
CHAPTER 18:

OTHER CONSUMER ISSUES

Oral Submissions

18.1 Clause 34 provides that the Tribunal must conduct review meetings without oral submissions from the parties. The Committee received submissions from the Law Council and from William M Mercer raising the concern that this provision offended or infringed the principles of natural justice.

18.2 The Committee understands that the ISC has considered these views and has received advice that the rules of natural justice will not be breached as a party has a right to make written submissions and the Tribunal has a discretion to allow oral representations to be made where the Tribunal thinks it is necessary. The Committee received a submission¹⁴⁵ drawing its attention to the decisions of *Heatley v Tasmanian Racing and Gaming Commission*¹⁴⁶ and *Daguio v Minister for Immigration and Ethnic Affairs*.¹⁴⁷ It was held in these decisions that procedural fairness does not necessarily require hearings to be oral.

Appeals to the Federal Court

Grounds of appeal

18.3 Parties to a dispute before the Tribunal have the right to appeal to the Federal Court. Appeals will be on a question of law only.¹⁴⁸ The Committee received submissions proposing the right to a de novo

¹⁴⁵ Andrew Fairley and Associates, op cit, SIS Sub No 91

¹⁴⁶ (1977) CLR 487

¹⁴⁷ (1986) 71 ALR 173

¹⁴⁸ Clause 46 of the Bill
Evidence, Pooley, p 176

review¹⁴⁹ at the level of the Federal Court. The Bill as it stands accords with the practice of the review of administrative decisions on the facts being limited to the Administrative Appeals Tribunal with appeals on questions of law only being heard by the Federal Court.

Actions in the Federal Court and representative actions

18.4 The Bill does not provide for de novo review at the level of the Federal Court, however it may be possible to commence some actions against trustees in the Federal Court under the SIS legislation. The SIS legislation does not expressly confer jurisdiction on the Federal Court but clause 10 of the Bill defines 'Court' to mean the Federal Court of Australia or the Supreme Court of a State or Territory. In defining 'Court' in this way, it could be said that the legislation impliedly confers jurisdiction on the Federal Court.

18.5 The Bill only allows beneficiaries to bring certain actions against trustees in the Federal Court. These are for matters of misleading conduct (clause 142), unfair dealing on issue or redemption of a superannuation interest (clause 150), misleading conduct in relation to a public offer entity (clause 156) and contravention of provisions taken to be included in the governing rules of a public offer entity (clause 166). In these specific cases, the Committee notes that it is arguable that a representative proceeding could be brought in the Federal Court pursuant to Part IV A of the *Federal Court of Australia Act 1976*.

Costs of appeals

18.6 The Australian Consumers' Association raised the problem of how a consumer could afford to pay for an appeal to the Federal Court. It was submitted it should either be funded by the ISC, as it is the Tribunal's decision that is the subject of the appeal, or that the ISC should act as a respondent in the appeal. The Australian Consumers' Association would not be in a position to fund test cases.¹⁵⁰

¹⁴⁹ A fresh hearing on the facts and law.

¹⁵⁰ Evidence p 164

Standard of Proof

Clause 37(2) provides:

The Tribunal must affirm the decision if it is satisfied that the decision, in its operation in relation to the complainant, was fair and reasonable in all the circumstances.

18.7 The Committee is satisfied that this provision is adequately drafted to take account of the concerns raised that in any given set of circumstances there may be several reasonable but different decisions available to a trustee, and that the necessary choice of one of these reasonable options by a trustee should not be grounds for varying or setting aside that decision.

18.8 The Committee is concerned that the standard of satisfaction required in clause 37(2) be explicitly stated in order to avoid unnecessary litigation on the point. It has been agreed by all who have addressed the issue before the Committee that they understand the standard of proof to be on the 'balance of probabilities'.

Recommendation 18.1:

The Committee recommends the Bill be amended to specify that the degree of satisfaction required for the Tribunal to affirm a decision pursuant to clause 37(2) of the Bill is that of reasonable satisfaction, that is, satisfaction on the balance of probabilities.

Appointment of Members

18.9 Submissions were received by the Committee proposing that one Tribunal member be appointed by the Minister of Consumer Affairs,¹⁵¹ however the Committee did not receive any representations from the Minister in relation to this proposal.

¹⁵¹ AFCO, *op cit*,
CCLS, CCLC, *op cit*.

18.10 The Bill provides for the appointment of a Chairperson, by the Governor General, and not fewer than five nor more than eight other members by the Minister ¹⁵² administering the Act.¹⁵³ Clause 8(4) of the Bill provides that two of the Tribunal members are to be appointed after the Minister administering the legislation has consulted with the Minister for Consumer Affairs about their appointment.

Life Insurance Complaints Board

18.11 The life insurance industry's revamped inquiries and complaints service came into operation in May 1991, following extensive consultation with industry, government and consumer groups. This body deals with disputes between life offices and trustees where there is a contractual arrangement between the two. Generally, it does not deal with disputes between fund members and trustees because there is no contractual arrangement between the fund member and the life office. However, it resolves disputes, involving personal superannuation, between fund members and life offices because there is a contractual relationship between the policyholder and the life office.

18.12 The Life Insurance Federation of Australia has submitted that the industry's system, that is, the Life Insurance Complaints Board, should continue to deal with complaints about personal superannuation.¹⁵⁴ As stated in paragraph 16.7, the Superannuation Complaints Tribunal will also deal with personal superannuation complaints.

Notification of a Right of Review

18.13 In the course of its inquiry, it appeared to the Committee that a large number of consumers were unaware of the existence of the Life Insurance Complaints Board and of their right to have adverse decisions reviewed¹⁵⁵.

¹⁵² Clause 7 of the Bill

¹⁵³ Section 19A, *Acts Interpretation Act 1901*

¹⁵⁴ SIS Sub No 56

¹⁵⁵ Evidence, p 187

18.14 The Committee recognises that although clause 96 of the SIS Bill does not prescribe a precise mechanism for trustee internal review, the issue of a beneficiary being notified of the existence of the Tribunal, and their right to have an adverse decision reviewed, will need to be addressed by the ISC. It may be appropriate for the trustee to advise the beneficiary of the right of review at the time of notification of any adverse decision.

Recommendation 18.2:

The Committee recommends that the ISC address the issue of notifying members of their right to have an adverse decision of a trustee reviewed by the Superannuation Consumer Complaints Tribunal.