

## CHAPTER 3:

### MEDICAL COMPLAINTS: NOW?

#### Introduction

3.1 In support of allowing the Tribunal to hear medical complaints, the committee received submissions on:

- the effect that the exclusion could have on overall confidence in the superannuation system;
- the drafting of regulation 4 and the width of the exclusion;
- the accessibility of justice, in terms of the comparative costs to parties of conducting a matter in the courts, the cost to the community and the intimidation of procedural formalities;
- the jurisdiction of other alternative dispute resolution fora and the mechanisms utilised by these bodies; and
- the implications under disability discrimination legislation.

3.2 A number of commentators in the area have also called on the government to review the situation and establish an all-encompassing body to deal with all manner of complaints and disputes if it is truly serious in the proper regulation of the burgeoning superannuation industry.<sup>41</sup>

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<sup>41</sup> Abramovich M, *The Superannuation Complaints Tribunal-a toothless tiger?*, Superfunds, July 1994, p 9  
Wasiliev J, 'Tribunal to rule on fair treatment', *Super Review*, May 1994, p 47

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### Confidence in the superannuation system

3.3 A number of submissions addressed the broad and important issue of confidence in the superannuation system and the effect that the exclusion will have on this confidence. In a period when there is a decline in the number of people citing distrust of legislative changes, the committee believes that consumer confidence is a vital consideration.<sup>42</sup>

3.4 ACA submitted that the consequences of excluding medical matters from the Tribunal include damage to the public trust in the Tribunal. It asserts that 'the community's trust in superannuation will be maintained if disputes can be resolved in the Tribunal rather than being aired in a less balanced way in the press and on television'.<sup>43</sup> AFCO also believes that the reputation of the Tribunal could be irreparably damaged if the government decides to exclude medical complaints.<sup>44</sup>

### Drafting of the regulation: how wide?

3.5 In its Ninth Report, the committee recommended that the government not exclude from the Tribunal's jurisdiction the parts of a complaint involving issues of procedural fairness.<sup>45</sup> The ISC advised the committee that the government had accepted that recommendation. The ISC submitted that the Regulations give effect to this acceptance.<sup>46</sup> The Federal Bureau of Consumer Affairs also submitted that complaints involving procedural fairness have not been excluded.<sup>47</sup>

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<sup>42</sup> MLC Superannuation Index #8, published 4 August 1994

<sup>43</sup> SISREG Sub No. 1 (Supplementary)

<sup>44</sup> SISREG Sub No 8

<sup>45</sup> Senate Select Committee on Superannuation, *Super Supervision Bills*, October 1993, Recommendation 16.2, p 88

<sup>46</sup> Duval, Evidence, p 111

<sup>47</sup> SISREG Sub No 14

3.6 Notwithstanding the government's assertion that the Regulations do not traverse procedural matters, ACA gave evidence that regulation 4 provides a seemingly 'very wide exclusion' and suggested that if the Tribunal stepped into the area 'it would be in the Federal Court before it could blink'.<sup>48</sup>

3.7 Although procedural matters in disability cases have not been expressly excluded, it may be that the drafting of regulation 4 is such that all cases that have medical evidence on file could be excluded by regulation 4. ACA have submitted that trustees could use the regulation as it is currently drafted to ensure that their decisions are not within the Tribunal's jurisdiction. ACA suggested that by referring to medical evidence a trustee will be able to exclude any decision from review.<sup>49</sup>

3.8 The committee has concluded that there is a lack of clarity in the drafting of regulation 4 as to the scope of the exclusion.

3.9 It was noted in paragraph 2.7 above that the procedural aspects of disability claims form the basis of the vast majority of complaints about disability claims. The disputes do not involve medical evidence, opinion or reports. They involve the question of disability, which 'is certainly not understood',<sup>50</sup>:

The criteria are certainly extremely strict and the notion of ability to work is misunderstood not only by the person who is insured, that is the member of the fund, but it is also very strictly applied in terms of the insurance company. My experience is that it is very difficult to get explanations out of the insurance company as to why it has made the decision it has. It involves three, four and five letters going back to the insurance company to provide an explanation regarding an individual.<sup>51</sup>

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<sup>48</sup> Drake, Evidence, p 27

<sup>49</sup> SISREG Sub No 1 (Supplementary)

<sup>50</sup> Mayman, Evidence, 14 July 1994, p 285

<sup>51</sup> Mayman, Evidence, 14 July 1994, p 285

3.10 It is these types of complaints, that involve the procedural aspects of disability disputes, that the government has stated 'should be within the Tribunal's jurisdiction'.<sup>52</sup>

### Access to justice

3.11 The Attorney-General's Department has submitted that 'convincing reasons need to be provided either way, in light of the high cost of access to justice for the majority of Australians'.<sup>53</sup>

### *Position of disability claimants*

3.12 The committee received evidence from the Attorney-General's Department that 'for the majority of Australians, that is neither the very rich nor the very poor, the Australian legal system is not within their reach' and that 'Australians are effectively being denied access to justice'. The Department contended that the availability of independent, low cost alternative dispute resolution mechanisms is an important step in the provision of justice.<sup>54</sup>

3.13 The effect of the exclusion in regulation 4 falls entirely on people with some degree of disability.<sup>55</sup> ACA stated that the regulation excludes a group whose need for access to such a tribunal would seem to be the highest - the people most in need.<sup>56</sup> Those who are likely to bring complaints involving medical evidence are:

normally unemployed, in a weak financial position and therefore ordinarily unable to take issue with an adverse decision that in the end result has a dramatic effect on the lives of those involved.<sup>57</sup>

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<sup>52</sup> Duval, Evidence, p 111

<sup>53</sup> SISREG Sub No 14

<sup>54</sup> SISREG Sub No 14

<sup>55</sup> Drake, Evidence, p 25

<sup>56</sup> Drake, Evidence, p 26

<sup>57</sup> Senate Select Committee on Superannuation, *Super Supervision Bills*, October 1993, p 86

3.14 In the SIS inquiry, the ISC acknowledged that 'there are problems at the moment with the resolution of medical disputes'.<sup>58</sup>

### Costs

3.15 On 22 August 1994, the Prime Minister, the Hon P.J. Keating, MP, stated in the opening of the Justice Forum, that 'the Attorney-General and the Minister for Justice are identifying the barriers to accessible justice'. He said, 'A major barrier to justice is cost'.<sup>59</sup> A number of submissions identified the Tribunal as a forum where 'complaints will be dealt with more quickly and cost-effectively than civil actions which can be both lengthy and involve substantial costs'.<sup>60</sup>

3.16 ACA submitted that regulation 4 effectively denies disabled persons any form of redress as 'few disabled people could afford the money or stress or delay involved in litigation'.<sup>61</sup> The ARC concurred with this view, noting that such complainants may be left without any accessible forum for the resolution of their complaint.<sup>62</sup> To conduct a matter to judgment in the court system costs in the order of \$10 000 per party, that is, a total of approximately \$20 000 for a party against whom costs are ordered.<sup>63</sup>

3.17 AFCO has submitted that the inclusion of medical complaints 'would result in considerable savings to the community ... by reducing long and costly legal battles in an already overloaded court system'.<sup>64</sup>

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<sup>58</sup> Senate Select Committee on Superannuation, *Super Supervision Bills*, October 1993, p 87

<sup>59</sup> Speech by the Prime Minister, the Hon. P.J. Keating, MP, opening the Justice Forum, Parliament House, Canberra, 22 August 1994

<sup>60</sup> Maurice Blackburn & Co., SISREG No. 26

<sup>61</sup> SISREG Sub No 1 (Supplementary)

<sup>62</sup> ARC, SISREG Sub No 22

<sup>63</sup> ACA, SISREG Sub No 1 (Supplementary) Burrill

<sup>64</sup> AFCO, SISREG Sub No 8

*Procedure*

3.18 The complexity of superannuation adds to the problems that consumers have in understanding their entitlements and rights. Additional complexities, by way of strict procedural and evidentiary requirements, alienate those attempting to ascertain and/or enforce their rights. Contrary to the view of the ISC that strict rules of evidence enhance the settlement of disputes,<sup>65</sup> it is the committee's view that the resolution by informal means of complaints arising out of misunderstandings will be an important role of the Tribunal as it provides a grievance process with the emphasis on conciliation. Maurice Blackburn has submitted that the current emphasis on conciliation should be strengthened with the provision of formal conciliation conferences rather than conciliation by way of written correspondence. This law firm's experience is that face-to-face conferences with an independent conciliator have a high rate of settlement.<sup>66</sup> It is for this reason that the committee considers that any limitation on the jurisdiction of the Tribunal needs to be thoroughly canvassed and evaluated. This can be done if exclusions can be made by way of regulations.

3.19 Tribunals such as the Superannuation Complaints Tribunal work well and are of extreme benefit to consumers. It is much simpler and easier for consumers to have concerns addressed at a tribunal than it is for them to go to court.<sup>67</sup>

**Other tribunals and mechanisms available to resolve medical complaints**

3.20 Chapter 2 traverses the evidence received in relation to other tribunals that hear and determine medical cases.

*Mechanisms to deal with medical complaints*

3.21 A range of mechanisms by which the Tribunal could deal with medical complaints were mooted before the Tribunal:

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<sup>65</sup> Duval, Evidence p 124

<sup>66</sup> Maurice Blackburn & Co., SISREG No 26

<sup>67</sup> Ford, Evidence, p 77

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- (i) the appointment of a Tribunal member with medical expertise;
  - (ii) the establishment by the Tribunal of a specialist panel;
  - (iii) the discretion of the Tribunal not to hear medical complaints that it viewed as beyond its expertise;
  - (iv) the provision of independent medical evidence from a doctor chosen by the Tribunal, and not by the complainant or the insurance company;
  - (v) the use by the Tribunal of a list of specialists in the same manner as is proposed by the LICB, along with other appropriate guidelines such as the requirement that advice must be taken from two medical specialists in every case; and
  - (vi) members of the Tribunal, whether medically qualified or not, to judge the evidence by an inquisitorial method. This mechanism could be implemented under the current Tribunal membership provisions in Part 2 of the Act.

### Disability discrimination legislation

3.22 The Attorney-General's Department submitted that the exclusion of medical complaints is an act carried out in direct compliance with a law other than the *Disability Discrimination Act 1992* (DDA), and that it is thereby exempt under the DDA for a period of three years. After the three year period that expires on 1 March 1996, the issue of inconsistency will be determined on the basis of existing evidence as to the reasons for the continued need for the medical exclusion.

3.23 ACA has submitted that the exclusion of the disabled from the Tribunal is contrary to the spirit of the Act.<sup>68</sup>

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<sup>68</sup> Drake, Evidence, p 25

**Trustees could avoid scrutiny**

3.24 It has been submitted that the effect of the present exclusion would be that trustees could protect themselves from having any decision they made about disability from being reviewed by stating that in view of the medical evidence, the claim ought not be paid.<sup>69</sup>

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<sup>69</sup> ACA, Sub No 1 (Supplementary), Drake, Evidence, p 24