CHAPTER 5

MEDICAL EVIDENCE

Background

5.1 The capacity of the Superannuation Complaints Tribunal to hear and assess medical evidence has remained a contentious issue since the Senate Select Committee on Superannuation first discussed it in its Ninth Report, *Super Supervision Bills.*

5.2 Until 1 November 1995 the Tribunal had been barred by regulation from receiving medical evidence in relation to a person's incapacity. The reasons why are discussed below.

Regulations concerning medical evidence complaints

5.3 Due to concerns about the capacity of the Tribunal to deal with medical complaints, the regulations governing its jurisdiction have undergone a number of changes.

5.4 Section 14(5) of the *Superannuation (Resolution of Complaints) Act 1993* provides that the Tribunal may not deal with a complaint to the extent that it relates to 'excluded subject matter'. This is defined under Section 3 as 'subject matter that is declared by regulations to be excluded subject matter'. Consequently, the limitations on the hearing of medical evidence have been defined by regulation.

5.5 The *Superannuation (Resolution of Complaints) Regulations*[1] were gazetted on 11 March 1994 and tabled in the Senate and House of Representatives on 17 and 22 March 1994, respectively. Regulation 4 of SR No 56 of 1994 defined 'excluded subject matter' to include 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
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> (b) would have to consider, having regard to medical evidence, opinion or reports, the question of a person's incapacity; or

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1 Statutory Rules No 56 of 1994

(c) would be likely to have to perform a function mentioned in paragraph (a) or (b).

5.6 Following tabling of the Senate Select Committee on Superannuation's report *Super Regs I*, on 29 August 1994, the Senate disallowed Regulation 4.

5.7 The government responded to the concerns of the Senate by signalling its intention to amend the regulation so that it had no effect after six months from that day. On 17 October 1994 the Senate rescinded its resolution of 29 August, to allow for a new regulation excluding medical evidence complaints, but only for six months.

5.8 The government gazetted the amended regulation on 1 November 1994, deferring the handling of complaints involving the assessment of medical evidence until 1 May 1995.[2] Subsequently, a further amendment was gazetted extending the exclusion of medical evidence complaints until 1 November 1995.[3] On 1 November 1995 the Tribunal finally had authority to hear medical evidence complaints. There is a new Regulation 4 with effect from 1 November 1995 limiting what medical evidence can be heard (see paragraph 5.15 below).

Current legislation affecting the operation of the Tribunal

5.9 The *Superannuation Industry (Supervision) Legislation Amendment Act 1995* amends the *Superannuation Industry (Supervision) Act 1993*, the *Superannuation (Resolution of Complaints) Act 1993*, the *Insurance Act 1973* and the *Life Insurance Act 1995*, and in doing so, aims to expand the jurisdiction and improve the effectiveness of the Superannuation Complaints Tribunal.

5.10 *The Superannuation Industry (Supervision) Legislation Amendment Act 1995* enables the Tribunal, inter alia, to:

- review and make determinations in respect of insurer decisions relating to death and disability benefits provided through regulated superannuation funds;
- review decisions made by certain persons other than a trustee or insurer as to whether and to what extent a person is totally and permanently disabled; and

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2 Statutory Rules No 374 of 1994

3 Statutory Rules No 77 of 1995

exclude disability complaints where more than one year has elapsed since the decision to which the complaint relates, where the trustee decision was taken before 1 November 1994, or where a person fails to lodge a claim for a disability benefit with the trustee within one year of permanently ceasing employment due to disability.

5.11 These amendments allow the Tribunal to independently review medical evidence, and empower it to make orders directly against an insurer in relation to death and disability complaints where a superannuation fund has entered into a contract with an insurer for that purpose.

Summary

5.12 In summation, the regulations which determine the matters that the Superannuation Complaints Tribunal is excluded from considering no longer prohibit the hearing of medical evidence complaints.

5.13 Based on the evidence considered below, the Committee expresses its concern that the uncertainties and confusion caused by the turbulent history of the Tribunal's jurisdiction may have resulted in unnecessary hardship and been inimical to the Government of the day's stated commitment to 'improving community access to our courts and tribunals'.[4] As the experience of Ms Sonia Nolan testifies, the uncertainty and delay surrounding the Tribunal's capacity to hear medical evidence has impacted upon some individuals markedly.

5.14 Consequently, the Committee regrets that in seeking to resolve this uncertainty the Government of the day sought to define the jurisdiction of the Tribunal by regulation rather than enactment.

5.15 Regulation 4 of the Superannuation (Resolution of Complaints) Regulations has been amended, with effect from 1 November 1995, to exclude from the Tribunal's jurisdiction medical evidence complaints where more than one year has elapsed since the trustee's decision or where the person making the complaint failed to lodge a claim for a disability benefit with the trustees within one year of permanently ceasing employment due to disability.[5]

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4 Attorney-General's Department, May 1995, *The Justice Statement*, p. 55

5 Statutory Rules No 318 of 1995

5.16 This use of delegated legislation to define the jurisdiction of the Tribunal is contrary to the Administrative Review Council's opinion that all exemptions from the jurisdiction of the Tribunal should be specified in the Act.[6]

Conclusion

5.17 The Committee believes that confirming the authority and capacity of the Superannuation Complaints Tribunal to review medical evidence is an important development in building member confidence in superannuation.

How is medical evidence best assessed?

5.18 In anticipation of the Tribunal being able to deal with medical evidence complaints, the Committee heard evidence of how this medical evidence might best be assessed by the Tribunal. The proposals put to the Committee included:

- the Tribunal hear medical evidence itself without any major changes to its operation;
- the Tribunal hear medical evidence itself while ensuring that its membership contained a medically trained representative;
- an independent medical panel be established to provide the Tribunal with its assessment of medical evidence; and
- that in instances where an internal review Committee of a fund has made a determination, whether or not that involved medical evidence, the member forfeit the right to have the decision reviewed by the Tribunal.

The Tribunal hears the matter

5.19 Some witnesses expressed concern as to whether the Tribunal was the best body to receive and assess medical evidence.

5.20 On the basis that the proper function of the Tribunal is to 'stand in the shoes of trustee' Jacques Martin expressed the opinion that trustees who have not been sufficiently diligent to provide medical evidence upon which a decision could be reviewed should be required to submit further evidence which will allow a proper review.[7] Jacques Martin stated that:

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6 SISREG Sub No 22, Administrative Review Council, p 3

7 SCTREV Sub No 20

> We do not believe that it is appropriate for the SCT to directly seek medical evidence in its own right. That is the role of the insurer. [8]

5.21 Suggesting that it is unnecessary and unwise for the Tribunal to usurp the evidence gathering responsibilities of trustees, Mr Vernon of Jacques Martin told the Committee that:

> ... the emphasis should be on the trustee being in control of the process and looking after the interest of its members. That is where it must start and finish.[9]

5.22 After having surveyed its members, Mr Paatsch presented the AIST's concern that competing medical evidence could make the review of medical complaints solely by reference to the papers unsatisfactory, as it provided little opportunity for objectively verifying the competing reports.[10] AIST's claims add weight to the argument that the Tribunal should more frequently extend review of matters beyond the use of papers.

The Tribunal include members having medical qualifications

5.23 This option was for the Tribunal 'to have a medical practitioner sitting as a part-time tribunal member'.[11] This would allow it to receive and expeditiously deal with medical evidence. This view was not a widely reflected in evidence however, with the stronger opinion suggesting that where expert opinion was necessary for review, it should be sought from outside the Tribunal.

An independent medical panel

5.24 A number of witnesses including Mr Paatsch and Mr Abramovich suggested that the best way to receive and deal with medical evidence was to have it heard by an independent medical advisory board that would report on the medical evidence provided to it, and if necessary, provide an opportunity for a physical examination of the complainant. [12]

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8 SCTREV Sub No 20

9 Vernon, Evidence, p 110

10 Evidence, p 116

11 Abramovich, Evidence, p 11

12 Evidence, p 116

5.25 The proposal of AIST provided to the Committee allowed for:

- the establishment of a review panel chaired by an independent person, approved by or acceptable to the Tribunal, together with member and insurer representatives; and
- the ability of the review panel:

  to bind the insurer;

  to follow certain procedural guidelines for hearing claims set down by the Tribunal; and

  to access the same independent panel of doctors to advise them on the veracity of competing sets of medical evidence. [13]

5.26 Ms Nerida Wallace of Transformation Management suggested the use of panels are a useful way of stopping an escalation of 'duelling panels',[14] although she noted concern has been expressed in legal circles about doctors considering 'issues of fact' without the necessary qualification.[15] Ms Wallace cited this as being a particular concern in jurisdictions where the certificates of medical panels are binding or conclusive and reasons are not given, noting that this matter was the subject of a Full Court appeal.[16]

5.27 The submission of Transformation Management made the observation that medical panels tend to fail where:

- cases are not screened out and the facts are not established prior to hearing;
- the best medical experts are not used; and
- courts or tribunals are allowed to consider other opinions as well as those of the medical panel when hearing cases.

5.28 Consequently, Transformation Management recommended that:

- medical panels should be used sparingly and as a place of last resort;

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13 SCTREV Sub No 27

14 Wallace, Evidence, p 172

15 SCTREV Sub No 31

16 SCTREV Sub No 31

- their members be paid commensurate with their other work;
- preliminary screening processes be employed were possible; and
- doctors not be required to establish facts outside their area of medical expertise.[17]

Internal claims review committee

5.29 In instances where total and permanent disability claims are made by a member of C+BUS and are denied by the insurer, they are reviewed by the National Claims Manager of the C+BUS Administrator and then forwarded to the trustee for review. If the trustee requires further medical evidence or if the insurer has made an error, the claim is referred back to the insurer for reassessment. If the insurer denies the claim and the trustee believes that it should not be denied, with the agreement of the member, the claim is referred to the Claims Review Committee for determination.[18]

5.30 Under this process of review by the Claims Review Committee, which is comprised of a representative of the insurer, a representative of the member appointed by the national office of the union covering the occupation of the member concerned[19] and an independent chairperson, claims are determined on the basis of fairness and reasonableness and not legal precedent or legal argument.[20]

5.31 C+BUS proposed that where funds provide satisfactory internal review, whether medical evidence is considered or not, that the right of review to the Tribunal be relinquished by the member. Ms Robertson of C+BUS described the potential role of internal review committees, such as that operated by C+BUS, by saying:

> Our model does not resolve everything, but ... when medical evidence comes as part of the tribunal's process, there ought to be some consideration given to those funds which have in place [such] a process.[21]

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17 SCTREV Sub No 31

18 SCTREV Sub No 12

19 SCTREV Sub No 12

20 SCTREV Sub No 12

21 Evidence, p 83

5.32 Indeed, the existence of such a process would support an assertion that the trustee's decision was fair and reasonable, in which case the Tribunal is required by the Act to affirm the trustee's decision. The Committee agrees with Mr Berrill's submission that:

> a tribunal could, should, take into account the quality of the alternative dispute resolution process in assessing whether the decision has been unfair and unreasonable.[22]

5.33 C+BUS sees internal review of complaints involving medical evidence as a worthwhile alternative to review of medical evidence by the Tribunal. Whilst administration of C+BUS in this respect is quite advanced, the Committee believes that, even if all funds could achieve the same degree of sophistication in their internal reviews, it is not reasonable to remove the right of appeal to the Tribunal.

5.34 Mr Goldberg of Andrew Fairley noted that while this system may be 'all right for the big players' small funds would not have the resources.[23] Mr Paatsch of AIST stated:

> What we are advocating is the approved review panel process for funds with the capacity to implement it, but we are saying they should get access to the same medical advice that the Tribunal does, they should be subject to procedural guidelines set out by the Tribunal and they should have an independent chair which is either approved by the Tribunal or comes from a body of people who are approved by the Tribunal. [24]

The impact of the Tribunal hearing medical complaints

5.35 The Tribunal has acknowledged that the inclusion of medical complaints evidence within the Tribunal's jurisdiction will increase the number of complaints it handles.[25] Due to the uncertainty as to the quantity of medical evidence complaints that the Tribunal may receive, LIFA has recommended a cautious approach by placing a cap on the size of claims which can be

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22 Evidence, p 101

23 Evidence, p 129

24 Evidence, p 115

25 SCTREV Sub No 19

determined by the Tribunal.[26] Mr McCutcheon of LIFA suggested that $100 000 was an appropriate cut-off mark.[27]

5.36 LIFA expressed its desire that the 'cut-off' point for making medical evidence complaints should be the earlier of either 24 months from the cessation of employment due to disablement, or 12 months from the date of the trustee's decision to not pay the disablement benefit.[28]

Conclusions

5.37 The Committee notes that 'no matter how many processes we put in place ... there is still recourse to law'.[29] It is not persuaded that access to the Tribunal should be determined by internal arrangements in individual funds.

5.38 The Committee is concerned that funds' internal review processes, as required and supported by section 101 of the Act, work to the maximum efficiency. In this respect the Committee commends the arrangements outlined by C+BUS in their evidence, and discussed above. With internal review arrangements of the quality of C+BUS, the Committee would expect the Tribunal to be used only in the case of serious breakdown in member-fund relationships.

5.39 The Committee considers an objectively efficient and transparent internal review process within a fund would itself add weight to the Tribunal's deciding, should a complaint against the fund come before it, to consider the trustee's decision 'fair and reasonable'. If the Tribunal so finds, it is required under the Act to affirm the decision.

5.40 The Committee was concerned that some witnesses seemed unaware of this requirement under the Act for the Tribunal to affirm the trustee's decision **if it is satisfied that the decision was fair and reasonable in all the circumstances.**

5.41 The Committee believes that medical evidence would best be dealt with by standard Tribunal practice, except where the use of medical experts on the panel is considered necessary in the circumstances of the particular case.

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26 SCTREV Sub No 29

27 Evidence, p 151

28 SCTREV Sub No 29

29 Robertson, Evidence, p 85

Time limitations

5.42 Regulation 4 of the *Superannuation (Resolution of Complaints) Regulations* now excludes disability complaints where the decision was made before 1 November 1994, or where more than one year has elapsed since the decision to which the complaint relates, or where the person fails to lodge a claim for a disability benefit with the trustees within one year of permanently ceasing employment due to disability.

5.43 The implications for funds which arise from the ability of members to lodge complaints involving medical evidence were heard from a number of witnesses, including LIFA, AIST and the Seafarers Retirement Fund.[30]

5.44 The Seafarers Retirement Fund, a defined benefit and self-insured fund, provided evidence that the time allowances for claims will have financial implications for funds in general, and for itself in particular.[31] Additionally, AIST noted that at the time of providing its submission, the exposure of trustees to claims was not met by any commensurate binding of insurers. The amendments to the SRC Act now enable the Tribunal to review insurer decisions relating to death and disability benefits provided through regulated superannuation funds. However, this was not in place by 1 November 1995.

5.45 The Committee notes that members and funds had been on notice since November 1994 that the former Government intended to allow the Tribunal to receive medical complaints evidence.

Trustee's reasons

5.46 There is no explicit requirement for the trustee of a superannuation fund to give reasons for its decisions.

5.47 However, decisions of superannuation trustees relating to the payment of benefits such as total and permanent disability benefits are clearly within the realm of public decisions.

5.48 The Committee notes the requirement for other decision makers in the public realm to provide reasons. Section 28 of the *Administrative Appeals Tribunal Act 1975* provides:

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30 SCTREV Sub Nos. 29, 27 and 23 (Supp)

31 SCTREV Sub No 23 (Supp)

> (1) Where a person makes a decision in respect of which an application may be made to the Tribunal for a review, any person ... who is entitled to apply to the Tribunal for a review of the decision may, ... request that person to furnish to the applicant a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision, and the person who made the decision shall, as soon as practicable but in any case within 28 days after receiving the request, prepare, and furnish to the applicant, such a statement.

5.49 Evidence was received from Barker Gosling, the Consumer Credit Legal Service, Larry Rees, John Moratelli of the New South Wales Legal Aid Commission, David Vernon of Jacques Martin, and Sonia Nolan that the provision of a trustee's statement of reasons to the complainant would greatly facilitate the Tribunal's capacity to make fair and robust decisions. Mr Noel Davis of the New South Wales Law Society also canvassed this issue, and submitted that 'there should be a conscious decision on the part of the parliament as to whether or not the tribunal can ask trustees to give the reasons for their decisions'.[32] It was Mr Abramovich's submission that the Act 'be amended to make it compulsory for trustees to give reasons for their decisions'.[33]

5.50 The Committee also notes that the supplying of the trustee's statement of reasons would also enhance the Tribunal's capacity to execute its statutory duty to affirm the decision of the trustees if it is satisfied that the decision was fair and reasonable in all the circumstances.

Recommendation 5.1:

The Committee recommends that where possible the trustees should provide reasons for their decisions.

To whom should medical evidence be available?

5.51 An issue associated with the giving of reasons is access to the medical evidence upon which the trustee's decision was made - the material that contributed to the reasoning behind the decision. A superannuation fund

[32] Evidence, p 53

[33] Evidence, p 8

member does not have the right to access the medical evidence used by a trustee in making a decision to reject their claim. In contrast, those who seek to derive an income from the state in similar circumstances, such as disability benefit applicants, must be given reasons if their application is rejected and be given the opportunity to address any matters raised in the evidence used to make the decision. The basis of this seeming anomaly is the formation of superannuation funds as trusts. This is despite the important distinction observed by Bryson J that superannuation payments are 'important entitlements in an employment relationship' and are not 'trusts for bounty or charity'.[34]

5.52 Mr Proctor of the Consumer Credit Legal Service told the Committee:

> In no other case ... in which I have ever acted as a lawyer, have I not been able to get access to the information on which the opposing party makes its decision.[35]

5.53 The issue of access is not only one of availability of information but also one of how it is conveyed and by whom. Ms Robertson of C+BUS and Mr Vernon of Jacques Martin expressed concern that if medical evidence were made available to members, it should be by reference through their own doctor in recognition of the sensitivities involved. Concern that medical records may contain information which would be harmful to a particular patient if disclosed has been argued in legal proceedings where patients have sought access to their medical records.[36]

5.54 Finally, the question of whether patients have a legal right to their medical records is the subject of the matter of *Breen v Williams*, heard by the High Court on 21 November 1995. The Court has reserved its decision. In Canadian jurisdictions, the existence of a fiduciary duty between doctor and patient has been argued and has been accepted as creating the right of access to medical records because the patient 'entrusts' personal information to the doctor for medical purposes. There has not been a wholesale endorsement of this approach in the Australian courts.[37] The interesting distinction between *Breen* and the situation of superannuation trustees is that there is no dispute that superannuation trustees have a fiduciary relationship with the members.

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34 *Vidovic v Email Superannuation Pty Ltd,* Supreme Court (NSW), Equity Division, File No 2745/86, p11

35 Evidence, p 80

36 Parkinson, "Before the High Court Fiduciary Law and Access to Medical Records: Breen v Williams", (1995) 17 Sydney Law Review 433 at 435

37 Ibid