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## CHAPTER 17:

# ISSUES: LEGAL REPRESENTATION AND CONSUMER ASSISTANCE

### Legal Representation

17.1 Mr Noel Davis submitted that a consumer need not necessarily be represented before the Tribunal provided there is the capacity for representation when necessary. He advised the Committee that part of the function of the Tribunal will be to assist people to present their case.<sup>126</sup>

17.2 However, Mr Drake (ACA) stated that the legislation presents an anomaly as consumers are not permitted to have representation as of right whereas superannuation funds will, as incorporated bodies, necessarily require natural persons to represent them. ACA submitted that this creates a complete imbalance in representation.<sup>127</sup> It noted that the Tribunal will have a discretion to allow complainants to be represented where the Tribunal considers it necessary, but submitted that the issue should be left at the complainant's discretion<sup>128</sup>.

17.3 The ISC countered the views of ACA by stating that the widespread use of legal representation, as distinct from direct communication between the Tribunal and the parties to the complaint, could undermine the capacity of the Tribunal to achieve the objectives of fair, economical, informal and quick resolution of disputes. It emphasised the inquisitorial nature of the Tribunal which permits the Tribunal to inform itself of all the information that it requires to make the correct decision. The ISC submitted that with

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<sup>126</sup> Davis, op cit, p 107

<sup>127</sup> Evidence p 162

<sup>128</sup> ibid

this type of process, and with the Tribunal staff giving all the necessary assistance to complainants, legal representation should rarely be needed and that when legal representation is required the Tribunal has the discretion to permit it.<sup>129</sup>

17.4 The Committee has given careful consideration to the concerns raised by ACA. It also recognises the role of the Tribunal as an alternative dispute resolution forum in which the Tribunal has the mandate and the power to redress any imbalance of power or representation that may arise.

### **Consumer Advisory Service**

#### *An alternative to legal representation*

17.5 As a result of the submissions concerning legal representation in particular, the Committee was concerned to ensure that there was an appropriate balance between the objectives of fair, economical, informal and quick dispute resolution and the access to consumers of appropriate assistance and advice in the preparation of their matters before the Tribunal.

17.6 For this reason the Committee was particularly attracted to the concept submitted by the Consumer Credit Legal Service (Vic) (CCLS) and the Consumer Credit Legal Centre (NSW) (CCLC) of an independent consumer advisory service, whether legal or multi-disciplinary.<sup>130</sup> The Committee therefore explored this option with a number of the witnesses in order to test its potential.

17.7 CCLS and CCLC submitted that as Australian employees are now compelled to become consumers of superannuation products, the Government should take responsibility for providing information and advisory services. They submitted that without such services many consumers will be unable to take advantage of the significant reforms in the area.<sup>131</sup> The Australian Pensioners' and Superannuants' Federation were similarly concerned that 'the value of the recent improvements in this area will be

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<sup>129</sup> Pooley, p 176

<sup>130</sup> SIS Sub No 53

<sup>131</sup> *ibid*

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diminished if consumers are unable to access independent specialist legal and information services to enable them to take advantage of the new supervisory and disclosure arrangements'.<sup>132</sup>

17.8 Mr David Niven of CCLS gave evidence that the role of a consumer legal service reaches beyond the provision of advocacy services. He submitted that it involves providing consumers with 'assistance in understanding the nature of what their complaint is about' and 'assistance in [determining] whether they have a complaint that is legitimate or not'. The Committee was interested to learn that in the consumer credit sphere, the majority of cases dealt with by the CCLS are resolved by negotiation, with only two to three per cent of matters going to litigation.<sup>133</sup>

17.9 Mr Niven proposed that the roles of a specific superannuation advisory service would include helping consumers to understand how to go about making their complaints; how to determine whether they have a legitimate complaint; and how to prepare the documents, the arguments and the proofs relevant to their case. The service would also play a role in the 'macro' picture. By obtaining statistics and complaint data and by negotiating complaints, the service would be in a position to negotiate with industry and government in relation to changes in practice and policy. Mr Niven submitted that neither the macro nor the micro functions discussed above are the type of functions that should or could be dealt with by the Tribunal secretariat.<sup>134</sup>

17.10 The Australian Consumers' Association commended the concept of a consumer legal service. It noted that in the area of consumer credit, this concept had worked very well and very cost-effectively.<sup>135</sup> Similarly, AFCO and Mr Davis supported the idea of such a service.<sup>136</sup>

17.11 It was noted by ASFA that the vast bulk of complaints will be dealt with through documents rather than through hearings. ASFA therefore sees it as important that a person preparing a document clearly understands what

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<sup>132</sup> SIS Sub No 73

<sup>133</sup> Evidence, Niven, p 24

<sup>134</sup> *ibid*, p 26-27

<sup>135</sup> Evidence p 164

<sup>136</sup> AFCO, evidence p 205  
Davis, evidence p 108

it is that they need to establish, and the sorts of thresholds they have to reach.<sup>137</sup>

17.12 The Committee foresees a community advisory service playing a vital role in providing complainants with assistance in preparing their matters for review.

### *Funding*

17.13 In relation to funding, the CCLS and the CCLC submitted that part of the superannuation levy be used for the purpose of funding a community advisory service. Alternatively, they submitted that the Government would need to make other funding arrangements. The CCLS is funded for its consumer credit work approximately 50 per cent through the consumer affairs budget, which is a State Government budget, and the other 50 per cent through the legal aid budget, which is a State-Commonwealth mix pursuant to the federal-state relations in that area.<sup>138</sup>

17.14 CCLS made submissions in respect to estimates of the funding that would be required to get a national coverage via centres in Melbourne and Sydney. It estimated that the costs would be approximately \$200 000 per annum for a centre in Melbourne and a further \$200 000 per annum for a centre in Sydney.<sup>139</sup> In the Committee's view, this would be a cost effective arrangement.

17.15 The Committee examined funding options, namely, a percentage of the supervisory levy on funds; unclaimed monies; and the surplus of the funding of the ISC. The Committee is aware that funding by way of these options may result in a heavier burden on some funds and consumers than on others. In addition, Mr Davis submitted that money should not be taken from the people for whom guarantee charge contributions have been made.<sup>140</sup>

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<sup>137</sup> Evidence, p 93

<sup>138</sup> Niven, evidence p 23

<sup>139</sup> *ibid*, p 27

<sup>140</sup> Evidence, p 107

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## Tribunal Secretariat Assistance to Complainants

17.16 In the context of the issue of adequate advice being available to consumers, the Committee heard submissions on clause 16 of the Bill which requires the Tribunal to help complainants to make complaints.<sup>141</sup>

### *What type of assistance will be provided?*

17.17 AFCO raised concerns that the role of the secretariat of the ISC was unclear, particularly in relation to the means by which the obligation of the Tribunal to assist complainants would be fulfilled. Mr Thomas of the ISC provided information that the requirement for assistance relates to 'to helping them [complainants] express their complaint and putting it in writing'.<sup>142</sup> This would accord with Mr Niven's concerns that it would be inappropriate for the Tribunal to assist complainants with the detailed preparation of their cases as this could create an appearance of bias, that is, the Tribunal could be seen to have a vested interest in the successful outcome for an applicant whom the Tribunal had assisted.<sup>143</sup>

### *Funding*

17.18 With respect to the these functions of the Tribunal secretariat and the funding of the secretariat, the ISC recognises that 'it will be a very important part of the process and that adequate resources will have to be allocated to that function'.<sup>144</sup>

17.19 The Committee notes that the funding of an independent advisory service has additional advantages. First, it would relieve the ISC secretariat of some of the more demanding consumer inquiries; and second, it would provide consumers with a service that is not only independent but also seen to be independent from the ISC. Some consumers may feel reluctant to show their hand to an advisory service operated by the watchdog body.

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<sup>141</sup> Clause 16 of the Bill

<sup>142</sup> Evidence, Thomas, p 213

<sup>143</sup> Evidence, Niven, p 29

<sup>144</sup> Evidence, Mr Thomas, p 213

**Recommendation 17.1:**

The Committee recommends that the Government consider supporting the establishment of an independent superannuation consumer advisory service by way of grants from Consolidated Revenue over three years. The Committee further recommends that the Government review the funding arrangement with a view to industry assisted funding after the expiry of the three year period.