W.A. Dick, M. Whiteside, D. Hume

Anti-Cancer Council of Victoria



14 September 1989

49-1422

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Best wishes.

Yours sincerely,

Nigel Gray
Director

Enclosures

cc W.A. Dick, M. Whiteside, D. Hume, M. Tehan, N. O'Bryan
AJH, RM, DR

FILE NOTE FOR SPSF FILE

13 September 1989

Dorothy Reading reported a discussion with Arthur Apted concerning the SPSF.

1. He has arranged for the Department to cease cooperating with the Union in their push to draw us into their net. This is presumably temporary.
2. He is setting about seeking a legal opinion as to whether we are or are not a government body. This will probably take some time.
3. His opinion is that sooner or later we may well finish up with a single union with an award developed uniquely for ACCV, which is to be preferred if any union or unions are to have cover of us.
4. He indicated that the SPSF would **expect** a closed shop agreement with the management. Although this is not apparent from any of their correspondence, Arthur Apted's advice is that they would **assume** willingness on our part to negotiate such a thing. The probability that they might in fact recruit only a small number of members; and that management might refuse to negotiate a closed shop; would be something totally unexpected for them.
5. He agreed that our salaries and conditions are such that they would have trouble attracting members except for the areas of project staff salaries and existing 35 hour week available as 9 day fortnight or 1 RDO per month. Dorothy thinks that their credit union, which is a very good one would also be attractive.
6. He said that the SPSF is probably the union most suited to ACCV staff i.e. he can't think of another we could approach to open negotiations with if we wanted to follow such a course.

A member of the Australian Cancer Society
Director: Dr Nigel Gray A.M. MB, BS, Hon. LL.D. FRACP, FRACMA
Anti-Cancer Council of Victoria



14 September 1989

49-1415

Mr D. Haynes
Federal Industrial Officer
State Public Services Federation
PO Box 387
Carlton South Vic 3053

Dear Mr Haynes,

I'm responding to your letter of September 8.

First of all I recognise the views you are putting and the fact that you believe we have been dilatory in coming to terms with your approach to us.

I must, nevertheless, respond by saying that the reasons set out in my letter remain valid reasons for not proceeding with award coverage **at this time**.

We are in the process of seeking a legal opinion as to whether we are or are not a government body. Our advice is that we are quite likely to be successful in resisting classification as a government body.

I have also raised this with the Minister for Health and she understands the reasons why we are proceeding as we are and has indicated willingness to discuss the issue, should we wish it, after we have completed our legal assessment.

There will probably come a time when we may be able to sit down with you and discuss the possibility of an award which might be developed as relevant to our organisation. However, I must persist in the view that we cannot agree to this until we have satisfied ourselves absolutely as to our status as a government body or otherwise.

In summary, I believe we still have good reasons for delaying any direct negotiations with you but will undertake to keep you informed of the situation as it develops.

Yours sincerely,

Nigel Gray
Director

S P S F
claim

SECTION

ATE
C SERVICES
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12 SEP 1989

139 Queensberry Street
Carlton South, 3053
ALL CORRESPONDENCE TO
P.O. Box 387, Carlton South, 3053
Ph: (03) 347 2488
Fax: (03) 347 0462

Federal Secretary: Helen Twohill

8 September 1989

C31310-88/DH:VK

Dr N Gray
Director
Anti-Cancer Council of Victoria
1 Rathdowne Street
CARLTON SOUTH VIC 3053

SPSF
Claim

Dear Dr Gray

I am writing in response to your letter of 18 August 1989 concerning the SPSF claim for award coverage of Anti-Cancer Council Staff.

As you know, following the service of a log of claims upon the Anti-Cancer Council by the SPSF, the (then) Conciliation and Arbitration Commission found a dispute to exist between us on 23 May 1988. The Anti-Cancer Council has had 17 months in which to consider its response to the SPSF log. I believe that this is more than enough time for you to address and solve the non-industrial relations problems you allude to in your letter.

To be frank, the reasons offered in your letter are not in my view valid reasons for not proceeding with award coverage. I do not believe that there is any value in delaying this matter further. I do not see that the creation of a federal award would change the Anti-Cancer Council's legal status or its relationship to the State Government or to the Private Sector.

You may also be interested in knowing that there is little or no publicity associated with the achieving of an award by consent. (Obviously, it is a different matter when there is conflict involved.) It is not intended that any State Government department or part thereof would be respondent to any award to which the Anti-Cancer Council would be party. Rather, it is our intention that the SPSF and the Anti-Cancer Council alone would be party to an award covering Anti-Cancer Council Staff. I do not accept that private donations will be diminished because of award coverage.

Regardless of which political processes you propose to pursue, it is now time to formulate an award (if necessary by Arbitration rather than by consent as originally intended).

SECTION



Please contact me as soon as possible but no later than 18 September if you are now prepared to enter into direct discussions about Award coverage for Anti-Cancer Council staff.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D. Haynes', with a stylized flourish at the end.

DAVID HAYNES
FEDERAL INDUSTRIAL OFFICER

Notes on a meeting at the Department of Labour between Arthur Apted (Political Advisor to Neil Pope), Dorothy Reading, and Robin Marks to discuss the classification of the Anti-Cancer Council of Victoria as a Government/non-Government body. 25 August 1989.

Discussion

Dorothy Reading had forwarded to Arthur Apted a number of documents about the Anti-Cancer Council including a copy of the amended Cancer Act, recent correspondence from Nigel Gray to the State Public Service Federation (SPSF) and correspondence with Mr Olthof of the Department of Labour. Arthur Apted had read some of this material and discussed the case in general. He explained that the Victorian Public Service Association (VPSA) is the State arm of the SPSF. He advised that they were looking for increased membership and that they were looking for a federal award for new organisations coming under their coverage. Their log of claims against us had been heard in the federal Arbitration Commission in Adelaide and we were now in dispute with this union.

Dorothy Reading explained that we were concerned about being classified as a Government body. She explained that the implications of this could mean substantial loss of funding for our operations. Arthur Apted asked us whether this was a move based on concern about being unionised. Dorothy Reading expressed the opinion that we were not concerned about having an award, this was concern about our classification as a Government body.

Arthur Apted pointed out that whether or not we were classified as a Government body, we must be prepared to have an award for our organisation. This would mean that we would need to allow some unions to have coverage of the organisation. He suggested that we develop an award with one union only, not multiple unions. He suggested looking for a union that was capable of covering the wide range of employees that we have. He suggested that we might like to make a unique award for the Council with some particular union. This award should not be too rigid and should set minimum conditions rather than maximum conditions. In this way it allows us the flexibility to pay whatever we like to people and give whatever conditions we like as long as they are above the minimum award. He suggested that we do not negotiate with any unions at this stage as this could inflame the VPSA and lead to them digging in. He also suggested that we make sure the award allows us to continue to have volunteers assist us in our operations, but does not necessarily mention their activities.

Arthur Apted summarised the situation by saying that at the moment our problems really all hang on a legal opinion of our classification as a Government/non-Government body. He will do several things for us including:-

1. Get a legal opinion within the Department of Labour on whether or not we are legally classified as a Government body.
2. Seek a legal opinion within his Department on whether the VPSA really does have coverage of the ACCV within the boundaries of its constitution.
3. Sound out the union on how genuine is their interest in us.
4. If possible, suggest that the union forget about their log of claims against us.

in return, Arthur Apted would expect us to do several things including:-

1. Look at other union awards to see if there are some which may suit us. This does not mean talking to the unions at this stage.
2. Possibly seek advice from our QC if we were not happy with the Department of Labour legal advice.

Dorothy Reading finished by explaining that David White shared our concern at being classified as a Government body and would be prepared to "take it further up" if the current approach doesn't work. The meeting finished on amiable terms.

Robin Marks
DPM-R-12

Anti-Cancer Council of Victoria



4 September 1989

49-1359

The Hon. C. Hogg
Minister for Health
GPO Box 4057
Melbourne Vic 3001

Dear Caroline,

You may recall that I briefly mentioned that we were concerned over the fact that the Department of Labour has classified us as a "government body". The reason for our concern is that we believe it would be very damaging to our public perception of our charity if this classification were to be widely known.

In fact our Act of Parliament does two things.

1. It sets us up as a non-government body i.e. gives us an Appeals Committee and the right to raise money and does not make us responsible to any minister.
2. It does, however, render us accountable in that our Annual Report must be tabled in Parliament, we must "take note of government policy, and we can be subject to audit by the Governor-in-Council if the government so desires.

This situation is pretty satisfactory and has established us as an independent body which does not call on the government purse.

I think it would be very helpful if we were to take you up on your offer to have a word with Neil Pope in the hope that he might suggest that his Department removes us from the list of government bodies.

Yours sincerely,

Nigel Gray
Director

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SECTION



17 August 1989

49-1359

The Hon. C. Hogg
Minister for Health
GPO Box 4057
Melbourne Vic 3001

Dear Caroline,

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Yours sincerely,

Nigel Gray
Director

*Relly held
note memo to all
David White*

KB a copy of that for 17/8/89

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Discussion

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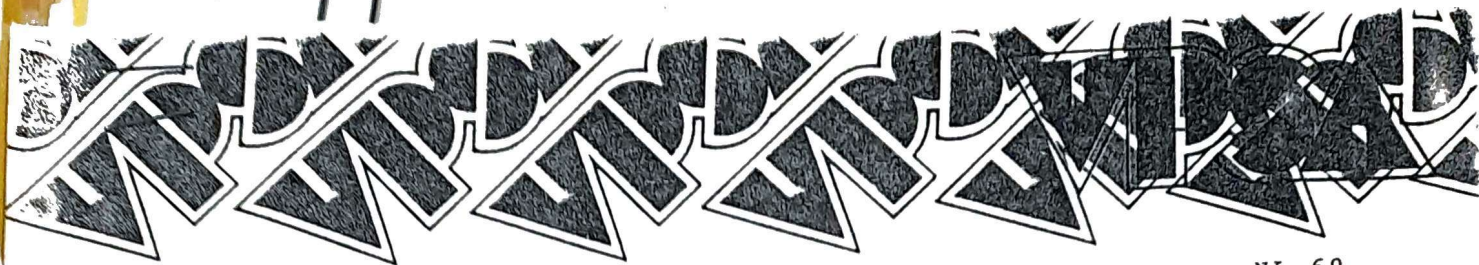
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Robin Marks
DPM-R-12



Contact: K McVey:NL 60
Ref: B12/2

10th August 1989

Robin,
I won't be responding to
this but would like your
comment BJR

FROM: Robin Marks

TO: _____

NJG

DATE SENT: _____

15/8/89

ACTION REQUIRED _____

Read & Discard

REPLY REQUESTED BY _____

*This is an
example of the*

*SPSF having
decided
we are
now on
their list*

Chief Executive
Anti-Cancer Council
Cnr Rathdowne & Victoria Streets
CARLTON SOUTH VIC 3053

Dear Sir

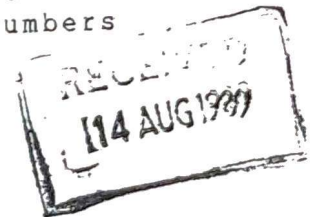
The VPSA has received a grant under the Women's Research and Employment Initiatives Program through the Department of Employment, Education and Training. The purpose of the grant is to look at Equal Opportunity in Restructured Awards.

The VPSA will:

- * identify classifications where women predominate in the State Public Service and Award areas;
- * analyse why this is so;
- * identify opportunities to maximise access for women under award restructure provisions; and
- * develop training and skills formation initiatives.

As your agency is in the area of coverage by the VPSA, I am writing to you to seek your assistance with this project. A necessary pre-requisite for the project is to establish a data base on staffing in the Victorian public sector to enable the identification of target groups. Such a database will also be required to aid the work of the joint Government/VPSA Task Force on Structural Efficiency.

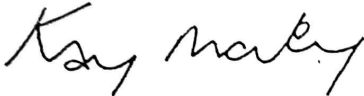
The information which I require is a breakdown of staff employed by occupational category, salary level, gender, permanent/temporary staff, and part-time staff as at 30 June 1989. If you employ persons under the Public Service Act could you please indicate these numbers separately.



It would also be appreciated if you could provide some information on educational qualifications required for positions and any data on access to training and study leave within your agency.

These details are required by 15 September 1989. If you require any further information please contact me on 654-4177.

Yours faithfully



Kay McVey
Project Officer

Anti-Cancer Council of Victoria



18 August 1989

49-1381

Mr D. Haynes
Federal Industrial officer
State Public Services Federation
PO Box 387
Carlton South Vic 3053

Dear Mr Haynes,

Thanks for your letter of August 17 which catches me on the eve of departure for a fortnight in America. Therefore, I am responding immediately.

In summary, I do not believe we can hurry the process which is going on at the moment. My reasons are as follows.

We remain in disagreement, however amicable, over the importance of our objection to the description of the ACCV as a "government body". I certainly note and understand your view that we are a "government body" because of the way in which we are established, however your comment that this is the case "regardless of the nature of our funding arrangements" is the key issue. As I know you understand, we believe that our funding might disappear (at least substantially) if it becomes widely accepted that we are a government body. In other words, our lifeblood is at stake and the classification as a government body is very threatening to both our existence and our modus operandi.

Given that we're coming at the issue from differing points of view, I think you probably understand why we take the view I have expressed so seriously.

There is an agreement at a senior committee level that we should not concede on this issue until the matter has been explored up to and including the political level. This will take some time and for this reason I would prefer to defer further negotiations with your organisation until it is completed.

I think I also ought to respond to the second part of your letter. You've listed the Victorian Health Promotion Foundation and the NSW State Cancer Council as bodies you cover. Both of these bodies have extremely good reasons for wishing to distance themselves from government as far as possible. The Victorian Health Promotion Foundation also has an Act of Parliament which confers on it a duty to be independent and they are not unduly enchanted with being brought closer to government. The same may certainly be said of the NSW State Cancer Council which has found it difficult to function as an independent volunteer based cancer society because of the fact that they have received over the years a substantial proportion of their funding from the government with the consequence that their independence has been impaired.

A concrete example of this is that the influence of the Anti-Cancer Council of Victoria was able to bring about the Victorian Tobacco Act in 1987. No such Act has or seems likely to be passed in New South Wales, and this is at least partly related to the fact that the NSW Cancer Council is unable to lobby as independently and vigorously as we were able to in Victoria. i.e. They are indeed much more of a "government body" than we are.

Obviously this letter is aimed at clarifying our position but also holding things as they are until we've had time to complete our political negotiations.

With best wishes.

Yours sincerely,

A handwritten signature in black ink that reads "Nigel Gray". The signature is written in a cursive style with a long horizontal stroke at the end.

Nigel Gray
Director

PUBLIC SERVICES FEDERATION

139 Queensberry Street
Carlton South Vic 3053
ALL CORRESPONDENCE TO
PO Box 387, Carlton South Vic 3053
Ph (03) 347 0188
Fax (03) 347 0162

17 August 1989

18 AUG 1989

C31310-89/DH:VK

Dr N Gray
Director
Anti-Cancer Council of Victoria
1 Rathdowne Street
CARLTON SOUTH VIC 3053

Dear Dr Gray

Thank you for your letter of 14 July 1989 responding to my earlier correspondence.

I note, but do not agree with, your objection to the description of the Anti-Cancer Council of Victoria as a "government body". There appears to be doubt that the Anti-Cancer Council is an undertaking established and carried on under a statute of the State of Victoria, regardless of the nature of your funding arrangements.

However, I thought it would also be useful to clarify with you the type of organisations in which the SPSF has coverage. It is true that SPSF has substantial and significant coverage of state government departments and instrumentalities (such as the Anti-Cancer Council) but it does not end there. The SPSF also has eligibility for persons employed by a wider range of health-related bodies. These include:

- Health Computing Services Pty Ltd (Victoria)
- Victorian Health Promotion Foundation
- Red Cross Society (WA Division)
- The Spastic Welfare Association of WA (Inc.)
- various professionals in NSW charitable institutions
- NSW State Cancer Council

This is only a very small list of such organisations that we cover. As you would know, many of those bodies listed above would have functions and objectives which are similar to the Anti-Cancer Council.

I hope that this has made things clearer and has put you in a position where you are prepared to meet directly with me. I await your response.

Your sincerely

A handwritten signature in blue ink, appearing to read 'D. Haynes'.

DAVID HAYNES
FEDERAL INDUSTRIAL OFFICER

Anti-Cancer Council of Victoria



14 July 1989

49-1294

Mr D. Haynes
Federal Industrial officer
State Public Services Federation
PO Box 387
Carlton South Vic 3053

Dear Mr Haynes,

I'm responding to your letter of the 10 July directly.

You are, of course, quite right in your perception that we have not been eager to open a dialogue.

I would like to make it clear that this is in no sense an ideological resistance to unionism. I think the reasons behind our resistance are well laid out in the attached letter which I sent to Mr Olthof of the Department of Labour recently.

This letter makes the point that we are in serious dispute with the Department over their classification of us as a "government body" merely because we are set up by Act of Parliament. If the public perception of us were to be that we were a government body, I believe our ability to raise funds, and to do our job, would be greatly diminished. For this reason I am, and propose to continue, in ongoing debate with the Department and would not wish to accept that the issue is settled without having discussions at least with the Minister for Health, and probably also with the Minister for Labour.

If the end result of all this is that the Anti-Cancer Council of Victoria is to be perceived as a government body, then I would be willing to discuss with you the possibility that you might pursue award coverage for our staff. However, if the issue is resolved in such a way that we are not classified as a government body, then your organisation may not be the appropriate one to cover us.

I have no wish to make your job more difficult, but the implications of seeing ourselves classified as a government body are quite enormous for us, and I have no alternative but to pursue that issue to its ultimate end.

I hope this at least clarifies things a bit.

Yours sincerely,

Nigel Gray
Director

Att. Ltr to Dept. of Labour

ANTI CANCER COUNCIL OF VICTORIA
1 Rathdowne Street, Carlton South, 3053
Victoria Australia

Facsimile Transfer Information

To: Fax No.: **617 4666**

Date: 13-7-89

Addressee: Mr A.F. Smith
Mr M.W. Tehan
Minter Ellison

No. of pages: 7

From: Fax No. 03-663 7809

Originator: Dr. Nigel Gray

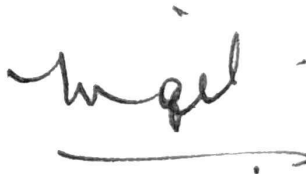
Dear Tony and Michael,

Attached is a letter from the State Public Services Federation who obviously would like to speak to me in person.

You've already received the attached letter directed to the Department in which we spell out our reasons for not wishing to be classified as a "government body". It seemed to me that a sensible modus operandi would be for me to send the attached draft letter to David Haynes together with a copy of our letter to the Department of Labour so that he at least understands why we are resisting his overtures.

In the meantime I've made a policy decision to discuss the matter with David White and will let you know if I can catch up with him.

Could I have your comments?



Att.

STATE
PUBLIC SERVICES
FEDERATION

139 Queen Street
Carlton South VIC 3053
ALL CORRESPONDENCE TO
P.O. BOX 457, CARLTON SOUTH VIC 3053
TEL (03) 417 1394
FAX (03) 417 0457

11 JUL 1989

Federal Secretary Helen Twohill

10 July 1989.

C No. 31310/89/DH:AR

Dr N Gray
Director
Anti-Cancer Council
of Victoria
1 Rathdowne Street
CARLTON SOUTH VIC 3053

Dear Sir

C NO. 31310 OF 1989

DISPUTE WITH SPSF

I refer to the dispute that has existed between us in the Australian Industrial Relations Commission since 23 May 1988.

Since the finding of that dispute there has been no substantive dialogue between us despite persistent efforts on our part. I have had numerous discussions with the solicitor representing your interests, however, in no sense could these be seen as opening a dialogue.

It is my earnest desire that the pursuit of award coverage for your staff can be resolved through conciliation rather than arbitration. Therefore, I again seek to be able to meet with you directly in the near future to discuss this issue. I also seek the opportunity to speak with your staff about the SPSF and the VPSA and our intentions in relation to the Anti-Cancer Council.

I await your response.

Yours faithfully



David Haynes
Federal Industrial Officer

JUL1001A/SPSF.

ANTI CANCER COUNCIL OF VICTORIA
1 Rathdowne Street, Carlton South, 3053
Victoria Australia

Facsimile Transfer Information

To: Fax No.: 617 4666

Date: 13-7-89

Addressee: Mr A.F. Smith
Mr M.W. Tehan
Minter Ellison

No. of pages: 7

From: Fax No. 03-663 7809

Originator: Dr. Nigel Gray

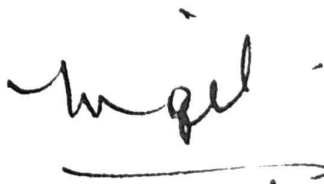
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In the meantime I've made a policy decision to discuss the matter with David White and will let you know if I can catch up with him.

Could I have your comments?



A handwritten signature in cursive script, appearing to read 'Nigel', with a horizontal line underneath it.

Att.

MINTER ELLISON

BARRISTERS & SOLICITORS

*Copies given to RM
r ASH*

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AFS

19 May, 1989

PRIVATE & CONFIDENTIAL

Dr. Nigel Gray,
Anti-Cancer Council of Victoria,
Keogh House,
1 Rathdowne Street,
CARLTON SOUTH 3053

Dear Nigel,

VICTORIAN PUBLIC SERVICE ASSOCIATION - INDUSTRIAL RELATIONS COMMISSION

Thank you for your memo of 9 May, 1989.

I agree with you that there may well be a great deal of inconvenience involved if we are deemed to be a government agency and therefore amenable to being unionised. The "unionisation" may well be merely one step along the road towards us suffering all the inconveniences which a government agency or government department suffers e.g. as you point out, in the need to obtain competitive tenders for nearly everything which is done.

At our last Executive Committee Meeting I thought we had reached the position where it was agreed that a small group of us should endeavour to arrange a meeting with Mr. Brian Shaw Q.C. so that all of the relevant matters can be called to his attention and his further advice sought. I note that the minutes bear this out and also that discussions be held with Alan Rassaby and Bill Kilpatrick.

If you think this should be done at this stage, please let me know and I will endeavour to set up a meeting with Brian Shaw but suggest this be done after discussions with Rassaby and Kilpatrick.

Yours

A handwritten signature in blue ink, appearing to read 'Tony Smith', written in a cursive style.

Tony Smith

5 June 1989

49-1133

MEMORANDUM TO: Finance Committee
Executive Committee

c.c. G. Carpenter

FROM: Nigel Gray

=====

Robin Marks received a phone call from the Health Department on Friday, May 19. He was informed that the Health Department was on the point of advising the Department of Management and Budget that the Anti-Cancer Council of Victoria, as a government body, should be added to the schedule of the Annual Reporting Act.

We examined the situation with some care. The Annual Reporting Act contains no threats to our modus operandi. It does, however, override other legislation and requires the Auditor-General to audit the accounts of organisations named in the schedule.

We checked this with Tony Smith and I discussed it with Allan Dick. We were concerned that being nominated under the Annual Reporting Act might infer that we were also covered by the Audit Act which means that our modus operandi would be covered by Treasury regulations.

Graham Carpenter had kindly raised this question with his staff as he was aware of our wish not to be overtly perceived as a "government" body. He has asked them to look at the Cancer Act in more detail and to defer a decision about naming the Anti-Cancer Council in the schedule of the Annual Reporting Act. I've conveyed our gratitude to him and will keep the committee informed of developments.

Graham was also able to reassure me that the Annual Reporting Act is quite separate to the Audit Act and that being named in the former does not imply that we would be covered by Treasury regulations.

Nigel Gray

MEETING MINUTES

DPM-01M

COPY

1989

NJG, RM

Recorder: RM

Weekly Meeting with the Director of ACCV

Action Required

By whom

By when

1. Public Service Association

RM discussed the developments in the Public Service Association. These include a recent move by the Department of Management and Budget to have us report under the Annual Reporting Act 1983. RM has resisted this, without much success so far. It was suggested that NJG contact Graham Carpenter on his return on Thursday, 1 June. It was also suggested to DMB that they delay implementation of this recommendation until next year to give us time to formally consider the proposal.

DMB will contact NJG. NJG to discuss with Graham Carpenter as soon as he returns.

2. Annual Budget

RM reported the Unit Heads have been asked to develop priorities for the Annual Budget so that appropriate selection can be made when increasing finance occurs.

Garfield Mahood's visit

RM reported that arrangements had been made for Garfield Mahood's visit and accommodation. NJG was to take over arrangements from here on.

NJG to look after Garfield Mahood during his visit.

Cervix Registry

RM reported that the legislation finally passed on Friday 26 May. Further developments will take place with the private pathologists but RM will gradually move back from negotiations as the Registry is established and takes over.

7 June 1989

49-1164

MEMORANDUM TO: Adrienne Holzer

FROM: Nigel Gray

=====

This little snippet from the Age this morning suggests that there's been some internal revolution within the VPSA.

I'm not sure what that means but I think Michael Tehan should be encouraged to make some detailed enquiries to discover whether the people in the Union who were pressing to take us over are actually still in power or whether they have been tossed out.

A handwritten signature in black ink, appearing to be a stylized 'N' or similar character.

Att.

9 May 1989

49-1031

MEMORANDUM TO: R. Marks
A. Holzer
W. Rae

c.c. W.A. Dick
D. Hume
A. Smith

FROM: Nigel Gray

=====
Our concerns over the attempted takeover by the Victorian Public Service Union is based primarily on the fact that we do not wish to be labelled as "a government agency".

We've sought legal opinion on this issue but only in the context of the potential takeover by the Union.

In practice the real threat is to our modus operandi which is not that of "a government agency". I believe there are lots of types of "government agency" but am not sure.

My experience with the Victorian Health Promotion Foundation indicates that they are distinctly inconvenienced by the need to get competitive tenders for everything they do and the introduction of such an extraordinarily poor business practice to our operation would have a similar effect on us.

I think we need to have a good indepth look at what being tagged as "a government agency" means even if it requires that we go to parliament and specifically ask them to pass an amendment which excludes us.

N. G.

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- 5 SEP 1990

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OUR REFERENCE

RDM 351961 MWT

YOUR REFERENCE

617 4707

3 September 1990

Dr Nigel Gray AM
Director
Anti-Cancer Council of Victoria
1 Rathdowne Street
CARLTON SOUTH VIC 3053

Dear Dr Gray

State Public Services Federation

We refer to previous correspondence in relation to the log of claims served by SPSF.

In an attempt to resolve this matter, on 29 August 1990 Michael Tehan and Paul O'Grady of our office had a "without prejudice" discussion with David Haynes and Ron Hutchins of the SPSF.

The SPSF was not willing to resile from its position. In other words, it is not prepared to consent to an order that the appeal be allowed on the ground that the ACCV is an "other undertaking" rather than a "state instrumentality" within the context of Rule 3(G) of SPSF's Rules.

In the SPSF's view such a consent order is a concession which limits the scope of their eligibility rule.

The SPSF did, however, propose the following:-

1. The SPSF will not oppose leave to appeal being granted.

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Dr Nigel Gray AM
Anti-Cancer Council of Victoria

- 2 -

3 September 1990

2. The SPSF will offer no evidence at the appeal hearing other than to stand by Deputy President MacBean's decision.
3. ACCV could present argument in support of its submissions on the state instrumentality question.
4. ACCV would not dispute coverage under the "other undertaking" limb of the eligibility rule.

We have asked Counsel to consider this proposal and will advise you of their view shortly. In the meantime, the appeal has been adjourned until 13 December 1990.

If you wish to discuss the matter further, please do not hesitate to contact Michael Tehan of our office.

Yours faithfully
MINTER ELLISON



354.024101

MINTER ELLISON

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FACSIMILE HEADER

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DATE : 20 August 1990
 TO : Dr Nigel Gray A M
 COMPANY OR FIRM NAME : Anti-Cancer Council of Victoria
 FACSIMILE NO : 663 3412
 FROM : Michael Tehan
 SECRETARY : Simone Yates
 DIRECT LINE : 617 4707
 FILE NO : RDM 351961 MWT
 RE : State Public Services Federation
 NO. OF PAGES : 3
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MESSAGE

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20 August 1990

"WITHOUT PREJUDICE"

OUR REFERENCE

RDM 351961 MWT

YOUR REFERENCE

Mr David Haynes
The State Public Services Federation
139 Queensberry Street
CARLTON SOUTH VIC 3053

Dear Mr Haynes

Anti-Cancer Council of Victoria
Appeal from decision of MacBean D P given 8 May 1990: C No 31537/90


We refer to the appeal in this matter coming on for hearing before a Full Bench of the Australian Industrial Relations Commission on 23 August 1990. As you know, we act for the Anti-Cancer Council of Victoria ("ACCV"). We are instructed to write to you as follows.

In order to settle this matter may we suggest that by consent the ACCV and the SPSF request the Full Bench to make the following orders:

1. Leave to appeal is granted.
2. Insofar as the decision of MacBean D P given on 8 May 1990 decided that the ACCV is a state instrumentality or a statutory authority within the meaning of Rule 3(G), the appeal be allowed.
3. The decision of MacBean D P be upheld on the ground that the ACCV is an undertaking within the meaning of Rule 3(G) and, accordingly, the appeal is dismissed.

We would be grateful for your response by 5.00 pm on Tuesday 21 August 1990.

Yours faithfully
MINTER ELLISON



mwt 289.022901 by

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24 May 1990

49-2037

S P S F
Clavin

MEMORANDUM TO: Robin Marks

c.c. Adrienne Holzer

FROM: Nigel Gray

Now we're committed to lodging an Appeal against the ruling of John McBean, it might be sensible to develop a strategic plan with a set of time-lines in it.

We need to be very certain of our position before we consider going political and so far I don't think we've thought the whole issue through with complete clarity. Perhaps the three of us together with David might sit down and do this quite shortly.

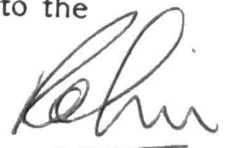
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MEMORANDUM TO: Nigel Gray
FROM: Robin Marks
DATE: 16 May 1990
SUBJECT: Meeting with Brian Shaw QC and our legal representatives concerning SPSF

DPM-M-24

A few brief notes on the outcome of last night's meeting with Brian Shaw QC. It was suggested that:-

1. The decision of Deputy President McBean of the Industrial Relations Commission was flawed, particularly in relation to his classification of ACCV as "a State instrumentality operating under a State Statute" or a "State authority".
2. We could appeal to the Full Bench of the Industrial Relations Commission. In this case it is likely that there would be two lawyers out of the three persons on the Bench.
3. We have only a moderate chance of success in having the decision on coverage of the building by SPSF overturned. However it is likely that we would have a very good chance of having the classification as a "State instrumentality" repealed. We could be reclassified as "other undertaking under any State Statute".
4. There was always a chance that if a too legalistic approach is taken to the dispute, the Bench could come up with the original opinion of Brian Shaw QC which stated that there was little doubt that the SPSF should have coverage of the building.
5. It was agreed that if we went back into a Full Bench hearing, that the cost to the Council would be nowhere near the cost of the original hearing. This is due to all the preparation for the presentation by our QC being already prepared for the last case. The major cost would be the cost of appearance of our legal representatives at the hearing. Thus our legal costs would be considerably less.
6. It appeared that we clearly made our point on the priorities of things we ought to achieve which were of importance to us. That is, that we have a first priority to remove the classification of ACCV as a "State instrumentality". The second priority is to prevent the SPSF from having coverage of our building.
7. It was agreed that in any future approach to the Treasury Department, and possibly the Department of Labour, having had an overturn in the decision which classified us as a "State Instrumentality" would make our path easier in having us taken off schedule I of bodies required to report under the Annual Reporting Act.
8. On the basis of the above points, it was agreed that we should recommend to the Finance Committee that we put in an Appeal to the Industrial Relations Commission against the hearing findings.



MEMORANDUM TO: Nigel Gray DPM-M-22
FROM: Robin Marks
DATE: 15 May 1990
SUBJECT: Discussions with Graham Carpenter following the SPSF ruling

I spoke to Graham Carpenter following the ruling of the Commission concerning the SPSF's right of coverage of ACV. I was seeking his opinion about the possible ramifications of the Commission's ruling in regard to Government control of our function. I was also trying to seek the particular Acts controlling Government organisations which may have some effects on the way we operate. Graham made a number of very good points, including:-

1. The Premier's Department makes a number of rulings on such operations as Government cars, senior staff salaries and overseas trips. These are not set out in standard Government regulations and appear to be determined from time to time by the Premier's Department. These are the regulations which could have a substantial effect on the way we operate.
2. Graham suggested that we do not approach the Premier's Department seeking an opinion on whether or not their rules apply to us. He says it is inevitable that if they are approached by an organisation for an opinion on whether or not they are covered, they invariably say yes when asked.
3. Graham had been meeting with Michael McGinness and Bill Rae working out how we were to report under the Annual Reporting Act once the decision of the Commission had been handed down. In view of the Commission's argument that we are a Government body, and the possible ramifications, Graham has agreed to put off the decision for us to report this year under the Annual Reporting Act for another year. He is doing this to give us more time to have our position clarified as non-Government.
4. Finally, he did indicate that if we did come in under the Premier's Department's rulings, he could see difficulties with our current operations in regard to Council cars, senior staff salaries, and overseas trips. These are to name but a few.

I forward this memo to you in confidence as requested.



AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1988

Conciliation and Arbitration Act 1904
s.25 notification of industrial dispute

State Public Services Federation

and

Law Reform Commission of Victoria and others
(C No. 31310 of 1988)

Anti-Cancer Council employees

State government administration

DEPUTY PRESIDENT MACBEAN

SYDNEY, 8 MAY 1990

Revocation of dispute finding - s.111(1)(g) application

DECISION

This matter is an application by the Anti-Cancer Council of Victoria for the revocation of a finding by Deputy President Hancock on 23 May 1988 that an industrial dispute existed between the State Public Services Federation (SPSF) and the Anti-Cancer Council of Victoria (ACCV).

The matter first came before the Commission on 27 October 1989 following an application by the SPSF for a hearing for the purpose of ascertaining the intention of the ACCV regarding the making of an award in settlement of the dispute found to exist by Deputy President Hancock on 23 May 1988. Mr Haynes, who appeared for the SPSF, outlined the history of events including the failure of the SPSF to meet with the ACCV in conference. Mr Haynes then requested the Commission to direct the parties into conference.

Mr West, appearing for the ACCV, advised that his client sought hearing dates to enable the ACCV to put submissions seeking a revocation of the dispute finding. In the alternative, Mr West sought that the Commission dismiss the matter pursuant to section 111(1)(g) of the Industrial Relations Act 1988.

The Commission determined to hear the applications by the ACCV and the matter was set down for hearing on 21 February 1990 where Mr Shaw of counsel and Mr Green sought and were granted leave to appear for the ACCV.

The substantial grounds advanced by Mr Shaw for the revocation of the dispute finding was to the effect that persons employed by the ACCV were not eligible to be members of the SPSF. In his opening submissions, Mr Shaw said that it was his intention to bring forward evidence which would demonstrate that employees of the ACCV did not fall within the SPSF's rule.

Mr Shaw referred to a decision by Deputy President Hancock involving the SPSF's eligibility rule in a matter dealing with Health Computing Services Victoria Limited (HCSV)⁽¹⁾. This case involved an application by HCSV opposing its inclusion in a dispute finding in a case where a number of employees had been the subject of the service of a log of claims by the SPSF. Deputy President Hancock found a dispute in respect of certain other employers including the ACCV. However, Deputy President Hancock excluded the HCSV to enable the HCSV to put its case in opposition. The HCSV argued that the SPSF was incapable of enrolling its employees and hence the HCSV could not be found to be in dispute with the SPSF.

The HCSV's case centred around the proposition that it was not an organisation employing persons in "a State instrumentality or other undertaking carried on by a public authority, commission or corporation" and did not operate "under any State charter, statute, enactment or proclamation of the State of Victoria". In other words, the HCSV was not part of the Victorian public sector.

⁽¹⁾ Print H6846

After reviewing the various authorities on the matter of interpretation of union rules, Deputy President Hancock decided that the HCSV was part of the Victorian public sector and the rules of the SPSF enabled it to enrol employees of the HCSV.

The oral evidence and documents tendered as part of Exhibit ACC1 identified that the ACCV is an organisation established by the Cancer Act 1936 (amended in 1958 and 1989)(the Act). Mr Gray, the Director of ACCV, who gave evidence and submitted a statement (Exhibit ACC1), summarised the objects of the ACCV contained in the Act in these terms:

"...undertaking, promotion, subsidising and coordination of cancer research in Victoria. The ACCV is further enjoined to provide information and advice about cancer; to develop, co-ordinate and participate in education programs relating to the prevention, detection, treatment and management of cancer; and to do similar things for the support and welfare of cancer patients. Another objective is to investigate the establishment of special cancer clinics within existing hospitals and, if thought advisable, to establish such clinics.

This is an extremely broad charter which allows the ACCV to take virtually whatever action it deems appropriate in the field of cancer."

Mr Gray described the operating structure of the ACCV as a "volunteer-based organisation with widespread support throughout the community". The ACCV had a staff of 99 who are ultimately responsible to various volunteer committees. There are a variety of occupations represented within the staff including: medical practitioners, scientists, accountants, teachers, health promotion officers, psychologists, nurses, social workers, clerks, medical record administrators and storepersons.

Mr Gray gave evidence regarding two recent campaigns by the ACCV involving firstly the passage of the Tobacco Act 1987 by a unanimous decision of the Victorian Parliament described by Mr Gray as "a pioneering piece of tobacco control legislation". The second successful campaign which the ACCV

was heavily involved in promoting was the Cancer (Central Registers) Act 1989. It was said by Mr Gray that the ACCV "sees itself as a volunteer resource and it generally does not ask the government for money". Most of the programs are supported with funds donated by the supporters of the ACCV.

The ACCV's 1989 Annual Report discloses that the income of the ACCV during the 1989 financial year was approximately \$9.1 million out of which \$330,000 was from the State government for operating the cancer registry out of a total operating cost of \$853,000. Mr Gray said that the only source of direct money from the State government was towards the running of the Cancer Registry which amounted to less than 4% of the ACCV's total income. In his statement, Mr Gray detailed the various sources from which funds were obtained by the ACCV which included donor requests, memorial programs, a variety of fund raising activities and corporate donors, trusts and foundations.

Mr Gray stressed the independence of the ACCV by noting that "it negotiates with parliamentarians of all persuasions with the aim of advocating an independent position in relation to cancer prevention and protection". It was put by Mr Gray that although the ACCV is "established by an Act of Parliament it is not funded by the State government to perform any State government functions". It was further stated by Mr Gray that governments do not fund organisations "which advocate the policies which it may or may not like" and that the ACCV had on many occasions advocated policies not shared by the government of the day.

Concerning the membership of the council of the ACCV, Mr Gray said that whilst the Minister for Health and the Permanent Head of the Department of Health are ex officio members of council, "they rarely attend a meeting of the council which meets annually".

Other evidence by Mr Gray concerned the campaign to reduce the incidence of smoking conducted jointly by the Health Commission and the ACCV. The government gave a grant of \$350,000 to assist the ACCV in the campaign.

Further evidence was given by Mr Rankin, Senior Medical Officer in the Department of Community Medicine at St Vincents Hospital, Melbourne, by way of a statutory declaration (Exhibit ACC4). Mr Rankin is a leading expert in the treatment of drug addiction and alcohol abuse and from 1970 to 1978 was the Chief Health Education Officer at the Victorian Department of Health. From 1978 to 1986 Mr Rankin held the position of Epidemiologist in the Department of Health and from 1981 to 1989 was a member of the Medical and Scientific Committee of the ACCV.

Mr Rankin stated that he has had extensive involvement with the ACCV in various capacities and had formed the view that the ACCV had a different function to perform from that of a State government agency.

Mr Trevaks, a registered medical practitioner who has held senior administrative posts for 26 years in Victorian health services, also submitted a statutory declaration (Exhibit ACC3). Mr Trevaks stated that in his view the ACCV "cannot be regarded as a government department" and "does not have a State government role to perform". A number of features were cited by Mr Trevaks which distinguished the ACCV from statutory authorities such as the State Electricity Commission of Victoria and the Public Transport Authorities.

Mr Shaw, in his submissions, put that the question that needs to be answered in determining the ACCV's application was whether the ACCV was a State government body. Mr Shaw submitted that it was not enough that the ACCV was established under a State Act and that some of the ACCV's activities "are essentially non-government and if necessary anti-government". Reference was

made to situations where the ACCV was involved in lobbying opposition parties in Parliament in circumstances where the governments of the day were not prepared to support the ACCV's position.

Other factors to be considered in deciding whether the ACCV is a State government body, in Mr Shaw's submission, involved the matter of funding and control of the organisation. In respect to funding it was put that only a small part of the income of the ACCV was received from the government. The majority of income is derived from donations and bequests. Accordingly, it was argued that the method and extent of funding received by the ACCV demonstrated that it could not be said to be a government body.

On the question of control, Mr Shaw submitted that the control of the activities of the ACCV was achieved through the operation of a "whole series of volunteer committees" in a manner "quite unlike a government body". Further, in contrast to this, the representation of government on the various ACCV bodies is "very, very small". Mr Shaw put that if the ACCV was a government body, one would have expected it to be controlled entirely by government nominees. Mr Shaw, at page 205 and 206 of transcript, summed up the ACCV submission in these terms:

"MR SHAW: What we submit accordingly is that when one looks at the matter one has a body which is not run by government appointees, which is not paid for by government money, which does not conduct functions which are essentially government functions and which to some extent conducts activities which could not be government functions. So that when one looks at what was said, for example, in the Home Care Service case - looking at page 9 of the report of the Health Computing Services case. The question there was different, it was question of whether it was a company or corporation employing persons on behalf of the government or state.

Hancock DP says:

The commission found Portus case to be the authority most relevant to its task the government of the state.

In our submission you could not say that here:

The commission went further, however, and applied
function of government -

you could not say that here either, we submit -

and also referred to a control test enhanced the degree
of control.

In our submission one could not say that test was satisfied here. Of course, they were not asking the same question, so the tests may not be appropriate."

It was further put that the establishment of the ACCV under a special Act of Parliament was not in itself sufficient to establish that the ACCV was a government body. Mr Shaw pointed to other organisations such as the Law Institute and the Victorian Racing Club which were established by Acts of Parliament but could not be described as government bodies.

Finally, Mr Shaw stated that the existence of provisions under the Cancer Act enabling the Governor-in-Council to conduct an audit of the ACCV did not indicate the existence of a government body. Similar provisions, it was put, existed in relation to friendly societies or building societies without either being described as government bodies. Mr Shaw concluded his submissions by putting the following at page 208 of transcript:

"So in our submission the terms of the Act far from establishing that one has here a government body indicate that one has a body which it is true is set up with the imprimatur of parliament and its objects are laid down by the parliament but which is cast out to find its own money and carry on its own activities, whether consonant with what government wants or not, simply because it is thought that activities of that kind are desirable activities to have in the community.

The mere fact that activities are desirable in the community does not in our submission demonstrate that the activities are government activities, it simply demonstrates that they are desirable. I suppose were this a community in which all activities were government activities it would be difficult to make that submission, but since it is not in our submission that is clearly so.

I cannot think of any other indication that might point to it being a government body except the various things that I have referred to. In our submission when one refers to the various matters that I have referred to, the funding, the set up, the way in which it is controlled, the way in which it is run, the way in which it lobbies politically,

there is in our submission little doubt that one has not got a body here which is carrying on activities for government or government activities at all."

Mr Haynes, on behalf of the SPSF, in opening his submissions stated that the ACCV had been represented at the dispute finding proceedings before Deputy President Hancock and had advised the Deputy President that the ACCV, along with other Victorian parties, did not oppose a dispute finding. Accordingly, the Deputy President found the existence of a dispute between the SPSF and the ACCV. Mr Haynes put that the key issue to be determined was "not whether or not the Anti-Cancer Council acts on behalf of the government but whether or not the SPSF has eligibility". It was put by Mr Haynes that the SPSF's eligibility to cover employees of the ACCV is provided by the words in Rule 3(G) "employed in any State instrumentality or other undertaking carried on by public authorities, commissions or corporations under any statute of the State of Victoria".

Mr Haynes distinguished Rule 3(G) of the SPSF Rules, which is applicable to the State of Victoria, from other sections of the eligibility rule applying to the States of New South Wales and Tasmania where eligibility is confined to employees of specified industries or to bodies which represent the Crown.

In determining the proper construction to apply to Rule 3(G), Mr Haynes submitted that the correct approach was one which construed the rule "liberally" and in a non-technical manner. Through this approach, Mr Haynes concluded that the word "instrumentality" must be of the State having a real connection with the Crown in the Right of the State of Victoria or an "emanation of the State".

A number of High Court cases involving consideration of eligibility rules or organisations were relied upon by Mr Haynes to support his approach

in defining the meaning of Rule 3(G). The history and development of Rule 3(G) was explained by Mr Haynes at page 218 of transcript in these terms:

"The wording of 3(G) may be usually, and there is a simple historical explanation for this. The rule is put together by lay persons who form the unregistered, unincorporated state union known as the Victorian Public Service Association. As you may be aware, most Victorian unions which are not de facto branches of federal unions do not have to go through the tortuous registration procedures of most unions in the federal system or indeed of other states, and their eligibility rules may simply be what meetings of members say that they should be.

That part of the federation's rule was inserted exactly as the VPSA rules stood by means of applications R numbers 282 and 283 of 1984, which was determined by the decision of Deputy Registrar Boland, which is found in Print G9376. In other words, it is one of those rules that the various observations of members of the High Court I have referred to, for good reason, indicated should not be interpreted narrowly or technically as though it was the product of careful legal drafting."

To support the submission that the ACCV is a Victorian State instrumentality, Mr Haynes stated that the Parliament had determined that there be a body known as the ACCV and that the Parliament also established the objects to which the body would be required to seek to achieve. Reference was made to exhibit H6 "The Parliamentary Committees (Joint Investigatory Committees) Act 1982" which at section 4(c) defined the meaning of a public body as one "established by or appointed pursuant to an Act or established by or appointed pursuant to any rule, regulation, by-law, order, Order in Council, proclamation or other instrument of a legislative character". This definition, in Mr Haynes submission, supported his proposition that a State public service body was one arising from an instrument of the State and the words "public bodies" and "state instrumentalities" have the same meaning in the context of State government.

A number of features of the ACCV were referred to which were said to be ones having public sector qualities. These included the requirement for the ACCV to have regard to advice of the Health Commission of Victoria; and that

the majority of council members (21 out of 36) be appointed by the Governor-in-Council.

The Act also provides for the Minister for Health and a number of statutory officers to be ex-office members of council and the Governor-in-Council has power to fill vacancies on the council.

Mr Haynes also directed the Commission's notice to the requirement that the ACCV Annual Report be tabled in Parliament and a provision which enables the Auditor-General, at the discretion of the Governor-in-Council, to audit the accounts of the ACCV and the power of the Governor-in-Council to revoke any rule made by the ACCV.

It was submitted by Mr Haynes that the totality of the features cited, that is "the origin, establishment, composition and on-going relationship to the Governor-in-Council both by and through the Act", established the ACCV as a State instrumentality.

In further support of the SPSF's contention that the ACCV is a statutory authority, Mr Haynes referred to a number of public sector bodies who pursue non-government funding and rely heavily on volunteers in the same way as the ACCV but who are nonetheless government bodies. One of these government bodies referred to was the Zoological Gardens established under an Act employing persons who are members of the SPSF and are respondent to an award of the Victorian Industrial Relations Commission. Others were the Victorian Relief Committee and the National Gallery of Victoria. The employees of the Gallery are employed as public servants. Reference was also made by Mr Haynes to Rule 3(C)(j)(iv) which enabled the SPSF to have coverage of employees of the NSW State Cancer Council, the NSW equivalent of the ACCV.

Other material relied upon by Mr Haynes were exhibits H7 and H8. Exhibit H7 was a report of the Public Bodies Review Committee, a Committee of the Victorian Parliament dealing with audit and reporting responsibilities of public bodies in Victoria. The ACCV is listed in the report as a statutory authority in the category of community services at page 272 of the exhibit. Exhibit H8 was an extract from the 1988 Victorian Government Directory setting out the range of government services. Included in the directory as a statutory authority is the ACCV.

Conclusion

Rule 3(G) of the SPSF rules is in the following terms:

"(G) In the State of Victoria the Federation shall also consist of -
Persons employed in the Public Service of Victoria or employed in any State instrumentality or other undertaking carried on by public authorities, commissions, or corporations under any State charter, statute, enactment, or proclamation of the State of Victoria and including any such person transferred or on loan to the Public service of another State or to any instrumentality or other undertaking carried on under any statute, charter or enactment or proclamation of any State."

Having considered the evidence and submissions, I have come to the conclusion that the SPSF rule applicable in this matter, as set out above, enables the SPSF to have eligibility to enrol employees of the ACCV.

In making this decision, I have concluded that the ACCV is a State instrumentality within the meaning of Rule 3(G) and operates under a State statute. I have considered a number of important features of the ACCV which define the organisation as a State instrumentality. The ACCV is created by an Act of the Victorian Parliament, the Act imposes a number of requirements upon the ACCV. It must, as required by section 3, consult with the Health

Commission of Victoria and "shall have regard to its advice". In accordance with section 11, the ACCV is required to submit its Annual General Report together with a full account of its financial position, including an audited balance sheet, to the Government to enable such report and financial statements to be laid before both Houses of Parliament within one month of the ACCV Annual Meeting and if Parliament is not sitting, within one month after the next meeting of Parliament. The accounts of the ACCV can be subject to audit by the Auditor-General whenever directed by the Governor-in-Council.

The Parliament, in adopting the Cancer Act 1936 and subsequent amendments, also established that the ACCV on its formation and since must comply with the objects which Parliament determined.

Another feature of the ACCV that relates to its relationship with government is the composition of the council. Section 6 sets out the composition of the council which provides for the Minister for Health and the Chairman of the Health Commission of Victoria to be ex-office members of council and a majority of the council are persons nominated by the Governor-in-Council, 7 of whom are nominated by the Minister for Health.

Finally, section 31 of the Cancer Act empowers the Governor-in-Council to revoke any rule made by the ACCV.

Mr Shaw has put forward a number of characteristics of the ACCV which, in his submission, are characteristics which place the ACCV beyond the scope of the SPSF eligibility rule and outside the definition of a State instrumentality. These characteristics were: the role of the ACCV in conducting political lobbying; its methods in raising funds; the activities of the ACCV, undertaken in the main by volunteers; and the absence of government funding in carrying out the objects of the ACCV. All of these were said to be

of a nature "quite unlike a government body". The other point made was to the effect that the passage of legislation by Parliament did not establish the ACCV as a State instrumentality.

I do not regard the tests which Mr Shaw has put forward as distinguishing the ACCV from that of a State authority as valid. The Parliament has determined how the ACCV should function in meeting the requirements of Parliament as reflected in the objects laid down in the Cancer Act.

Through section 5(2) of the Cancer Act, Parliament has provided the ACCV with the powers to obtain moneys in meeting the objects established by Parliament. The fact that the ACCV relies upon volunteers in part to raise such moneys, or otherwise carry out its functions, does not remove it from the category of a State instrumentality. As Mr Haynes pointed out, there are many Victorian authorities with the same characteristics as the ACCV which are statutory or government bodies. The existence of volunteers and the raising of moneys through donations and bequests are not peculiar to the ACCV.

For the reasons outlined, I find that the ACCV is a Victorian State instrumentality established by an Act of the Victorian Parliament; its objects and the manner in which it carries out its functions in achieving those objects are all determined by the Victorian Parliament. In other words, the business of the ACCV is to carry out the interests of the Crown as laid down by legislation enacted by Parliament. It exists for no other reason. Because the Crown has determined it shall operate differently than certain other government bodies established by legislation, in the way it goes about its business on behalf of the Crown, does not provide any grounds for arguing that it is not a State instrumentality operating under a State statute.

The eligibility rule of the SPSF states that persons employed in any state instrumentality or other undertaking under any State charter, statute, enactment, or proclamation of the State of Victoria shall be eligible for membership. All that needs to be established is whether the body is a State authority or other undertaking as set out in the rule established by the Crown to determine eligibility.

In determining that the ACCV is a statutory authority within the meaning of the SPSF eligibility rule, I have had regard to a number of High Court cases dealing with the issue of defining what is a statutory authority or a government body in relation to a union's eligibility rule. In particular, I have had regard to views expressed in R v Portus; ex parte Federated Clerks Union of Australia⁽¹⁾ of Latham CJ and Dixon J. The case involved a consideration by the High Court of the eligibility rule of the Australasian Transport Officers Federation (ATOF) who claim coverage of certain employees of Qantas. The rules of the Federation enabled it to cover "persons employed at a salary rate in connection with air transport who are salaried officers of the Crown". "Salaried officers of the Crown" being defined as "employees of any person or corporation employing persons at an annual salary rate on behalf of the Government of the Commonwealth or any of the States". The Court determined that the rules enabled ATOF to enrol employees of Qantas.

Latham CJ at page 435 said:

"A corporation created by Parliament for the purposes of performing a function on behalf of the Government (such as a railway commissioner who is made a corporation sole) may be said to employ persons on behalf of the Crown - though only in the sense that the corporation represents the interests of the Crown in relation to the activities of the corporation. But can the same be said of a public company the relation of the Government to which is that the Government is a shareholder? The fact that the Government owned some shares while other persons owned other shares would not show either that the employees of the company were

⁽¹⁾ (1949) 79 CLR 428

SPSF
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employed on behalf of the Crown or that they were employed on behalf of the other shareholders. But where the Crown holds all the shares the company is really carrying on its business solely in the interests of the Crown in the same way and to the same extent as in the case of the other authorities mentioned in rule 2. The substance of the matter is the same, whether the corporation is a specially created body or a company formed under a Companies Act."

In his reasons for deciding that ATOF had eligibility Dixon J at page 438 said:

"But plainly the rule of the Federation when it uses the words 'on behalf of' is not contemplating the legal relation of principal and agent. The language as well as the context and subject matter shows that. For the rule speaks of the employees of the person or corporation who employs persons on behalf of the Commonwealth. The person or corporation is the employer, the principal in the contract of service. The employer is not the Crown or Government. The expression 'on behalf of' is used in a wider sense. It means for the purposes of, as an instrument of, or for the benefit and in the interest of, the Commonwealth. The reference to the Railways Commissioners and other bodies of the States shows that what is in mind is a corporation set up and used by the government as an authority in which the undertaking is vested. Perhaps the possibility was not foreseen of a company registered under the Companies Acts and controlled by Government by means of the share capital. But I think that the arrangements adopted and the use made of Qantas Empire Airways Ltd. bring the case within the meaning of constitution of the Federation. It does so because of the combined effect of three considerations. Firstly the two Acts of the Federal Parliament operate as legislative declarations or indications of intention that the company shall be 'owned' by the Government which shall furnish the capital for the undertaking by subscribing to further issues. Secondly because the Government does hold all the capital. Thirdly because by making the directors the nominees of the Minister an effective control of the undertaking by the Government of the Commonwealth is established. The result is that by a use of the machinery of the company law made under the sanction of Federal statute substantially the same practical result is produced as if a statutory authority were set up."

It was concluded by Latham CJ and Dixon J that the words "on behalf of" mean as an "instrument of, or for the benefit and in the interest of" the body concerned.

In this case, there is no requirement in the rule that the corporation or body is employing persons on behalf of the Crown. It is only sufficient that the persons are employed in any "State instrumentality" carried on "under

S P S F
Latham

any State charter, statute, enactment or proclamation of the State of Victoria
....".

The Court, in determining that Qantas was a body within the meaning of the Federation rules, adopted a wider and less restrictive approach in considering the Federation's rules and defining Qantas as a corporation with the meaning of the rule.

The ACCV in its application, in addition to applying for a revocation of Deputy President Hancock's dispute finding on 23 May 1988, sought in the alternative that pursuant to section 111(1)(g) the Commission should dismiss the matter or refrain from further hearing or determining the matter in the public interest.

The only submission in support of this application, beyond the matters raised concerning eligibility, was one which stated that an award identifying the ACCV as a government body would prejudice its activities. There is no evidence before the Commission, beyond the assertion contained in the submission, that would lead the Commission to conclude that if an award were to be made regulating the wages and conditions of employment of employees of the ACCV, such action would be against the public interest.

Accordingly, both applications are dismissed and the ACCV is directed to confer with the SPSF in relation to the dispute found to exist by Deputy President Hancock.

BY THE COMMISSION:

DEPUTY PRESIDENT

Appearances:

B Shaw QC with N Green and R West for the Anti-Cancer Council of Victoria.
D Haynes with R Hutchins for the State Public Services Federation.

Dates and places of hearings:

1989.

Melbourne:

October 27;

1990.

Melbourne:

February 21.

MINTER ELLISON

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cc note RM

10 MAY 1990

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617 4723

8 May 1990

OUR REFERENCE

RDM 351961 MWT (PMOG)

YOUR REFERENCE

Miss Adrienne Holzer
Secretary
Anti-Cancer Council of Victoria
1 Rathdowne Street
CARLTON SOUTH VIC 3053

Dear Miss Holzer

Log of Claims by SPSF

We refer to recent telephone conversations and the decision of Deputy President MacBean in the Industrial Relations Commission earlier today.

Working about
We confirm that the Council has a right of appeal to a Full Bench of the Australian Industrial Relations Commission.

First, however, leave of the Full Bench is required before an appeal can be instituted. Section 45(2) of the Industrial Relations Act 1988 ("the Act") provides that a Full Bench shall grant leave to appeal if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted.

Where an appeal has been instituted, a Full Bench may order that the operation of the whole or part of the decision concerned be stayed pending the determination of the appeal. In order to obtain such a stay, application must be made to the Full Bench when seeking leave to appeal.

Such an appeal is instituted by lodging a Notice of Appeal within 21 days after the date of the decision.

The Full Bench has power to confirm, quash or vary the decision of Deputy President MacBean. Alternately, the Full Bench can ask Deputy President to take further action to deal with the subject matter of the decision or act in accordance with the directions of the Full Bench.

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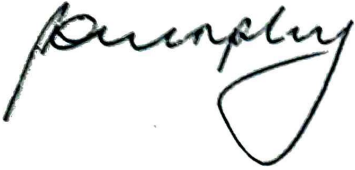
OVERSEAS ASSOCIATED OFFICES: AUCKLAND, WELLINGTON, SINGAPORE, BEIJING.

Ms Adrienne Holzer
Anti-Cancer Council of Victoria

Page 2
8 May 1990

We confirm that a conference is to be held with Mr Brian Shaw QC at his chambers on Tuesday, 15 May 1990 at 4.30 p.m.

Yours faithfully
MINTER ELLISON

A handwritten signature in cursive script, appearing to read 'Minter Ellison', written in dark ink.

PERSONAL & CONFIDENTIAL AIDE MEMOIRE TO N.J.G.

Will see
SPSF
resistance
file

Re: Discussion with Michael Tehan, 4/5/90

Scenario if the decision goes against us and we do not appeal.

1. Negotiations commence with SPSF with a view to establishing an award -
 - (a) Paid rates award - i.e. actual rates prescribed for certain jobs or
 - (b) Minimum rates prescribed. This is the more likely one.
2. The award would reflect broadly existing conditions of employment. Any changes would depend upon whether the Union would insist on certain conditions.
3. Trade-offs are possible, e.g. we are currently on a 35 hour week. We could say that we could increase this to 38 hour week for all new staff.
4. It is probably that the Union will seek to publicise its existence and inform staff of the desirability to become a member.
5. At this stage the SPSF does not have a 'Right of Entry clause. However it could be a good idea to be open and allow them the right to have a room set aside at lunchtime for interested staff to talk to them. At this stage we should not propose to call a general meeting which they could address.
6. It is not anticipated that there will be any significant change in the way in which the Council is operated.
7. We do not regard the staff as public servants and that was the main thrust of our Appeal. It just so happens that a quirk of drafting allows this Union access to the public service and other government or quasi-government corporations and companies.
8. ACCV has no hostility toward SPSF. All negotiations have been conducted amicably. We won't be taking a prejudged position.
9. Keep the whole think low key.

4th May, 1990

A.J. Holzer

VICTORIAN
GOVERNMENT
DIRECTORY

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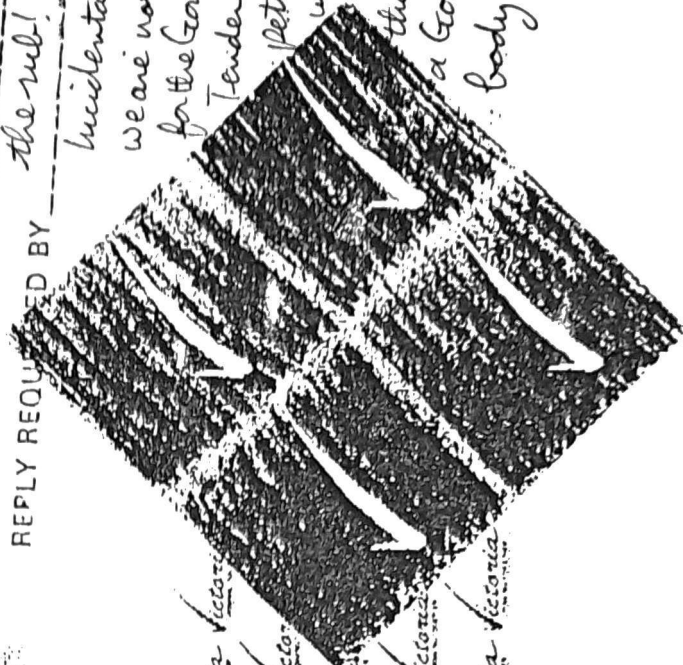
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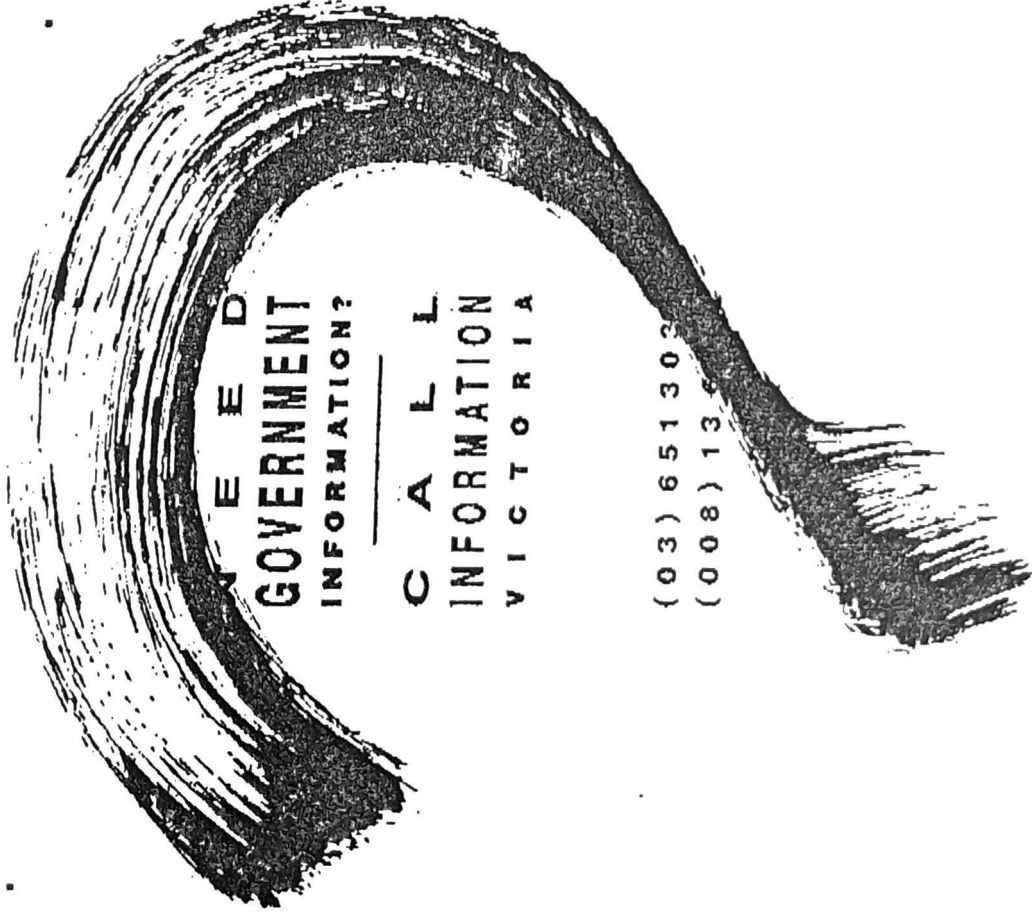
ACTION REQUIRED SRSF file. Here in his

REPLY REQUIRED BY the sub!

Incidentally, we are not eligible for the Government Tender Price on petrol because we are not listed in this case as a Government body!



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A WELCOME CHANGE



Statutory Authorities

Advanced Dental Technicians Qualifications Board

48 St Kilda Road, Melbourne 3004
☎ 268 7888

Acting Chairman: Professor John Waterson
Secretary: Ms Toni Talbot

The Board was established under the *Dental Technicians Act 1972*. It is responsible for the conduct and practice of dental mechanics by advanced dental technicians.

Anti-Cancer Council of Victoria

One Victoria and Rathdowne Streets, Carlton South 3053
☎ 662 3300

President: Mr W. Allan Dick
Director: Dr Nigel Gray
Secretary: Ms Adrienne Holzer

The Council co-ordinates research and investigation in Victoria into the causes, prevention and treatment of cancer and allied conditions. It was established under the *Cancer Act 1936*.

Cancer Institute Board

481 Little Lonsdale Street, Melbourne 3000
☎ 641 5555

Chairman: Mr James Guest
Chief Executive Officer: Mr George S. Bolitho

The Board was established under the *Cancer Act 1958*. Its terms of reference are to:

- provide facilities for and undertake research and investigation of cancer and allied conditions;
- provide outpatient and inpatient hospital treatment;
- provide instruction for medical students and practitioners, nurses, etc. in cancer and allied conditions.

The Peter MacCallum Clinic in Melbourne is the specialist hospital in which these terms of reference are carried out.

Chiropodists Registration Board

8th Floor, 555 Collins Street, Melbourne 3000
☎ 616 8059

Chairman: Mr Duncan C. Reilly
Registrar: Mr Aidrian J. Warren

The Board was established under the *Chiropodists Act 1968* to determine the period of training and courses of training in chiropody, to conduct examinations and to maintain a register of chiropodists.

Chiropactors and Osteopaths Registration Board

19th Floor, 555 Collins Street, Melbourne 3000
☎ 616 7070

Chairman: Mr Simon Williams

examinations in chiropodics and osteopathy, to approve qualifications for registration of persons, to establish courses of study or training and to maintain a register of chiropactors and osteopaths.

Dental Board of Victoria

8th Floor, 555 Collins Street, Melbourne 3000
☎ 614 3258

President: Dr Daniel Hurley
Registrar: Dr Ewan Deane

The Board was established under the *Dentists Act 1972*. It is responsible for the registration of all dental practitioners in Victoria and for the maintenance of standards of professional conduct of dentists.

Dental Technicians Licensing Committee

448 St Kilda Road, Melbourne 3004
☎ 268 7888

Acting Chairman: Mr Gordon Lovel
Secretary: Ms Toni Talbot

The Committee was established under the *Dental Technicians Act 1972*. It is responsible for the conduct of dental technicians and the practice of dental mechanics by dental technicians.

Dentists Board of Victoria

8th Floor, 555 Collins Street, Melbourne 3000
☎ 616 7326

Chairman: Mrs Kaye Gibbons
Registrar: Mr John H. Smith

The Board was established under the *Dentists Act 1981* and is responsible for prescribing courses of training in dentistry, holding or approving examinations and maintaining a register of dentists.

Fairfield Hospital Board

Fairfield Hospital, Fairfield 3078
☎ 488 2268

Chairperson: The Hon. Geoffrey Connard
Secretary: Mr Christopher F. Richards

The Board was established under the *Health Act 1958*. It is responsible for the management of the Fairfield Hospital, which is primarily a hospital for the care and treatment of persons suffering from infectious diseases.

Food Standards Committee

20th Floor, 555 Collins Street, Melbourne 3000
☎ 616 7139

Chairman: Dr Graham Rouch
Secretary: Mr John Irvine

The Committee was established under the *Food Act 1984* to recommend regulations for the control of standards to ensure the purity of food offered for sale to the public.

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FACSIMILE HEADER

Date: 10/4/89

To: MS ADRIENNE HOLZER

Company or Firm Name: ANTI-CANCER COUNCIL OF VICTORIA

Your Reference: _____

Facsimile No.: 663 3412 Country: _____

From: MICHAEL TEHAN

Secretary: KAYE Direct Line: 617 4707

File No.: RDM 351961 MWT

File Name: _____

Re: _____

Property: (If applicable) _____

No. of Pages: (Including header) 4

**IF YOU DO NOT RECEIVE ALL PAGES PLEASE TELEPHONE, TELEX OR FAX
THE APPROPRIATE SECRETARY IMMEDIATELY**

Message: _____

The decision referred to in this letter is not enclosed
with this fax.

- 2 -

enne Holzer
ary
Cancer Council of Victoria

10 April 1989

ventures and trusts but that coverage by those guidelines should not be taken to imply that government policies with respect to conditions of employment or other management or operational matters are applicable.

Notwithstanding all of the above, the full details of which you can read in the decision, the Deputy President found that, in his opinion, HCS is "a part of the Victorian public sector". Bearing in mind the fact that this term is not used in either of the relevant rules of SPSF, it was unnecessary to make this finding.

Deputy President Hancock continued to consider whether SPSF had the constitutional capacity to enrol employees of the Company. A broad interpretation was given to the relevant rules of SPSF, thus enabling the Deputy President to conclude that SPSF does have coverage of HCS employees. It might be noted that the rules are widely drawn and, additionally, the High Court has often held that the rules of trade unions ought be liberally construed.

A copy of the decision is enclosed for your information.

The second development is that the Department of Labour has indicated its renewed interest in this matter. On 15 March 1989, a meeting was held with Mr Paul Carlson, an industrial relations officer of the Department. Three things emerged during and after the meeting:

- a) SPSF has approached the Department, informally, to try to have some pressure brought to bear on ACCV to agree to the making of an award with the Federation;
- b) the Department sees the ACCV as "part of the public sector". It appears to believe that the SPSF has constitutional coverage of the employees of the ACCV and that, in due course, an award will be made in respect of the employees of the ACCV. It might be noted that the Department is not aware of, and did not appear particularly interested in, public interest arguments on why the ACCV should be exempt from award coverage;
- c) having formed a view that the SPSF has constitutional coverage of the employees of ACCV, the Department appears to want to have the matter of the log of claims resolved. It was not clear if it is prepared to allow the ACCV to handle its own negotiations. The Department appears to be willing, indeed determined, to be involved in any negotiations with SPSF.

The ACCV is under no obligation to take any further step at present. If the SPSF wishes to activate the matter, it need only notify the Australian Industrial Relations Commission (as the Australian Conciliation and Arbitration Commission is now known) that it wants the matter called on for hearing. The Department of Labour, on the other hand, seems anxious to know what the attitude of the ACCV will be and an indication was given to Mr Carlson that the matter will be further considered during April and that he would be advised further.

enne Holzer
ary
Cancer Council of Victoria

10 April 1989

Three options are available to the Council. First, if and when the SPSF seeks to have the matter relisted, you can indicate that you will be challenging the original finding of dispute on the ground that the SPSF does not have constitutional coverage of your employees. In the light of the decision of Mr Deputy President Hancock, which itself confirms the opinions last year obtained from Mr Green and Mr Shaw QC, we do not believe this argument would be successful. That is not to say that the argument should not be prosecuted. It may be that there are tactical considerations relating to the desire of the ACCV to be seen to be quite independent of government. These considerations may commend an argument on technical grounds, even though it might be thought that the chances of success are not high.

The second option is opposition to the making of an award in respect of the staff of the ACCV on the basis that it is not in the public interest that such an award be made. Such an argument is available pursuant to section 111(1)(g)(iii) of the Industrial Relations Act 1988. We believe that you have an arguable case on this ground. We have noted previously, however, that the Industrial Relations Commission has been reluctant to decline to make an award in what have been award-free areas.

A third option is to have "without prejudice" discussions with SPSF. These discussions can take place even though the ACCV has determined to oppose the making of an award on either or both of the options identified immediately above. The ACCV could explain to SPSF the reasons it has adopted its position to ensure that, if ultimately the making of an award is inevitable, cordial relations have been maintained with the Union. It may be possible to ascertain from the SPSF what type of award it sees as appropriate for ACCV staff. Other options may be canvassed. An unregistered agreement may be a possibility SPSF is prepared to consider. Alternatively, the Industrial Relations Act makes provision for certified agreements to be entered into between parties. SPSF may be prepared to enter into such agreement on the basis that the ACCV does not acknowledge that SPSF has constitutional coverage.

One obvious risk in opening up discussions with SPSF is that it may be seen as acceptance of the notion that the ACCV is "part of the public sector". Such a concession may contain far wider ramifications for the ACCV. From a strictly industrial relations perspective, however, we believe that appropriate caveats could be placed on any "without prejudice" discussions which might take place with SPSF.

On the basis outlined above, we recommend that you instruct us to advise SPSF that you are prepared to have a preliminary, informal discussion aimed at ascertaining each other's views. We await your further instructions.

Yours faithfully,
MINTER ELLISON

STER ELLISON

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OUR REFERENCE

RDM 351961 MWT

YOUR REFERENCE

4 August 1988

Miss Adrienne J. Holzer,
Secretary,
Anti-Cancer Council of Victoria,
1 Rathdowne Street,
CARLTON SOUTH. VIC. 3053.

Dear Miss Holzer,

LOG OF CLAIMS BY STATE PUBLIC SERVICES FEDERATION

We refer to recent correspondence and discussions in relation to the Log of Claims served on the Anti-Cancer Council of Victoria.

As we understand the facts, they are as follows:-

1. On 13 April 1988 The State Public Services Federation ("SPSF") served a Log of Claims on the Council. The typical demand that the claims be granted or settled within seven days of the date of the letter of demand was made, failing which SPSF would assume that the claims had been refused and the Australian Conciliation and Arbitration Commission would be notified of the existence of an industrial dispute.
2. A number of other bodies were also served with the Log of Claims. These included the Legal Aid Commission of Victoria, the Rural Finance Commission and the Victorian Economic Development Corporation. A total of 14 respondents were served.

.../2

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3. On 21 April 1988 the Department of Labour wrote to you advising that it had been notified by SPSF that it had served the Log of Claims. The Department of Labour indicated that it would be co-ordinating a government response to the Log of Claims and "will undertake the appropriate negotiations with the State Public Services Federation".
4. By letter dated 9 May 1988, SPSF advised you that the hearing of the industrial dispute arising out of the non-acceptance of the demands contained in the Log of Claims was listed for hearing at 11.30 a.m. on 23 May 1988.
5. On 23 May 1988, Deputy President Hancock of the Australian Conciliation and Arbitration Commission found that an industrial dispute existed between the SPSF and the Council. The Department of Labour representative did not oppose such a finding. The Deputy President directed that the parties confer between themselves prior to him further hearing the matter.

State Public Services Federation

SPSF is a registered trade union comprising most state Public Service Unions. In Victoria, the Victorian Public Service Association is the relevant associated body. SPSF has a national policy that all persons who can be covered pursuant to an award of the Arbitration Commission should be covered unless the SPSF council decides otherwise, in special circumstances. For territorial reasons, SPSF will be anxious to ensure that it has the coverage of employees of the Anti-Cancer Council; it would not like any other unions to have the opportunity of covering Council staff.

SPSF's eligibility rules (and consequent legal entitlement to represent staff of the Council) are extremely widely drawn. We enclose a copy of an advice from Mr. N.J.D. Green of Counsel which considers whether SPSF is entitled to cover staff of the Council. As you will see, he concludes that it would appear that subject to an exception relating to medical practitioners, SPSF has the power to create an industrial dispute in relation to the Council by virtue of the provisions of Rule 3(G). Rule 3(G) gives SPSF constitutional capacity to enrol persons "employed in any State instrumentality or other undertaking carried on by public authorities, commissions or corporations under any State ... statute ... of the State of Victoria". Mr. Green notes that the Council is a public authority and a corporation established pursuant to the Cancer Act 1958.

What has been done by SPSF is the creation of a "paper dispute" sufficient to attract the jurisdiction of the Australian Conciliation and Arbitration Commission. Although the Council and

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SECTION

4 August 1988

its employees may well be in complete industrial harmony, SPSF, none of whose members is employed by the Council, has created a technical dispute by delivering on the Council a formal Log of Claims.

The Arbitration Commission cannot proceed to exercise its powers unless it first ascertains that an interstate industrial dispute has come into existence. Whether such a dispute exists in any particular case is a question of evidence. The practice of creating "paper disputes" simplifies the task of the Commission. The practice consists of the following elements. An organisation, usually of employees, serves a Log of Claims and a letter of demand on certain respondents. The claim is in extravagant terms, thereby ensuring that the Arbitration Commission has "ambit" to deal with any disputes involving the parties in the foreseeable future. The accompanying "letter of demand" requires compliance with the Log within a specified period of time (in this case seven days). Refusal to comply (in this case evidenced by silence) will then constitute an "industrial dispute". Several High Court decisions have accepted that this process constitutes "prima facie evidence" of an industrial dispute. The dispute must still be a genuine one in the sense that the organisation making the demands must really want what it demands. However, the fact that there may be more than one purpose for a union's demands will not necessarily prevent those demands giving rise to a genuine dispute. For example, a union may serve a Log of Claims not simply for the purpose of obtaining the wages and conditions claimed, but also for the purpose of establishing a history of and right to award coverage of certain workers.

In summary, the dispute must be interstate, genuine and clear.

Future Approach

The Council must now decide the approach it wishes to take in relation to the claim by SPSF. The options, other than total acceptance of the claim, are:-

- (i) Rejection of the claim and opposition to it in whatever ways are possible;
- (ii) If Federal award coverage appears to be inevitable, negotiations with SPSF in relation to the terms of the award or agreement.

Opposition to the Log of Claims may be carried out in a number of ways. There are technical, legal objections which can be pursued, although in view of the fact that the Department of Labour consented to the finding of a dispute in May 1988, it will be more difficult to take points such as the lack of clarity of the demands of SPSF

.../4

SPSF
SECTION

4 August 1988

and any alleged lack of bona fides by SPSF. One ground of opposition relates to the fact that some of your staff are already subject to State awards. If it can be shown that State award coverage is preferable, the Commission may decline to hear the matter further. A stronger ground arises on public interest grounds. The Commission has power, in relation to an industrial dispute, to refrain from further hearing of a matter if it appears that further proceedings are not necessary or desirable in the public interest.

The Commission has been reluctant to define the precise meaning of the "public interest", thereby retaining the widest possible discretion. Each case depends on its own factors. In the past, it has been relevant that the staff have been unanimously opposed to award regulation and that there has been an absence of any demonstrated advantage to the union or to the employer to have an award. In our view, the Commission might also be prepared to refrain from hearing the matter if the Council can demonstrate that its work would be adversely affected by the introduction of an award. As we understand it, approximately 98% of the Council's funding comes from private sources and reflects the Council's status as a charity. Other relevant arguments would be the leading role of the Council in cancer research, education and prevention and the need for the Council to be competitive and flexible in its salary fixation. On the other hand, the Commission will be conscious of the fact that some other comparable research bodies have their salaries determined by arbitral tribunals. It is difficult to assess whether the Commission will be particularly responsive to these lines of argument, worthy though they are. The Commission perceives its role overwhelmingly as one where it is required to prevent and settle industrial disputes between unions and employers.

If you come to the view that Federal award coverage is inevitable, you will need to make a careful assessment of the Log of Claims to determine areas of agreement/consent and disagreement. Where you wish to oppose certain proposed conditions, we will need to lead evidence in support of your view. On the other hand, there may be existing conditions of employment which you need to have included in any new award. For example, in view of your annual appeal on Melbourne Cup Day, you may wish to delete reference to a Melbourne Cup holiday. Depending on the attitude of SPSF, the examination of the Log and comparison with your existing conditions of employment may require careful work by Council staff. In our view it is possible that SPSF may be prepared to settle the matter of the Log of Claims on the basis that existing conditions are enshrined in an award or agreement. We would also imagine that SPSF would want to have the opportunity to speak to staff. To check this aspect further it will be necessary for you to meet with an appropriate industrial officer of the organisation and Mr. David Haynes of SPSF

.../5

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1-Cancer Council of Victoria,

4 August 1988

has expressed his willingness to meet with Dr. Gray and yourself on 15 August 1988. We seek an indication from you as to whether this will be acceptable. It would not be necessary to make any commitments at that meeting, but simply to take the opportunity to hear what he has to say in relation to SPSF's proposals.

We believe that it would be desirable for you to meet with our Mr. Tehan to discuss this matter further and we would be grateful if you could contact our office to arrange a suitable time.

Yours faithfully,
MINTER ELLISON



Enc.

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SPSF
SECTION

IN THE MATTER of the
ANTI CANCER COUNCIL
OF VICTORIA
and
IN THE MATTER of a log of
claims served by the
STATE PUBLIC SERVICES
FEDERATION

ADVICE

1. My instructing solicitors act for the Anti-Cancer Council of Victoria ("the Council"). On 13 April, 1988 the Federation served a log of claims on the Council. It appears that on 23 May, 1988 before Mr. Deputy President Hancock of the Australian Conciliation and Arbitration Commission, the Federation asked the Commission to make a finding of an industrial dispute. I am not instructed about whether such a finding has been made. For the purposes of this advice, however, I shall assume that an industrial dispute has been found to exist and that the Council is a party to the dispute.

2. The Council was established by an Act of Parliament: see section 4 Cancer Act 1958 ("the Act"). The statutory objects of the Council are:
 - (a) to co-ordinate in Victoria all activities in relation to research and investigations with respect to cancer and allied conditions and with respect to the

causation, prevention and treatment thereof;

- (b) to promote and subsidise such research and investigation;
- (c) to provide maintenance and travelling expenses to persons in need who are suffering from cancer to enable them to become inmates of, or to attend a public general hospital or special cancer clinic for treatment;
- (d) to investigate the advisability of the establishment of special cancer clinics and, if thought advisable, to establish such clinics;
- (e) to facilitate the improvement of the treatment of persons suffering from cancer;

(section 5(1) of the Act).

3. In order to carry into effect the objects the Council has power to:

- (a) obtain moneys by means of grants, subscriptions, gifts, bequests or otherwise and invest any money so obtained and hold investments of the same;
- (b) receive, obtain and hold moneys, securities and other property, real or personal;

- (ba) with the consent of the Governor-in-Council borrow such sums of money, whether secured upon the funds or property of the Council or otherwise, as it thinks requisite upon such terms and conditions as may be agreed upon between the Council and the lender and approved by the Governor-in-Council but so that the total sum owing at any one time does not exceed \$100,000;
 - (c) execute any special trusts in connection with moneys or property received, obtained and held by the Council;
 - (d) apply the capital and income of the fund and property of the Council or any part thereof, subject to such trusts (if any), for or towards the foregoing objects; and,
 - (da) affiliate or associate with any other body of persons whatsoever having the like or similar objects whether such body of persons is corporate or unincorporate or carrying on activities within Victoria or elsewhere;
 - (e) do all such things as are incidental or conducive to the attainment of the foregoing objects and the exercise of the powers of the Council;
- (section 5(2)).

In carrying out its objects, the Council is under a duty to consult the Health Department of Victoria about existing and proposed activities of the Council and is to have regard to its advice;
(section 5(3)).

4. The composition of the Council includes the following ex officio members:

The Minister of Health;

The Chancellor and Vice Chancellor of the University of Melbourne;

The Lord Mayor of Melbourne;

The Head of the Health Department.

The Council also consists of a number of persons appointed by the Governor-in-Council upon nomination as provided in the Second Schedule to the Act by the Committees or other governing bodies of the Associations or bodies set out in that Schedule. No more than four persons appointed by the Governor-in-Council upon nomination by the Minister of Health to represent contributors to the funds of the Council are to be members of the Council. Likewise, there are three other persons to be so appointed upon the recommendation of the Minister.

Finally, the Chairman of each of the Committees provided for in the Act and not more than four members of the medical and scientific committee elected from time to time by that Committee are to be members of the Council.

(section 6(1)).

The Governor-in-Council on the recommendation of the Council may by proclamation published in the Government Gazette, alter the Second Schedule by removing and inserting any item therein or by altering the number of nominees of any institution and the Schedule so altered shall thereupon be deemed to be the Second Schedule.

(section 6(1A)).

5. The Council is a body corporate with perpetual succession and a common seal and by the name of the Anti-Cancer Council of Victoria is capable of suing and being sued.

(section 7).

6. The Act establishes a number of Committees, namely:

The Executive Committee (section 12);

The Finance Committee (section 14);

The Medical and Scientific Committee (section 16); and

The Appeals Committee (section 18).

The composition and functions of each of those Committees is dealt with in the Act in some detail. The Finance Committee has important powers in relation to the investment and reinvestment of funds of the Council.

7. The Council may accept gifts and endowments of real and personal estate by the special purposes of the Council in aid of its general purposes and upon such terms and conditions (not inconsistent with its objects) as may be agreed upon between the Council and the person bestowing such gifts and endowments. (section 28(1)).

8. The Council of any municipality may out of its municipal or town fund, as the case may be, contribute moneys to the fund of the Council by the special purposes of the Council or in aid of its general purposes and upon such terms and conditions (not inconsistent with the objects of the Council) as may be agreed upon by the Council and such municipal council. (section 28(2)).

There is to be a continuous audit of the accounts of the Council.

(section 29(1)).

The Executive Committee for the purposes of such audit is to appoint as auditors, persons being registered company auditors within the Companies (Victoria) Code and may remove any auditor so appointed.

(section 29(2)).

Whenever the Governor-in-Council so directs, the accounts of the Council are to be audited by the Auditor-General who with respect to the accounts is to have all the powers conferred on him by any law relating to the audit of the public accounts.

(section 29(3)).

There is to be paid into the consolidated revenue at the Treasury in Melbourne an amount to be determined by the Auditor-General to defray the costs and expenses of such an audit and the remuneration of the officers of the Auditor-General engaged in such audit.

(section 29(4)).

The Council has the power to revoke, amend or vary rules for or with respect to, among other things, generally, the carrying into effect of the purposes of Part I of the Act.

(section 31(1)).

Any rule may be revoked by order of the Governor-in-Council published in the Government Gazette.

(section 31(2)).

9. I am instructed that less than five percent of the funds of the Council come from Government, and that the Council is a registered charity in Victoria. I am also instructed that the Council does not wish to become a respondent to an award of the Australian Commission in respect of its staff. The Council is presently considering its position in relation to the proper approach to be taken in dealing with the Federation. As presently advised, my instructing solicitors understand that no members of the Council's staff are members of the Federation or of one of its constituent bodies, the Victorian Public Service Association. I am asked to particularly advise whether the Federation's Rules cover the staff of the Council. As I understand the position, that staff is constituted by medical scientists, medical

doctors and persons performing duties of an administrative or clerical nature.

THE FEDERATION'S RULES

10. The Rules of the Federation with which I have been briefed are, so far as is material, in the following terms:

"3. CONSTITUTION AND ELIGIBILITY FOR MEMBERSHIP

(A) The Federation shall consist of an unlimited number of employees employed by:-

- (i) the Crown in right of any State or States (other than the State of Queensland);
- (ii) any statutory body representing the Crown in right of any State or States (other than the State of Queensland);
- (iii) any instrumentality or authority whether corporate or unincorporate acting under the control of or for or on behalf of or in the interest of the Crown in right of any State or States (other than the State of Queensland);

S P S F
Clerical

(iv) ...

in or in connection with any one or more of the industries of:

...

medical officers and para-medical officers excluding legally qualified medical practitioners or persons studying or training to obtain such qualifications;

...

(B) The Federation shall also consist of an unlimited number of employees employed by:-

- (i) the Crown in right of any State or States (other than the State of Queensland);
- (ii) any statutory body representing the Crown in right of any State or States (other than the State of Queensland);
- (iii) any instrumentality or authority whether corporate or unincorporate acting under the control of or for or on behalf of or in the interest of the Crown in right of any State or

SPSF Division

States (other than the State of Queensland);

(iv) ...

and which employees are engaged in any one or more of the industrial pursuits of:

...

medical officers including
para-medical officers excluding
legally qualified medical
practitioners or persons studying or
training to obtain such
qualifications;

...

(C) The Federation shall also consist of such other persons (being any persons employed by any employer excluded in Rules 2(A) or 2(B)) as are officers of the Federation or who may lawfully be or become members of a registered organisation of employees having the constitutional coverage and eligibility for membership set forth in sub-rule (A) and (B) of Rule 2 Constitution of the Rules of the Federation;

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(D) [New South Wales] ...

(E) [South Australia] ...

(F) [Tasmania] ...

(G) In the State of Victoria, the Federation shall also consist of:
Persons employed in the Public Service of Victoria or employed in any State instrumentality or other undertaking carried on by public authorities, commissions, or corporations under any State charter, statute, enactment, or proclamation of the State of Victoria and including any such person transferred or on loan to the Public Service of another State or to any instrumentality or other undertaking carried on under any Statute, charter or enactment or proclamation of any State.

(H) [Western Australia]...

EXCLUSIONS

Notwithstanding anything hereinbefore contained:

(i) any person who is employed by any instrumentality of the Crown including without limiting the generality of the foregoing the following instrumentalities:-

Victorian Instrumentalities

Ballarat Water Board;

Bendigo Water Board;

Road Construction Authority of Victoria;

Dandenong Valley Authority;

Gas & Fuel Corporation of Victoria;

Port of Geelong Authority;

Geelong Water Board;

LaTrobe Water Board;

Melbourne Harbour Trust;

Melbourne and Metropolitan Board of Works;

The Metropolitan Transit Authority;

Port of Melbourne Authority;

State Transport Authority;

State Electricity Commission of Victoria;

Hospital and Charities Commission;

Housing Commission;

...

(ii) ...

(iii) Any person employed by:

...

Melbourne and Metropolitan Board of Works;

Road Construction Authority of Victoria;

...

State Electricity Commission of Victoria;

Port of Geelong Authority;

Melbourne Harbour Trust;

Port of Melbourne Authority;

The Metropolitan Transit Authority;

The Totalizator Board of Victoria;

...

shall not be eligible for membership of the Federation.

...

- (xi) [Further exclusions are set out relating to eligibility for membership of the Federation in the State of Victoria. The exclusions are extensive and I note, include dental technicians and dental nurses employed by the Cancer Institute, a body established under the Cancer Act.]

11. In my opinion, neither the industries specified in Rule 3(A) nor the industrial pursuits specified in Rule 3(B) apply to the industry of the Council or of the industrial pursuits of its employees. On its face, however, Rule 3(G) would appear to embrace some of the employees of the Council. Under Rule 3(G), the Federation has the constitutional capacity to enrol persons "employed in any State instrumentality

or other undertaking carried on by public authorities, commissions or corporations under any State ... statute... of the State of Victoria". Whether the Council is a State instrumentality, in my view, is open to debate and I think that a respectable argument can be made out that the Council is not such an instrumentality. However, the Council is a public authority and it is a corporation which has been established under an Act of Parliament of the State of Victoria. That being so, apart from medical practitioners, Rule 3(G) gives the Federation the power to enrol membership in respect of persons employed by the Council. If, contrary to the opinion that I have expressed, the Council is an instrumentality of the State of Victoria, there may be some limited scope for arguing that the Council is covered by the exclusions that appear immediately after Rule 3(H). The difficulty with that argument though is that - apart from the Hospital and Charities Commission - the Council would appear to have little in common with the other Victorian instrumentalities described. There may be an argument open to the Federation that Rule 3(G) is concerned with persons employed in an undertaking akin to the public service and, therefore, the scope of that Rule does not extend to employees of the Council. For that argument to succeed, it would

involve the Industrial Tribunal construing the Rule having to accept that the reference to instrumentalities or undertakings or authorities or corporations is coloured by the primary reference to the Public Service of Victoria. I do not consider that to be a convincing argument. I think that the proper construction to be placed upon Rule 3(G) is one that gives it a wider meaning than is produced by the last argument to which I have referred.

12. It must be borne in mind that the words which the Federation or its members have adopted to prescribe the conditions of eligibility for membership must be construed objectively, i.e. they must be given the ordinary meaning which they bear generally among people concerned with industrial matters in relevant or related industries: Electrical Trades Union v. W.W.F. 42 A.L.R. 587, 591.
13. It would appear, therefore, that subject to the exception relating to medical practitioners, the Federation has the power to create an industrial dispute in relation to the Council by virtue of the provisions of Rule 3(G).
14. Since setting out the above, I have received instructions that when the matter came on before Mr.

deputy President Hancock in May, a representative of the Department of Labour, on behalf of the Council, consented to a finding of an industrial dispute being made. I tend to think that that was not an advisable course to adopt, but it probably reflects the likely outcome had the matter been debated.

THE MERITS OF THE DISPUTE

14. It does not follow from what I have said above that the Commission would proceed to make an award prescribing the terms and conditions of employment of the employees of the Council. If it can be shown that most or all of the employees of the Council who are, as I understand it, currently award-free, do not wish to be covered by a Federal award, then that may be a factor that would attract the Commission's exercising its powers under section 41(1)(d)(iii) of the Conciliation and Arbitration Act 1904. An exercise of that power might also be attracted if the Council can demonstrate to the Commission that its funding is overwhelmingly from private sources and that its activities would be impaired by the Council's being a respondent to a Federal award. This same type of argument is about to be dealt with in the Victorian Industrial Relations Commission where the Medical Scientists Association is asking that Commission to vary the jurisdiction of the relevant

Board to extend to institutes such as the Murdoch Institute. However, in relation to the Federal setting, while one would hope that the Commission would view with some sympathy the circumstances in which the Council finds itself and the apparent fact that it is not run on public service lines, one ought not to underestimate the predatory nature of the Federal Commission which is ever willing to extend its sphere of influence by way of making awards.

15. In any event, I consider that it is open to the Council to resist being made a Respondent to the Award by invoking considerations that bear upon the public interest. If such a case is to be successfully made out, the gentleman instructing me will need to obtain from the Council detailed statements of evidence about its funding; the type of work performed by its employees; the terms and conditions under which each of those employees is employed; and the attitudes that the employees have expressed (if any) towards the prospect of their being covered by a Federal Award.

Please tell me of any queries.

Owen Dixon Chambers,
Melbourne.
22 June, 1988.

Nicholas Green
NICHOLAS GREEN.

IN THE MATTER of the
ANTI-CANCER COUNCIL
OF VICTORIA

and

IN THE MATTER of a log of
claims served by the
STATE PUBLIC SERVICES
FEDERATION

ADVICE
