Parliament of the Commonwealth of Australia

Thirteenth Report of the
Senate Select Committee on Superannuation

Super Regs I

Canberra
August 1994

ISBN 0 642 21310 0

This document was produced from camera-ready copy and prepared by the Senate Select Committee on Superannuation Secretariat, and printed by the Senate Printing Unit, Parliament House, Canberra.

MEMBERS OF THE COMMITTEE:

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Senator Alan Ferguson		South Australia
Senator John Woodley		Queensland

Secretariat Staff:

Secretary:	Mr Richard Gilbert
Principal Research Officer:	Ms Krista Gerrard
Executive Assistant:	Ms Janice Scarabottolo

Address: The Senate
Parliament House
CANBERRA ACT 2600

Telephone: (06) 277 3439

Facsimile: (06) 277 5719

PREFACE

The Senate Select Committee on Superannuation received a reference to examine the Superannuation Industry (Supervision) Regulations and the Superannuation (Resolution of Complaints) Regulations.

This is the first of two reports on these Regulations.

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CHAPTER 1:

INTRODUCTION

The object of this report is to examine the exclusion of medical complaints from the jurisdiction of the Superannuation Complaints Tribunal.

Background

1.1 In its First Report, entitled *Safeguarding Super*, the Senate Select Committee on Superannuation recommended 'the establishment by legislation of an external disputes resolution mechanism, at the earliest practicable date'.[1]

1.2 Included in the package of legislation, that has become known as the SIS package of legislation,[2] is the *Superannuation (Resolution of Complaints) Act 1993*. This Act establishes the Superannuation Complaints Tribunal (the Tribunal). The Tribunal was established on 1 July 1994.

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[1] Recommendation 11.4, *Safeguarding Super*, Senate Select Committee on Superannuation, June 1992

[2] Superannuation Industry (Supervision) legislation which comprises the following Acts:
Occupational Superannuation Standards Amendments Act 1993
Superannuation (Financial Assistance Funding) Levy Act 1993
Superannuation Industry (Supervision) Act 1993
Superannuation Industry (Supervision) Consequential Amendments Act 1993
Superannuation (Resolution of Complaints) Act 1993
Superannuation (Rolled-Over Benefits) Levy Act 1993
Superannuation Supervisory Levy Amendment Act 1993

1.3 The objective of the Tribunal is:

to provide mechanisms for:

(a) the conciliation of complaints; and

(b) if complaints cannot be resolved by conciliation - the review of the decisions of the trustees to which the complaints relate;

that are informal, economical and quick.[3]

1.4 Pursuant to *the Superannuation (Resolution of Complaints) Act 1993* (the Act), are the Superannuation (Resolution of Complaints) Regulations, Statutory Rules No. 56 (the Regulations). These regulations were made on 4 March 1994, gazetted 11 March 1994, and tabled in the Senate and House of Representatives on 17 and 22 March, respectively. The Regulations were referred to the Senate Select Committee on Superannuation on 16 March 1994. The terms of reference for this inquiry appear at Appendix A.

1.5 Two substantive issues are dealt with by the Superannuation (Resolution of Complaints) Regulations. Regulation 4 defines 'excluded subject matter' and is the subject of this report. Regulation 5 defines the prescribed period for the purposes of paragraph 14(3)(b) and sub-paragraph 15(2)(a)(ii) of the Act. The definition in regulation 5 of the abovementioned prescribed period is in accordance with Recommendation 2.3 of the Tenth Report of the committee and requires no further examination by this committee.

The issues

1.6 The issues that have emerged from the examination of the regulations, and in particular regulation 4, are:

(i) the appropriate jurisdiction of the Superannuation Complaints Tribunal; and

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[3] Section 11, *Superannuation (Resolution of Complaints) Act 1993*

(ii) the appropriate legislative instrument in which to define the Tribunal's jurisdiction.

The jurisdiction of the Superannuation Complaints Tribunal

1.7 The jurisdiction of the Superannuation Complaints Tribunal is outlined in Part 4 of the Act. The jurisdiction is legislated in terms of:

(i) the complaints that may be brought;[4]

(ii) the persons who may bring a complaint;[5]

(iii) the processes that must be undertaken between an applicant and a trustee prior to the Tribunal hearing a complaint;[6]

(iv) the time frames within which a complaint must be made;[7] and

(v) the exclusions made by way of regulation.[8]

1.8 The Tribunal's jurisdiction is also examined in the Ninth and Tenth Reports of the Senate Select Committee on Superannuation.

The legislative structure of the exclusions

1.9 Subsection 14(5) of the Act provides:

> The Tribunal cannot deal with a complaint to the extent that it relates to excluded subject matter.

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[4] Section 14, *Superannuation (Resolution of Complaints) Act 1993*
Regulation 4, *Superannuation (Resolution of Complaints) Regulations*

[5] Section 15, *Superannuation (Resolution of Complaints) Act 1993*

[6] Section 19, *Superannuation (Resolution of Complaints) Act 1993*
Section 101, *Superannuation Industry (Supervision) Act 1993*

[7] Subsections 14(4),15(2),22(3),*Superannuation (Resolution of Complaints) Act 1993*

[8] Subsections 14(2) and 14(5), *Superannuation (Resolution of Complaints) Act 1993*

1.10 Section 3 of the Act is an interpretation section that defines 'excluded subject matter' as:

> subject matter that is **declared by the regulations** to be excluded subject matter for the purposes of this Act [emphasis added].

1.11 Regulation 4 provides:

> 4. For the purposes of the definition of "excluded subject matter" in section 3 of the Act, excluded subject matter is matter in relation to which the Tribunal, in dealing with the matter:
>
> (a) would have to undertake the assessment or evaluation of medical evidence, opinion or reports; or
>
> (b) would have to consider, having regard to medical evidence, opinion or reports, the question of a person's incapacity; or
>
> (c) would be likely to have to perform a function mentioned in paragraph (a) or (b).

Throughout this report, complaints involving this excluded subject matter are referred to as 'medical complaints'.

1.12 The jurisdiction of the Tribunal can also be limited under the 'excluded complaint' provision. Section 14 provides:

> (2) ... a person may make a complaint **(other than an excluded complaint)** to the Tribunal, that the decision...[emphasis added]

1.13 'Excluded complaint' is defined in section 3 to be a complaint about a decision of a trustee of a fund or a matter **declared by the regulations** to be a fund or a matter about which complaints may not be made under the Act. There are currently no regulations declaring 'excluded complaints'.

Conduct of the inquiry

1.14 On 24 March 1994, the committee wrote to approximately 400 previous submitters, interest groups, state and federal politicians and others on its mailing list. Twenty four written submissions were received. The list of written submissions appears at Appendix C.

1.15 The committee conducted public hearings on 20 and 23 June 1994 in Canberra. A list of witnesses who gave evidence at these hearings appears at Appendix D. In addition to the oral evidence taken on these dates, the Trades and Labour Council of Western Australia gave evidence in relation to this inquiry to the committee in Perth on 14 July 1994.

Acknowledgments

1.16 The committee records its appreciation of the written submissions and oral evidence to this inquiry.

CHAPTER 2:

MEDICAL COMPLAINTS: NOT YET?

Introduction

2.1 This chapter examines the arguments that were put to the committee in support of the contention that medical complaints should be excluded from the jurisdiction of the Tribunal. Chapter 3 examines the arguments for the inclusion of medical matters in the Tribunal's jurisdiction.

2.2. The Insurance and Superannuation Commission (ISC) contended that:

> (i) the assessment of medical evidence is a highly complex function and does not rest easily with the tribunal process, which is informal, economical and quick. It rests better in a court process where dealing with that type of disagreement is well established;[9]
>
> (ii) the cost of disability benefits falls on other members of the fund. These high costs could make small or medium funds insolvent unless the fund was able to recover the provision through insurance;[10] and
>
> (iii) if a disability benefit is an extra $100 000, a large number of disability claimants would choose to go to the Tribunal,[11] a 'floodgate' could open.

2.3 These contentions raise two general categories of argument against the inclusion of medical complaints in the Tribunal's jurisdiction:

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[9] Duval, Evidence, p 111

[10] Duval, Evidence, p 112

[11] Duval, Evidence, pp 113-114

(i) that a floodgate of complaints could open; and

(ii) that the Tribunal does not have the relevant expertise to hear matters involving medical evidence.

Opening a 'floodgate'?

2.4 The ISC posed the rhetorical question: 'What is the point of accepting an adverse decision of the trustee?'.[12] The Commission went on to postulate that disability claimants, the majority of whom the Commission has 'no doubt' are sick, would go to the Tribunal in large numbers 'given the amount of money they might get if they did get a claim up'.[13] These contentions were made by way of speculation, although the committee did seek to elicit more substantial material on the issue, but with little or no success.

2.5 The evidence of Association of Superannuation Funds of Australia in the ninth inquiry of the committee was that disability claims would potentially overwhelm the Tribunal so that the Tribunal's time would be taken up in dealing with those matters rather than the other sorts of matters which would come before the Tribunal.[14] The committee has received no evidence in support of this contention in the course of this inquiry. The committee has been provided with evidence that refutes the floodgate argument. After examining all of the evidence, the committee does not accept that a caseload of unmanageable proportions will be created as a result of the inclusion of medical complaints in the Tribunal's jurisdiction.

Or a pinhole?

2.6 In response to the floodgate argument put to the committee, a number of witnesses raised compelling counter-arguments.

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[12] Duval, Evidence, p 113

[13] Duval, Evidence, p 114

[14] Senate Select Committee on Superannuation, *Super Supervision Bills*, October 1993, p 82

2.7 In the committee's Ninth Report, evidence that disputes over medical evidence comprise a minority of disputes was provided.[15] This contention has been supported by the evidence received in this inquiry. The committee has received evidence on the types of disputes that arise with disability claims. Generally, they do not involve the assessment, evaluation or consideration of medical evidence, opinion or reports, but are disputes involving procedural fairness. These are discussed further at paragraph 3.9 below.

2.8 In the course of this inquiry, the committee has received substantial evidence on the pressure that matters involving medical evidence place on the workloads of other tribunals that deal with these sorts of matters. In particular, the committee received evidence on the Life Insurance Complaints Board (LICB), the Social Security Appeals Tribunal (SSAT), the Administrative Appeals Tribunal (AAT), the Defence Force Retirement and Death Benefits Authority (DFRDBA) and the Veterans' Review Board (VRB).

2.9 In the period 1 July 1992 to 31 December 1993, the proportion of disability complaints made to the LICB represented 11 per cent of total complaints in that period. The most recent LICB data indicates a slight reduction in complaints re disability policies. [16] Although some predict that the **number** of complaints will increase, there has not been any evidence submitted that the **proportion** of medical complaints will increase.

2.10 SSAT data demonstrates a similar trend, showing 9.5 per cent of persons denied the disability pension have appealed to the SSAT.[17]

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[15] Senate Select Committee on Superannuation, *Super Supervision Bills*, October 1993, p 84

[16] Attorney General's Department, SISREG Sub No 14

[17] ACA, SISREG, Sub No 1 (Supplementary)
AFCO, SISREG Sub No 18
Drake, Evidence, p 24

Half of these appeals have been successful. The statistics are set out at Figure 1 below.[18]

Figure 1:

Statistics on the Social Security Appeals Tribunal

Applications for disability pension		108,000
Rejections by DSS		38,000
Appeals to SSAT	non-medical cases	600
	medical cases	3,000
Of the 3,000 medical appeals to SSAT:		
	original decision varied	1,450
	original decision not varied	1,550

Statistics for 1992/93 (rounded)
Source: DSS Statistics office; Geoff Hall, Operations Manager of the SSAT and former SSAT member

2.11 Ms Prudence Ford of the Attorney-General's Department submitted that at the time of the establishment of the SSAT, there had been a great deal of concern about vexatious complaints and difficult medical cases. In relation to the problems of backlogs, the SSAT has managed by changing procedures and appointments.[19]

2.12 The potential for a relatively large number of persons to seek a merits review of decisions under a specific decision-making power does not justify

[18] SISREG Sub No 1 (Supplementary)

[19] Evidence, p 79

excluding those decisions from merits review.[20] This has been the consistent argument of the Administrative Review Council (ARC), established under the *Administrative Appeals Tribunal Act 1975* to advise the government as to the classes of administrative decisions that should be the subject of review by a court, tribunal or other body and the appropriate court, tribunal or other body to make that review.[21] The ARC's view on the relevance of potential numbers using a jurisdiction was endorsed by the Australian Consumers Association (ACA) which submitted that options for review of medical complaints are needed regardless of the number of cases involved.[22]

2.13 As a precaution against any opening of a floodgate, it was put to the committee that the position of the Tribunal could be reviewed in 12 months so as to assess the impact of medical complaints. This would allow hard evidence to be available in relation to the volume and complexity of medical complaints.[23]

Tribunal expertise and resources

2.14 The submission that the assessment, evaluation or consideration of medical evidence would be too difficult for the Tribunal, was made by the ISC as set out at paragraph 2.2 above.

Response to the 'too hard' argument

2.15 The committee questioned the argument that trustees are better qualified than the Tribunal to make the decision on disability,[24] as did other witnesses before the committee.

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[20] ARC, SISREG Sub No 22

[21] Section 51, *Adminstrative Appeals Tribunal Act 1975*

[22] Drake, Evidence, p 30, p 34

[23] Drake, Evidence, p 33

[24] Evidence, p 117

2.16 ACA submitted that trustees are unlikely to have expertise in medical matters. Similarly, courts that rely on medical evidence to make determinations do not have medical expertise. Furthermore, primary decision-makers, such as the Commonwealth Superannuation Board of Trustees and the trustees of private superannuation funds are often involved in the assessment of medical evidence.[25]

2.17 The ARC also expressed concern that the basis for the exclusion of medical complaints, as identified in the committee's Ninth Report, is that conflicts in medical opinion could only be adequately determined by a court and that there could be a flood of work in the area of medical complaints. The ARC has argued that the Tribunal would be as well placed as a court to determine complaints involving medical evidence.

2.18 There is strong evidence that other tribunals handle cases involving medical evidence in a 'reasonably efficient way'.[26] The AAT, the SSAT and the VRB are examples of alternative dispute resolution mechanisms that resolve disability cases involving medical evidence.[27]

2.19 In response to 'the inference that tribunals really do not have the competence to deal with the assessment of medical evidence', committee member, Senator Woodley, informed other members of the committee, and put on public record, that he had been a member of the SSAT in Brisbane. Senator Woodley stated that it was not his experience that tribunals were incompetent in making a judgement in disputes involving medical evidence.[28] Mr White, of Disabled Peoples International, gave evidence that he had been a member of the Defence Force Retirement and Death Benefits Authority and that all the matters before that body involved the

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[25] ACA, SISREG Sub No 1 (Supplementary)

[26] Evidence, p 78

[27] ACA, SISREG Sub No 1 (Supplementary)
AFCO, SISREG Sub No 8
ARC, SISREG Sub No 22

[28] Evidence, p 31

assessment of medical evidence. Mr White agreed with Senator Woodley that, in his experience, tribunals are competent to deal with medical evidence.[29]

The role of the insurance company in the payment of death and disability benefit

2.20 It was put to the committee that the ability of a fund to recover a disability payment from its insurer is a paramount factor in the determination of disability claims. Maurice Blackburn & Co., a law firm with a superannuation disability claim practice of approximately 500 active cases, submitted that in its experience 80-90 per cent of claims are initially rejected, particularly in non-government superannuation funds. It stated that 'the claims process is substantially influenced by the role played by underwriting insurers', some of whom adopt an adversarial attitude to claims.[30]

2.21 LIFA outlined to the committee the role of insurance in the superannuation industry. LIFA stated that there are two players: the trustee, that determines the benefits payable to an individual; and the insurance company, that provides cover on the policy.[31] However, the committee also received evidence that, in a number of cases, trustees use the same assessors as the insurance companies, to the extent that trustees have in the past undertaken no assessment at all other than consulting the insurance company's assessors.[32] Funds take out insurance with a life insurance company that covers both the eventuality of death and total and permanent disability.[33] Throughout the inquiry the committee was told that there is a significant problem with inconsistencies between the definitions of disability in the insurance policy and the trust deed. This evidence is canvassed at paragraph 3.9.

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[29] Evidence, p 31

[30] SISREG Sub No 24

[31] Robinson, Evidence, p 101

[32] Duval, Evidence, p 121

[33] Drake, Evidence, p 35

2.22 The committee acknowledges that these discrepancies create difficulties for superannuation funds where an underwriting insurer refuses to accept a claim. However, it has been submitted that such problems can be overcome by superannuation funds renegotiating the decision-making process in group insurance policies and, in particular, binding the insurers to determinations made by the Tribunal. The argument is that, given the competitive insurance market, such modifications could be negotiated.[34]

2.23 The ISC submitted that the inclusion of medical complaints in the jurisdiction of the Tribunal is likely to cause funds 'to tighten the definition so that it is abundantly clear what is covered and what is not'.[35] In view of the plethora of evidence that the committee received on the discrepancies and uncertainties surrounding these definitions, the committee agrees with the ISC that such a move 'is quite significant'.[36]

2.24 A number of funds have now given members the right to choose whether they want this sort of cover and if so, at what level. It was put to the committee that it is very important that this choice be mandatory as there are people who have this type of cover elsewhere or for whom such cover is a waste of money.[37]

Prudential impact

2.25 The Attorney-General's Department has noted that the review of decisions involving medical evidence could possibly have a prudential impact on funds, that is, funds that have to make payments outside their insured cover will be at risk. The Department further noted that there appears to be no information available to gauge the possible prudential impact.[38]

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[34] Maurice Blackburn & Co., SISREG Sub No. 26, see also Duval, Evidence, p 123

[35] Duval, Evidence, pp 115-116

[36] Duval, Evidence, p 115

[37] Drake, Evidence, p 35

[38] SISREG Sub No 14

2.26 The distinction between the prudential impact of a court's judgement and a tribunal's decision has not been demonstrated to the committee. Medical cases decided by a court also have a prudential impact.[39] If 'prudential impact' is the reason for limiting the Tribunal's jurisdiction, there needs to be some very significant data collection, research and actuarial analysis to demonstrate and assess those impacts. Prudential reasons should be tested very rigorously so it can be determined whether they are an overriding consideration.[40]

2.27 In commenting upon the LICB's decision to allow the panel to deal with medical complaints up to the investigation and conciliation phases, Ms Ford stated that the Board, in coming to this decision, took account of some of the prudential implications. The committee understands that the Board will review this position in two years. In view of the life industry's initiative in this regard, the committee is very concerned that a federal tribunal is lagging behind industry-based justice initiatives. It is particularly concerned that the needs of consumers, as identified by industry, for an alternative disputes resolution system in the area of medical complaints has not been addressed in the current environment of improving access to justice.

2.28 The committee received a further submission from LIFA dated 24 August 1994 expressing a concern that 'if the assumptions underlying premiums rates can be over-ridden by other non-judicial decisions, then the integrity of insurance products will be in jeopardy. In this situation, the solvency of some life companies could, ultimately, be at risk.' The committee did not receive any supporting data and did not have the opportunity to test such statements with other witnesses.

Government employees

2.29 It was argued that, as the right to merits review at the AAT was withdrawn from public servants in the transition from the Commonwealth Superannuation Scheme to the Public Sector Superannuation Scheme, it would be inequitable to provide for merits review of disability decisions for members of non-public sector schemes. The committee understands that

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[39] Ford, Evidence, p 85

[40] Ford, Evidence, pp 84-85

both public sector scheme members and non public sector scheme members will have the same rights of review under SIS if they are members of a regulated fund. Both groups will have access to the Superannuation Complaints Tribunal. Indeed, following amendments debated in the Senate on 25 August 1994, it is likely that some state public sector superannuation funds, who have not elected to come under the SIS legislation, will be able to use the services of the Tribunal.

2.30 This argument is no longer relevant to the debate.

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.[41]

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[41] 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

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.[42]

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'.[43] AFCO also believes that the reputation of the Tribunal could be irreparably damaged if the government decides to exclude medical complaints.[44]

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.[45] The ISC advised the committee that the government had accepted that recommendation. The ISC submitted that the Regulations give effect to this acceptance.[46] The Federal Bureau of Consumer Affairs also submitted that complaints involving procedural fairness have not been excluded.[47]

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[42] MLC Superannuation Index #8, published 4 August 1994

[43] SISREG Sub No. 1 (Supplementary)

[44] SISREG Sub No 8

[45] Senate Select Committee on Superannuation, *Super Supervision Bills*, October 1993, Recommendation 16.2, p 88

[46] Duval, Evidence, p 111

[47] 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'.[48]

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.[49]

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'[50]:

> 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.[51]

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[48] Drake, Evidence, p 27

[49] SISREG Sub No 1 (Supplementary)

[50] Mayman, Evidence, 14 July 1994, p 285

[51] 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'.[52]

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'.[53]

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.[54]

3.13 The effect of the exclusion in regulation 4 falls entirely on people with some degree of disability.[55] 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.[56] 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.[57]

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[52] Duval, Evidence, p 111

[53] SISREG Sub No 14

[54] SISREG Sub No 14

[55] Drake, Evidence, p 25

[56] Drake, Evidence, p 26

[57] 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'.[58]

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'.[59] 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'.[60]

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'.[61] The ARC concurred with this view, noting that such complainants may be left without any accessible forum for the resolution of their complaint.[62] 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.[63]

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'.[64]

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[58] Senate Select Committee on Superannuation, *Super Supervision Bills*, October 1993, p 87

[59] Speech by the Prime Minister, the Hon. P.J. Keating, MP, opening the Justice Forum, Parliament House, Canberra, 22 August 1994

[60] Maurice Blackburn & Co., SISREG No. 26

[61] SISREG Sub No 1 (Supplementary)

[62] ARC, SISREG Sub No 22

[63] ACA, SISREG Sub No 1 (Supplementary) Burrill

[64] 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,[65] 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.[66] 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.[67]

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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[65] Duval, Evidence p 124

[66] Maurice Blackburn & Co., SISREG No 26

[67] Ford, Evidence, p 77

(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.[68]

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[68] 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.[69]

[69] ACA, Sub No 1 (Supplementary), Drake, Evidence, p 24

CHAPTER 4:

COMPROMISE POSITIONS

Introduction

4.1 Two similar, middle ground positions were put to the committee. The implementation of any such solutions will be subsequent to the Senate's consideration of the disallowance motion.

Discretion not to hear certain complaints

4.2 ACA submitted that 'the regulation could give the Tribunal a discretion to not hear a case involving medical evidence if the Tribunal believes the case could not be properly dealt with. This would allow the Tribunal to conciliate disability complaints and resolve the ones within its ability.'[70]

Power to deal with complaints to the investigation and conciliation stage

4.3 The other compromise position was put by the Attorney-General's Department. The mechanism of dispute resolution by the Tribunal involves three phases: investigation, conciliation and determination.[71] The proposal is that the Tribunal have a role in the investigation and conciliation of matters involving medical evidence. However, it was also submitted by the Attorney General's Department that it is unclear as to whether regulation 4 excludes the Tribunal from investigating and attempting to conciliate complaints involving medical evidence.[72]

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[70] SISREG Sub No 1 (Supplementary)

[71] *Superannuation (Resolution of Complaints) Act 1993*

[72] SISREG Sub No 14

4.4 Ms Ford submitted that experience with other dispute resolution mechanisms has demonstrated that quite a high proportion of complaints can be dealt with by way of conciliation which involves the disputing parties getting together to resolve a problem. She stated that the middle ground approach could allow for a significant number of medical complaints to be dealt with.[73] This would be at least consistent with the LICB decision to extend the industry complaints mechanism to enable its panel to look at medical disputes up to the investigation and conciliation phase.[74]

4.5 The response of ACA to this compromise proposal was that it would help in the resolution of some complaints, but that the Tribunal could do much better and should attempt to resolve all complaints that it decided it had the competence to deal with.[75]

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[73] SISREG Sub No 14, Ford, Evidence, pp 78-79

[74] Ford, Evidence, p 81

[75] Evidence, p 32

CHAPTER 5:

REGULATING FOR JURISDICTION: AN INAPPROPRIATE DELEGATION?

Introduction

5.1 The Administrative Review Council (ARC) raised the issue of the appropriate legislative instrument in which the jurisdiction of a tribunal should be defined.

5.2 As noted in Chapter 1, there are two provisions in the *Superannuation (Resolution of Complaints) Act 1993* where, in order to ascertain the jurisdiction of the Tribunal, the regulations need to be consulted. These are subsections 14(2) and 14(5). The majority of this report deals with the regulations that prescribe 'excluded subject matter' referred to in subsection 14(5). The issue of the appropriate legislative instrument for the definition of jurisdiction is also relevant to regulations that may in the future prescribe an 'excluded complaint'.

5.3 The ARC has as part of its function, the mandate to inquire into the adequacy of the law and practice relating to the review by the courts of administrative decisions, and to make recommendations to the Minister as to any improvements that might be made in that law or practice.[75]

5.4 The ARC has submitted to the committee that because the complete ambit of the Tribunal's jurisdiction is not complete on the face of the Act, it is necessary for users of the Tribunal to have access to delegated legislation. The ARC contends that this may cause unnecessary uncertainty for users of the Act.

5.5 The ARC, therefore, has submitted that all exemptions from the jurisdiction of the Tribunal should be specified in the Act, possibly by way

[75] Section 51, *Administrative Appeals Tribunal Act, 1975*

of a schedule. If it is necessary to use regulations as a convenient short term mechanism, 'excluded subject matter' and 'excluded complaints' should be identified in the Act in due course.[76]

5.6 In evaluating the evidence in relation to the appropriate legislative instrument for exclusions, the committee has examined the legislation that prescribes the jurisdiction of the Social Security Appeals Tribunal (SSAT). Section 1250 of the *Social Security Act 1991* sets out the non-reviewable decisions. There is **no** delegation of authority to prescribe by regulation decisions that cannot be reviewed by the SSAT. Any decisions that are not to be reviewed by the SSAT must be set out in the primary legislation and pass through Parliament.

[76] SISREG Sub No 22

CHAPTER 6:

CONCLUSIONS AND RECOMMENDATIONS

6.1 The committee is not convinced that there is not a role for the Tribunal to play in dealing with medical complaints.

6.2 The committee recommends that, notwithstanding the outcome of the disallowance motion, the government re-examine the issue in the light of:

(i) the evidence presented to the Senate Select Committee on Superannuation;

(ii) the experience of the Tribunal over its first six months of operation; and

(iii) a review of the range of mechanisms available to the Tribunal to deal with medical complaints.

6.3 The committee further recommends that the Government:

(iv) amend the legislation to remove any doubt that may exist in relation to the handling of procedural complaints by the Superannuation Complaints Tribunal; and

(v) seek advice from the Regulations and Ordinances Committee on the appropriate legislative instrument for defining the jurisdiction of the Superannuation Complaints Tribunal.

APPENDIX A

TERMS OF REFERENCE

19 May 1993

(1) That the following matters be referred to the Select Committee on Superannuation for inquiry and report:

(a) increasing Superannuation Guarantee coverage from 9 to 12 per cent and the role of employee contributions in this process;

(b) the use of superannuation funds to finance the purchase of housing by members;

(c) legislation to implement the recommendations of the committee's first report, *Safeguarding Super*, and related matters; and

(d) the likely effect of the changes in the treatment of allocated pensions and annuities for social security purposes contained in Division 19 of the Social Security Legislation Amendment Act (No. 3) 1992, with particular reference to:

(i) the application of the proposed income test for allocated pensions,

(ii) the likely impact of the changes on allocated pension holders,

(iii) the implications of the changes for the integration of the taxation and social security systems,

(iv) the implications of the changes for Australian retirement incomes policy,

(v) the desirability, or otherwise, of equitable treatment between allocated pensions and annuities,

(vi) the processes employed by the Department of Social Security and the Government in reviewing the treatment of allocated pensions for social security purposes, and

(vii) any other matters related to the treatment of income stream retirement products for taxation and social security purposes.

(2) That the committee report to the Senate not later than the last sitting day of each June and December until the end of Parliament or until the committee presents its final report, whichever first occurs.

16 March 1994

That, without prejudice to any inquiry or report that may be made by the Standing Committee on Regulations and Ordinances, the following regulations be referred to the Senate Select Committee on Superannuation for inquiry and report on or before the last sitting day in November 1994:

(a) Superannuation Industry (Supervision) Regulations (Statutory Rules 1994 No. 57); and

(b) Superannuation (Resolution of Complaints) Regulations (Statutory Rules 1994 No. 56).

APPENDIX B:

LIST OF COMMITTEE REPORTS AND PAPERS

Super System Survey - A Background Paper on Retirement Income Arrangements in Twenty-one Countries (December 1991)

Papers relating to the Byrnwood Ltd, WA Superannuation Scheme (March 1992)
Interim Report on Fees, Charges and Commissions in the Life Insurance Industry (June 1992)

First Report of the Senate Select Committee on Superannuation - *Safeguarding Super* - the Regulation of Superannuation (June 1992)

Second Report of the Senate Select Committee on Superannuation - *Super Guarantee Bills* (June 1992)

Super Charges - An Issues Paper on Fees, Commissions, Charges and Disclosure in the Superannuation Industry (August 1992)

Third Report of the Senate Select Committee on Superannuation - *Super and the Financial System* (October 1992)

Proceedings of the Super Consumer Seminar, 4 November 1992 (4 November 1992)

Fourth Report of the Senate Select Committee on Superannuation - *Super - Fiscal and Social Links* (December 1992)

Fifth Report of the Senate Select Committee on Superannuation - *Super Supervisory Levy* (May 1993)

Sixth Report of the Senate Select Committee on Superannuation - *Super - Fees, Charges and Commissions* (June 1993)

Seventh Report of the Senate Select Committee on Superannuation - *Super Inquiry Overview* (June 1993)

Eight Report of the Senate Select Committee on Superannuation - *Inquiry into the Queensland Professional Officers Association Superannuation Fund* (August 1993)

Ninth Report of the Senate Select Committee on Superannuation - *Super Supervision Bills* (October 1993)

Tenth Report of the Senate Select Committee on Superannuation - *Super Complaints Tribunal* (December 1993)

Eleventh Report of the Senate Select Committee on Superannuation - *Privilege Matter Involving Mr Kevin Lindeberg and Mr Des O'Neill* (December 1993)

A Preliminary Paper Prepared by the Senate Select Committee on Superannuation for the Minister for Social Security, *Options for Allocated Pensions Within the Retirement Incomes System* (March 1994)

Twelfth Report of the Senate Select Committee on Superannuation - *Super for Housing* (May 1994)

Thirteenth Report of the Senate Select Committee on Superannuation - *Super Regs I* (August 1994)

APPENDIX C

LIST OF WRITTEN SUBMISSIONS

No 1	Australian Consumers' Association (ACA)
No 2	Bus and Coach Association
No 3	Tidswell Benefit Consultants and Fund Administrators
No 4	Freedom of Choice Fund Management Ltd
No 5	National Australia Bank
No 6	Trustee Corporations Association of Australia
No 7	ANZ Funds Management
No 8	Australian Federation of Consumer Organizations Inc. (AFCO)
No 9	Chris Hanson
No 10	Office of the Cabinet, Queensland
No 11	Financial Planning Association of Australia (FPA)
No 12	Howard V Smith & Associates Pty. Ltd.
No 13	Sly & Weigall
No 14	Attorney-General's Department
No 15	August Financial Management Limited
No 16	Self Management Retirement Systems Pty Ltd
No 17	Life Insurance Federation of Australia Incorporated (LIFA)
No 18	G. & E. Foti Enterprises Pty. Ltd.
No 19	Arthur Robinson & Hedderwicks

No 20 Insurance and Superannuation Commission (ISC)

No 21 Mr J. M. Kelberg

No 22 Administrative Review Council (ARC)

No 23 Superannuation Trust of Australia

No 24 Permanent Trustee Company Limited

No 25 Mr Bryce Jarrett

No 26 Maurice Blackburn and Co., Barristers and Solicitors

APPENDIX D:

LIST OF WITNESSES AT PUBLIC HEARINGS

CANBERRA, 20 JUNE 1994

Ms Caroline Le Couteur, Director, August Financial Management Ltd

Mr Robert Drake, Senior Policy Officer, Australian Consumers Association

Mr Robert Gunning, Adviser, Bus and Coach Association

Mr Roger Nairn, General Manager, Custodian Services Division, National Australia Bank Ltd

Mr Howard Pender, Director, Management Co., Australian Ethical Investment Trust

Mr Ronald J Rankin, Chief Executive Officer, Financial Planning Association of Australia

Mr Trevor J Thomas, Assistant Commissioner, Review Branch, Insurance and Superannuation Commission

Ms Judith N Towler, Member, Legislative and Regulatory Committee, Financial Planning Association of Australia

Mr Michael B White, Executive Director, Disabled Peoples International (Australia) Ltd

CANBERRA, 23 JUNE 1994

Mr Darren Davis, Assistant Manager, Operations, Life Insurance Federation of Australia

Mr Donald B Duval, Australian Government Actuary and First Assistant Commissioner, Policy, Legal and Actuarial, Insurance and Superannuation Commission

Ms Prudence Ford, Director, Federal Bureau of Consumer Affairs, Attorney-General's Department

Mrs Wendy Robinson, Director, Review and Legislation Section, Insurance and Superannuation Commission

Mr Kenneth Robinson, Member, Superannuation Committee, Life Insurance Federation of Australia

Ms Dusanka Sabic, Acting Assistant Secretary, Consumer Policy Branch, Federal Bureau of Consumer Affairs

Mr Trevor John Thomas, Assistant Commissioner, Review Branch, Insurance and Superannuation Commission

Mr Tim Williams, Member, Superannuation Committee, Life Insurance Federation of Australia