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**Parliament of the Commonwealth of Australia**

**Eighteenth Report of the  
Senate Select Committee on Superannuation**

**Review  
of the  
Superannuation  
Complaints Tribunal**

**Canberra  
April 1996**

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## **RECOMMENDATIONS**

### **CHAPTER 2**

#### ***Recommendation 2.1:***

The Committee recommends that the government reconsider the legislative requirement that the Tribunal must include the Chair or Deputy Chair when exercising its powers and assess whether it would enhance the timeliness of the Tribunal to have a less restrictive provision such as those found in the Administrative Appeals Tribunal Act, Social Security Act and the Migration Act.

#### ***Recommendation 2.2:***

The Committee recommends that the Superannuation Complaints Tribunal develop a charter of access and service, using those developed by the Federal Court, the Family Court and the Administrative Appeals Tribunal as a model.

### **CHAPTER 4**

#### ***Recommendation 4.1:***

The Committee recommends that all superannuation fund members, including members of excluded funds, should have access to the Superannuation Complaints Tribunal. The Committee has reservations about the participation in excluded funds of employee members and is of the view that such membership should be discouraged.

### **CHAPTER 5**

#### ***Recommendation 5.1:***

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

## CHAPTER 6

### *Recommendation 6.1:*

The Committee recommends that a limited government funded superannuation consumer advice service be established within the existing community legal or credit advice centres; that there be a general limit of two appointments for each client; and that the service be restricted to providing advice and information only and not extend to the running of cases before the Tribunal. The Committee further recommends that this arrangement be reviewed after two years and an assessment as to its adequacy be made at that time.



# CHAPTER 1

## INTRODUCTION

1.1 The Superannuation Complaints Tribunal (the Tribunal) began operating on 1 July 1994 to provide for the conciliation of complaints, and for the fair, economical, informal and quick review of the decisions of trustees if required.<sup>1</sup>

### **How the inquiry came about**

1.2 In response to the growth in superannuation membership and the increasingly complex administration that has ensued, the first report of the Senate Select Committee on Superannuation, *Safeguarding Super*, examined the need for dispute resolution mechanisms. That report recommended the establishment of an external disputes resolution mechanism.

1.3 The Tribunal was established under the *Superannuation (Resolution of Complaints) Act 1993* (the Act) which established a scheme for the external resolution of complaints by members and beneficiaries of superannuation funds and approved deposit funds.

1.4 Conscious of the need to ensure the Tribunal remain a low cost, informal and expeditious vehicle for resolving disputes, the Commonwealth Parliament considered the need to review the operation of the Tribunal, and whether to augment its operation with an independent advisory service.

1.5 On 22 November 1993, the Senate considered the House of Representatives' disagreement to the Senate's schedule of amendment to the Superannuation (Resolution of Complaints) Bill 1993. The Senate had proposed assistance to complainants in the making of their complaints. In response to the House of Representatives' rejection of the Senate amendments, the Senate resolved to refer the matter of assistance to complainants to the Senate Select Committee on Superannuation for inquiry and report.

1.6 Under the terms of reference established on 22 November 1993, the Senate Select Committee on Superannuation has undertaken a review of the Tribunal following its first twelve months of operation, examining whether it meets the needs of superannuation fund members, and the efficacy of establishing a funded superannuation consumer advice service.

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<sup>1</sup> Section 11, *Superannuation (Resolution of Complaints) Act 1993*

1.7 The terms of reference for inquiry and report are:

- (a) the operation of the Superannuation Complaints Tribunal in the first 12 months of its work;
- (b) whether the tribunal is adequately meeting the needs of superannuation fund members; and
- (c) whether an independent superannuation consumer advice service should be established and supported by grants from Consolidated Revenue.

1.8 The significant impact of superannuation trustee decisions and the importance of an avenue of review of decisions of superannuation trustees was highlighted in the decision of Bryson J in *Vidovic v Email Superannuation Pty Ltd*,<sup>2</sup> on 3 March 1995. That matter involved a total and permanent disability claim from 1986. In commenting on the discretionary nature of decisions of trustees, his Honour stated:

It is a marked anomaly to use mechanisms drawn from fields of law remote from employment and relating to trusts for bounty or charity to administer important entitlements in an employment relationship. I find it difficult to understand why the entrenchment of such important rights against review is so usual, and why this kind of arrangement is so commonly found acceptable to employees in view of the economic significance of such decisions and the economic function of superannuation, not well represented in the terms of the documents, as a contracted employment benefit for which value is given. These anomalies appear particularly clearly where, as in this case, the fund out of which benefits are paid is contributory and an employee claiming benefits is claiming to be paid, at least in part, in his own coin.

1.9 A pervasive theme in the evidence to this inquiry was the hearing of 'medical evidence complaints' by the Tribunal. The Senate Select Committee on Superannuation's thirteenth report, *Super Regs I*, also gave consideration to the reception of medical evidence by the Tribunal.

1.10 More generally, the need for the Tribunal was borne out by the number of inquiries and complaints that were made. As noted by the Association of Superannuation Funds of Australia:

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<sup>2</sup> Supreme Court (NSW), Equity Division, File No 2745/86

The fact that there are currently close to 1000 complaints before the Tribunal, apart from those which have been settled by whatever means, suggests that people do know that it exists and that it is the right vehicle to go to.<sup>3</sup>

### Conduct of the inquiry

1.11 The Committee called for submissions on the reference by placing an advertisement in the *Australian* newspaper on 27/28 May 1995. It also contacted persons and organisations who had expressed interest in superannuation matters and were on the Committee's mailing list. The Committee received 35 written submissions.<sup>4</sup> Thirty-three witnesses<sup>5</sup> appeared before the Committee to give oral evidence during five hearings conducted in:

Sydney	9 August 1995
Melbourne	10 August 1995
Canberra	24 August 1995
Canberra	28 August 1995 (morning)
Canberra	28 August 1995 (evening).

1.12 In this inquiry, the Committee has particularly sought the evidence of those people who have had dealings with the Tribunal, or who have expressed an opinion as to changes that might improve the operation of the Tribunal.

1.13 To facilitate discussion of the issues raised in the terms of reference, and in accordance with the Committee's previous resolutions, unless otherwise ordered, written submissions were published on receipt and uncorrected Hansard transcripts were circulated as soon as they became available.

1.14 Oral evidence is cited by reference to Hansard as follows: 'Evidence, p XX'. Written submissions are referred to by their registration number: 'SCTREV Sub No XX'.

1.15 The Committee records its appreciation to those who made written submissions and gave oral evidence in the inquiry.

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<sup>3</sup> Lockery, Evidence, p 43

<sup>4</sup> See Appendix A

<sup>5</sup> See Appendix B



## CHAPTER 2

### PERFORMANCE OF THE TRIBUNAL

#### What is it required to do?

2.1 The Tribunal is an independent statutory body established under the *Superannuation (Resolution of Complaints) Act 1993* (the Act). Its role is to resolve complaints that members of superannuation funds may have in relation to certain decisions of trustees of regulated superannuation funds or approved deposit funds.

2.2 Section 12 of the Act specifies the functions of the Tribunal:

- to inquire into a complaint and try to resolve it by conciliation; and
- if the complaint cannot be resolved by conciliation, to review the decision of the trustee to which the complaint relates.

A table describing the complaint procedure is set out in Appendix D.

#### How well did it operate?

2.3 There was substantial evidence to suggest there were some significant operational problems. The Committee has been made aware of the pressures experienced by the Tribunal in its first 12 months, however, it appears to the Committee that the operational problems resulted from a convergence of factors, some of which were beyond the control of the Tribunal, others which could have been averted.

2.4 The Committee recognises that superannuation has developed very rapidly. Such rapid development in any industry creates difficulties for the bureaucratic process responsible for its supervision. The Committee therefore acknowledges that whilst leadership issues were raised in this inquiry, the Tribunal did not have the time that was available to other parts of the superannuation industry to evolve and develop its processes.

2.5 In its first 12 months, the Tribunal received 881 complaints, 465 of which fell outside its jurisdiction. Of the complaints within jurisdiction,

12 determinations were made. The Chairperson has stated that the Tribunal will soon be delivering two review decisions per week.<sup>1</sup>

### *Delays*

2.6 The Committee heard evidence of delays in the handling of member complaints. One example was a member of an industry fund who lodged a complaint on 6 March 1995. The fund involved approached the Tribunal on 6 July to see what was happening with the complaint. On 18 July the Tribunal advised that it had no jurisdiction over the matter as the member had made the complaint outside the 28 day period within which to object.<sup>2</sup>

2.7 Another example is that of Mrs Sonia Nolan. Her case before the Tribunal began with a submission to the Insurance and Superannuation Commission (ISC) in January 1994 who forwarded it to the Tribunal in June 1994. Mrs Nolan completed the appropriate form and visited the offices of the Tribunal on about 21 July 1994 and had a lengthy discussion with an officer there.<sup>3</sup>

2.8 Mrs Nolan was correctly informed that the fund had 90 days to respond, before the Tribunal could act. That period expired in October 1994 with a refusal by the fund to settle her matter so she then telephoned the Tribunal. Following the passage of another 45 days the Tribunal advised it had all the relevant documentation and would look into the matter. Mrs Nolan's evidence continued in this way:

I received a couple of letters saying that the tribunal was now looking at the matter and then, in January [1995], I received a lengthy letter from the tribunal saying that basically it could not hear my case. It was out of its jurisdiction; it could not handle my particular complaint.<sup>4</sup>

2.9 The Tribunal provided justification for time taken to finalise complaints:

The average time taken to finalise a complaint that was within jurisdiction was 95 days ... If a complainant comes in and the fund is responding to the limit of the time-lines given, there would be a minimum of three months before a complaint could be concluded.

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<sup>1</sup> Lockery, Evidence, p 46

<sup>2</sup> SCTREV Sub No 18

<sup>3</sup> Evidence, p 75

<sup>4</sup> Evidence, p 76

So our 95 days as against 84 days, if the full time limit is taken by the complainant or the trustee.<sup>5</sup>

2.10 It was put to the Committee that ‘delays are often a symptom of poor information management’.<sup>6</sup> The evidence certainly pointed to a slow flow of information.

A set of procedures should be devised in consultation with the users and strictly enforced and the tribunal must take control of the caseload. This means tracking cases, enforcing deadlines and rewarding compliance with deadlines.<sup>7</sup>

### *Case management*

2.11 The Committee questions the adequacy of the system of case management. The Australian Federation of Consumer Organisations (AFCO) was very critical of the case management system in saying that it ‘has failed under testing every time’. Ms Jenni Mack said:

What this means is that the Tribunal has no way of recording and categorising data in a way that fosters efficient reporting. The Chair informed me that record keeping is done manually and that is why material is being produced with mistakes and with great difficulty.<sup>8</sup>

Ms Mack emphasised that an ‘effective case management system must be put in place with utmost urgency’.<sup>9</sup>

2.12 The appropriate information technology was not in place:

The capacity of the Tribunal to monitor and report on its operations has been hampered during the year by the absence of an adequate database or case management system. By the end of the reporting period such a system was still not fully operational ...<sup>10</sup>

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<sup>5</sup> Cardiff, Evidence, p 216

<sup>6</sup> Transformation Management Services, SCTREV Sub No 31

<sup>7</sup> *ibid*

<sup>8</sup> SCTREV Sub No 26

<sup>9</sup> SCTREV Sub No 26

<sup>10</sup> Superannuation Complaints Tribunal, SCTREV Sub No 19

*The statutory constitution of the Tribunal*

2.13 The Committee considered section 9 of the Act, a section which provides for the constitution of the Tribunal for the purposes of exercising its powers.

2.14 The section requires the Tribunal, when exercising its functions and powers in relation to a complaint, to include the Chairperson or the Deputy Chairperson. During the Tribunal's first 12 months, there was no provision for a Deputy Chairperson and the Chairperson was required to be part of the Tribunal when it exercised its powers. This placed a certain degree of pressure on the Chairperson and may well have contributed to the delays reported to the Committee. Mr Ken Lockery expressed ASFA's view that:

given that the chairperson currently sits on all review cases, it is difficult to see how they would do more than two or three [matters] a week.<sup>11</sup>

He went on to observe that:

if we have got the best part of a thousand complaints before the Tribunal, settling two a week means that we have got nine years' worth of complaints currently there.<sup>12</sup>

2.15 The Committee notes that other merit review tribunals do not have a comparable requirement. The Administrative Appeals Tribunal, the Social Security Appeals Tribunal and the Refugee Review Tribunal are not required to be constituted in such a restricted manner.<sup>13</sup> The report of the Administrative Review Council of the merits review tribunals, *Better Decisions: Review of Commonwealth Merits Review Tribunals*,<sup>14</sup> recommended that 'the composition of panels to review particular cases should be left to the discretion of review tribunals'.<sup>15</sup>

2.16 Whilst the legislation which now provides for a Deputy Chairperson is an improvement, the statutory requirements relating to the composition of the

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<sup>11</sup> Evidence, p 46

<sup>12</sup> Evidence, p 47

<sup>13</sup> Administrative Appeals Tribunal Act 1975, section 21; Social Security Act 1991, section 1327; Migration Act 1958, section 421

<sup>14</sup> Report No 39, 1995

<sup>15</sup> Recommendation 7



Tribunal remain inappropriate in the view of the Committee. The Committee considers that the constraint put on the composition of the Superannuation Complaints Tribunal may increasingly inhibit its ability to meet the objective of providing a 'quick'<sup>16</sup> dispute resolution mechanism.

**Recommendation 2:1**

**The Committee recommends that the government reconsider the legislative requirement that the Tribunal must include the Chair or Deputy Chair when exercising its powers and assess whether it would enhance the timeliness of the Tribunal to have a less restrictive provision such as those found in the Administrative Appeals Tribunal Act, Social Security Act and the Migration Act.**

**Performance assessment**

2.17 In seeking to evaluate the performance of the Tribunal the Committee used the following criteria:

- accountability
- corporate planning
- the handling of inquiries
- available information.

*Accountability*

2.18 Any particular tribunal can be accountable in various ways to different stakeholders in relation to different aspects of its operations. For this Tribunal there was basic accountability to Parliament through the submitting of an annual report.<sup>17</sup>

2.19 There is also a relationship to the Insurance and Superannuation Commission (ISC), the body responsible for planning the establishment of the

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<sup>16</sup> Section 11

<sup>17</sup> Section 67(1)

Tribunal. The ISC continues its involvement through responsibility for the staffing, budgets and policy formulation of the Tribunal.

2.20 The Committee considered there was an inadequate accountability to other stakeholders, notably trustees, actual and potential complainants, and the industry generally. This essentially related to a lack of information about the operation of the Tribunal. AFCO said the Tribunal was 'yet to settle on a methodology for reporting' and even if reports were available the SCT had no means of distribution.<sup>18</sup> The reporting of its decisions is discussed below in paragraph 2.29.

#### *Corporate planning*

2.21 There was an absence of corporate vision in the establishment and early operation of the Tribunal. The Committee is concerned that little seems to have happened since, in relation to corporate planning, beyond the implications of the expansion in the jurisdiction of the Tribunal.

2.22 In the Tribunal's annual report for the year 1994/95, there is information provided about structure and operation including the Memorandum of Understanding between the Tribunal and the ISC. However, the Committee detects no overall corporate strategy that could be fairly identified as a corporate vision or plan.

#### *The handling of inquiries and complaints*

2.23 While raw statistics were provided on the number of complaints handled, together with a degree of characterisation, the Committee would also like to see implemented some 'best practice' initiatives. These should include a minimum time for responding to telephone and written inquiries and an effective file tracking system. It was suggested to the Committee that perhaps 28 days was an appropriate turnaround time, that being the figure applicable to complaints in the banking industry.<sup>19</sup>

2.24 The Tribunal advised that it was 'currently fine-tuning its computerised complaints management system to provide throughput indications'.<sup>20</sup> It said:

Statistics on the time taken to handle different types of complaints will be available in future reports.<sup>21</sup>

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<sup>18</sup> SCTREV Sub No 26

<sup>19</sup> Wallace, Evidence, p 181

<sup>20</sup> SCTREV Sub No 19

2.25 The Access to Justice Report recommended that each Commonwealth court and tribunal should develop a charter, with a view to setting standards for all aspects of its dealings with the public.

2.26 In its Justice Statement, the previous government supported the development of charters of access and service. Over the next two years the Federal Court, the Family Court and the Administrative Appeals Tribunal will develop charters.<sup>22</sup>

2.27 The Committee is of the view that such a charter is an appropriate document for the Superannuation Complaints Tribunal to develop.

**Recommendation 2.2:**

**The Committee recommends that the Superannuation Complaints Tribunal develop a charter of access and service, using those developed by the Federal Court, the Family Court and the Administrative Appeals Tribunal as a model.**

*Available information*

2.28 There was a general impression through the evidence of inadequate information at two levels. Firstly the inadequacy of statistical data was indicated by the Federal Bureau of Consumer Affairs.<sup>23</sup> Second, the issue of public awareness of the Tribunal and its function may need to be further addressed.

2.29 Also the Tribunal faced difficulties in distributing its determinations. Distribution through the legal publishers Butterworths was said by AFCO to have 'worked reasonably well as far as the industry was concerned but none reached the community sector'.<sup>24</sup> AFCO pointed to the subscription costs as effectively excluding community groups and said:

At any rate this is not information the community should expect to pay for.<sup>25</sup>

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<sup>21</sup> SCTREV Sub No 19

<sup>22</sup> The Justice Statement, May 1995, pp 57-58

<sup>23</sup> SCTREV Sub No 16

<sup>24</sup> SCTREV Sub No 26

<sup>25</sup> SCTREV Sub No 26

2.30 The Committee was surprised to learn from its own inquiries that one state consumer complaints tribunal was unaware of the existence of the Superannuation Complaints Tribunal and welcomed the Committee's advice of the Tribunal's existence.

2.31 The Committee is aware that the provision of information about the Tribunal has evolved since the Tribunal completed its first year of operation. It must continue to evolve and must be reviewed to ensure this continues.

### **Achievements**

2.32 In the period 1 July 1994 to 30 June 1995 a total of 881 written complaints and 5188 telephone inquiries were received by the Tribunal with 53 per cent of the written complaints being outside the Tribunal's jurisdiction. Of the 416 complaints within jurisdiction 321 (77 per cent) were in the inquiry/conciliation stage at 30 June 1995, while 83 (20 per cent) had been completed after inquiry and conciliation. Another 12 (three per cent) had gone to review hearings.<sup>26</sup>

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<sup>26</sup> SCTREV Sub No 19

## CHAPTER 3

### MANAGEMENT AND STAFF

3.1 This was an area of considerable concern to the Committee particularly given the fact that the management was aware that a review was to be done on the Tribunal's first twelve months operation. The Committee found it surprising that no mention was made of its review of the Tribunal in the Annual Report.

#### **Delay in government appointments**

3.2 Part 2 of the Act establishes the Tribunal with a full-time Chairperson, a Deputy Chairperson and between 7 and 10 other members. The Chairperson and the Deputy Chairperson are appointed by the Governor-General, and the Tribunal members by the Minister.

3.3 Mr Neil Wilkinson took up his appointment as inaugural Chairperson of the Tribunal on 5 September 1994, that is, some two months after the commencement of the operation of the Tribunal. Ms Jill Cardiff was the Acting Chairperson between 18 July 1994 and 5 September 1994. All other original members of the Tribunal were appointed in either August or September 1994.<sup>1</sup>

3.4 The Committee considers the failure to have had appointments ready before the commencement of operation of the Tribunal on 1 July 1994, could have contributed to the slow progress the Tribunal made in establishing itself in an operational sense.

#### **Executive staff resignations and rearrangements**

3.5 Senior staff were appointed in May 1994 with other staff progressively employed from June to mid-August 1994.<sup>2</sup> There was a major staff turnover mid-way through the Tribunal's first year involving the departure 'for various reasons' of three of the four senior staff.<sup>3</sup> They were the Executive Director, the Director of Inquiries and Conciliation and the Assistant Director of Inquiries and Conciliation. A staffing review was conducted in February and March 1995:

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<sup>1</sup> Annual Report, p xi

<sup>2</sup> Annual Report, p 1

<sup>3</sup> Annual Report p, 2

which resulted in a restructure to make more effective use of the available resources.<sup>4</sup>

3.6 Mr Wilkinson was critical of some of the staff who had left the Tribunal,<sup>5</sup> but the Committee did not find a satisfactory explanation for major staff changes.

### **Non-executive staff**

3.7 There was evidence of the inexperience of the staff handling inquiries and complaints. The Industry Superannuation Funds (ISF) noted that:

many, though not all, of the SCT [Tribunal] staff with whom they deal are apparently inexperienced in dealing with the subject matter of the complaints.<sup>6</sup>

3.8 The Seafarers Retirement Fund considered the Tribunal staff ‘lacked commercial experience’<sup>7</sup> while the Committee concurs with the recommendation of the Construction + Building Unions Superannuation Fund (C+BUS) that all staff appointed to fill future vacancies or new positions be required to have experience in the administration of superannuation.<sup>8</sup>

3.9 The Committee considers that qualities apart from experience in the administration of superannuation are appropriate for Tribunal staff. For example, skills in handling complaints and ‘first contact’ experience are at least as vital in the Tribunal’s operation.

3.10 AFCO advocated that not only should the staff appointed have expertise in the consumer complaints process, but existing staff ‘must be trained in community expectations of a consumer complaints body’.<sup>9</sup> AFCO indicated it would be happy to assist with this training.

3.11 The Committee did receive positive comment in relation to the attitude of staff in their dealing with complainants, with ‘the experience of practitioners generally [being] that the Tribunal has been very helpful in the way in which it has been conducted.’<sup>10</sup> However, the Committee was concerned at a possible lack of direction for staff. For example the ISF believed ‘that many staff did not

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<sup>4</sup> SCTREV Sub No 19

<sup>5</sup> Evidence, p 140

<sup>6</sup> SCTREV Sub No 18

<sup>7</sup> SCTREV Sub No 23 (Supp)

<sup>8</sup> SCTREV Sub No 12

<sup>9</sup> SCTREV Sub No 26

<sup>10</sup> Davis, Evidence, p 52

clearly understand their role' and tended to act as if they were agents for the prosecution rather than staff of an independent Tribunal.<sup>11</sup> They said:

Many SCT staff appear to operate on the basis that the lodging of a complaint by a member indicates that a prima facie case exists and that the onus is on the Fund to disprove the member's allegations. This is a very serious concern of the ISFs.<sup>12</sup>

### **Management of staff**

3.12 The Committee finds staff management was inadequate. From recruiting right through to the guidance of staff on the job, the evidence suggested weaknesses.

3.13 In its Annual Report the Tribunal provided details of training undertaken by staff.<sup>13</sup> However, formal training courses (all but three of which were provided internally or by the ISC) are not the full answer to equipping staff to effectively function in the operation of a new statutory Tribunal. The matters raised by the Seafarers Retirement Fund, C+BUS and ISF and outlined above should also be given attention.

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<sup>11</sup> SCTREV Sub No 18

<sup>12</sup> SCTREV Sub No 18

<sup>13</sup> Annual Report, p 49





## CHAPTER 4

### JURISDICTION

4.1 The Tribunal experienced frustration and difficulty as a result of limitations on its jurisdiction.

#### **What jurisdiction**

##### *The Tribunal's position*

4.2 In hearing a complaint, the Tribunal essentially sits in place of the trustee. For the purposes of reviewing a decision of a trustee, the Tribunal has all the powers, obligations and discretions conferred on a trustee by law or under the governing rules of the fund. 'The Tribunal effectively stands in the shoes of the fund trustee and examines the original decision which is at issue'.<sup>1</sup> It has power to:

- affirm the trustee's decision;
- remit the matter to which the decision relates back to the trustee for reconsideration in accordance with the directions of the Tribunal;
- vary the decision; or
- set aside the decision and substitute its own.<sup>2</sup>

4.3 However, there is an important discipline placed on the operation of the Tribunal. **Where it considers the trustee's decision to have been fair and reasonable in all the circumstances, the Tribunal must affirm that decision.**<sup>3</sup>

##### *Which decisions can it deal with*

4.4 Complaints can be made about a trustee's decision, or failure to make a decision, in relation to a member, former member, beneficiary or former beneficiary of a fund. A person can complain that the decision was in excess of

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<sup>1</sup> SCTREV Sub No 19

<sup>2</sup> Section 37C(2)

<sup>3</sup> Part 6, SRC Act

the trustee's powers, an improper exercise of the powers, or was unfair or unreasonable.<sup>4</sup>

4.5 Examples of complaints that could be made include:

- the procedural or administrative aspects of disability claims;
- errors in annual statements;
- a belief that a death benefit was paid to the wrong person; and
- miscalculation of a benefit.<sup>5</sup>

4.6 Perhaps more significant, in some respects, were the complaints which the Tribunal was precluded from considering during its first 12 months. These included:

- Complaints in relation to funds which had not elected to become regulated under the *Superannuation Industry (Supervision) Act 1993* (SIS).
- Complaints in relation to funds with less than five members or approved deposit funds with only one beneficiary.

The Investment Funds Association submitted that 'it is quite likely that there will be legitimate grievances that arise amongst the membership of these excluded funds, and ... that people in those funds should have access to the Tribunal, as does any superannuant'.<sup>6</sup> The Committee particularly is concerned for non-related members of excluded funds as those members will often be employees who had no choice in their membership of the excluded fund. Also of concern are those who become involved in family law proceedings and have 'no idea what was happening with the superannuation fund and the way in which it was dealt with, and the fact that money might have disappeared from it.'<sup>7</sup> It was submitted that 'arms-length members of small superannuation funds should be able to make a complaint in the same way as members of a larger fund.'<sup>8</sup> It certainly appears that there is some demand for a dispute

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<sup>4</sup> Section 14 of the Act

<sup>5</sup> SCTREV Sub No 19

<sup>6</sup> Hutley, Evidence, p 49

<sup>7</sup> Davis, Evidence, p 57

<sup>8</sup> Davis, Evidence, p 57

resolution mechanism for these members as ‘there are 37 complaints that have been currently withdrawn from the SCT’s jurisdiction to date from excluded super funds’.<sup>9</sup>

**Recommendation 4.1:**

**The Committee recommends that all superannuation fund members, including members of excluded funds, should have access to the Superannuation Complaints Tribunal. The Committee has reservations about the participation in excluded funds of employee members and is of the view that such membership should be discouraged.**

- Complaints that relate to the management of the fund as a whole and affect all members, for example, the fund's investment strategy.
- Complaints concerning the assessment of medical evidence.
- Complaints about the actions of third parties such as life offices and their agents and about annuities sold by life companies.<sup>10</sup>
- Complaints against an employer, unless the employer is also a trustee.
- Complaints relating to some State and Commonwealth government superannuation schemes.
- Complaints which deal with matters which are the subject of legal proceedings before a court.

**Jurisdictional problems**

4.7 The Tribunal claimed jurisdictional issues constituted a major problem, with the Tribunal not being able to deal with over 50 per cent of complaints made to it. (However, more than one third of ‘out of jurisdiction’ complaints related to a failure to go through the section 101 procedure.) Three exclusions were highlighted. They were complaints:

- about public sector funds;

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<sup>9</sup> Paatsch, Evidence, p 113

<sup>10</sup> Most of these complaints are currently referred to the Life Insurance Complaints Service.

- involving the assessment of medical evidence; and
- about life office superannuation, including allegations of agent misrepresentation.<sup>11</sup>

4.8 A separate chapter (Chapter 5) has been dedicated to the question of medical evidence. For public sector funds the lodgement date for election to become regulated under the SIS Act was 1 July 1995 (extended to 1 July 1996 for some specific funds).

Most Commonwealth public service funds became regulated on 30 June 1995 and now fall under the Tribunal's jurisdiction.<sup>12</sup>

4.9 Complaints involving allegations of agent misrepresentation, represented over half of out of jurisdiction complaints referred by the Tribunal to the Life Insurance Complaints Service (LICS). They were 22 per cent of all complaints made out of jurisdiction (other than those referred to funds internal review processes pursuant to Section 101 of the Act).<sup>13</sup>

### **Transitional problems**

4.10 The Tribunal in its submission noted that funds only slowly became regulated under SIS and thereby subject to the Tribunal's jurisdiction. The number of regulated, non-excluded superannuation entities falling under jurisdiction were estimated as:

1 July 1994	500
1 October 1994	1500
30 June 1995	6000. <sup>14</sup>

4.11 This gradual increase over the year was said by the Tribunal to have had a significant impact. It submitted:

As at 1 July 1994 there were practically no complainants who had been through the section 101 complaint process and were eligible to bring a complaint to the Tribunal. Much of the Tribunal's time was spent in informing potential complainants of the Tribunal's process and the need to first make a complaint to the Fund.<sup>15</sup>

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<sup>11</sup> SCTREV Sub No 19

<sup>12</sup> Superannuation Complaints Tribunal, Annual Report, p 4

<sup>13</sup> SCTREV Sub No 19

<sup>14</sup> SCTREV Sub No 19

<sup>15</sup> SCTREV Sub No 19

4.12 On 24 July 1994, the ISC announced that non-excluded funds other than public sector funds, had until 31 October 1994 to elect to become regulated under SIS and therefore come under the Tribunal's jurisdiction<sup>16</sup> (previously, the deadline had been 28 July 1994). So, in fact there was only a maximum of four months of 1994/95 where the number of funds under jurisdiction would have been low.

4.13 The Tribunal said considerable resources were taken up in determining whether a fund was regulated and from when, with funds sometimes incorrectly advising they were regulated at the time they considered the section 101 complaint. This resulted in delays in processing claims at the Tribunal in 1994.<sup>17</sup>

### **New legislation**

4.14 The Superannuation Industry (Supervision) Legislation Amendment Bill 1995 was passed on 30 November 1995. It received Royal Assent on 16 December 1995. It amends the SRC Act to expand the jurisdiction of the Tribunal. The various amendments:

- enable the Tribunal to review and make determinations about insurers' decisions relating to death and disability benefits provided through regulated superannuation funds;
- enable the Tribunal to provide appropriate remedies where it determines that the decision of a trustee to admit a person to a fund, where that member is covered by a life policy maintained by the trustee for the purposes of the fund, was unfair or unreasonable (conduct by an insurer or representative of the insurer will be relevant for the Tribunal in making the determination in this regard);
- enable the Tribunal to review life office conduct, and decisions in relation to the sale and management of superannuation-related annuity products acquired after Royal Assent;
- allow the Tribunal to review decisions as to whether, and to what extent, a person is totally and permanently disabled, where those decisions are made by persons other than a trustee or insurer;

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<sup>16</sup> CCH Superannuation Source Materials, Report No 34 of 25 July 1994

<sup>17</sup> SCTREV Sub No 19

- exclude disability complaints where more than one year has elapsed since the decision to which the complaint relates, or 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 trustees within one year of permanently ceasing employment due to disability;<sup>18</sup>
- remove the requirement for the Tribunal to establish that a complaint has been dealt with "adequately" by the other complaint handling body;
- allow a person with a disability to be represented by an agent only where the disability is of a kind that makes such representation necessary, and that bodies corporate (like complainants) cannot have agent representation as a matter of course;
- clarify that certain provisions relating to complaints about benefit payments can only apply to complaints about death benefit payments;
- where a complaint has been made about a death benefit payment, require other persons who have an interest in the outcome of a complaint to be notified and given the opportunity to become a party to the complaint; and
- allow the appointment of a Deputy Chairperson and two additional part-time members to assist the Tribunal in dealing with the increased volume and complexity of complaints that are expected to occur following these amendments.<sup>19</sup>

4.15 Relevant areas of the proposed new legislation are discussed in the following chapter.

### **Conclusion**

4.16 The Committee recognises that jurisdiction was limited and this may have created some problems for the Tribunal in its first year. However, the Committee considers that, in some respects at least, the limited jurisdiction could, and perhaps should, have meant an opportunity to get the management settings right and systems in place while the operational demands were low.

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<sup>18</sup> This provision has now been dealt with in amended Regulation 4 of the SRC Regulations with effect from 1 November 1995

<sup>19</sup> *CCH Super News* p 37

## 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*<sup>1</sup> 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
- (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.<sup>2</sup> Subsequently, a further amendment was gazetted extending the exclusion of medical evidence complaints until 1 November 1995.<sup>3</sup> 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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<sup>2</sup> Statutory Rules No 374 of 1994

<sup>3</sup> 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'.<sup>4</sup> 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.<sup>5</sup>

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

<sup>5</sup> 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.<sup>6</sup>

### *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.<sup>7</sup> Jacques Martin stated that:

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<sup>6</sup> SISREG Sub No 22, Administrative Review Council, p 3

<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup> 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'.<sup>11</sup> 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.<sup>12</sup>

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<sup>8</sup> SCTREV Sub No 20

<sup>9</sup> Vernon, Evidence, p 110

<sup>10</sup> Evidence, p 116

<sup>11</sup> Abramovich, Evidence, p 11

<sup>12</sup> 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.<sup>13</sup>

5.26 Ms Nerida Wallace of Transformation Management suggested the use of panels are a useful way of stopping an escalation of ‘duelling panels’,<sup>14</sup> although she noted concern has been expressed in legal circles about doctors considering ‘issues of fact’ without the necessary qualification.<sup>15</sup> 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.<sup>16</sup>

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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<sup>13</sup> SCTREV Sub No 27

<sup>14</sup> Wallace, Evidence, p 172

<sup>15</sup> SCTREV Sub No 31

<sup>16</sup> SCTREV Sub No 31

- their members be paid commensurate with their other work;
- preliminary screening processes be employed where possible; and
- doctors not be required to establish facts outside their area of medical expertise.<sup>17</sup>

#### *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.<sup>18</sup>

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<sup>19</sup> and an independent chairperson, claims are determined on the basis of fairness and reasonableness and not legal precedent or legal argument.<sup>20</sup>

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.<sup>21</sup>

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<sup>17</sup> SCTREV Sub No 31

<sup>18</sup> SCTREV Sub No 12

<sup>19</sup> SCTREV Sub No 12

<sup>20</sup> SCTREV Sub No 12

<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup>

### **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.<sup>25</sup> 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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<sup>22</sup> Evidence, p 101

<sup>23</sup> Evidence, p 129

<sup>24</sup> Evidence, p 115

<sup>25</sup> SCTREV Sub No 19

determined by the Tribunal.<sup>26</sup> Mr McCutcheon of LIFA suggested that \$100 000 was an appropriate cut-off mark.<sup>27</sup>

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.<sup>28</sup>

### Conclusions

5.37 The Committee notes that 'no matter how many processes we put in place ... there is still recourse to law'.<sup>29</sup> 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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<sup>26</sup> SCTREV Sub No 29

<sup>27</sup> Evidence, p 151

<sup>28</sup> SCTREV Sub No 29

<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> 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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<sup>30</sup> SCTREV Sub Nos. 29, 27 and 23 (Supp)

<sup>31</sup> 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'.<sup>32</sup> It was Mr Abramovich's submission that the Act 'be amended to make it compulsory for trustees to give reasons for their decisions'.<sup>33</sup>

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

<sup>32</sup> Evidence, p 53

<sup>33</sup> 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’.<sup>34</sup>

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.<sup>35</sup>

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.<sup>36</sup>

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.<sup>37</sup> 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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<sup>34</sup> *Vidovic v Email Superannuation Pty Ltd*, Supreme Court (NSW), Equity Division, File No 2745/86, p11

<sup>35</sup> Evidence, p 80

<sup>36</sup> Parkinson, “Before the High Court Fiduciary Law and Access to Medical Records: *Breen v Williams*”, (1995) 17 Sydney Law Review 433 at 435

<sup>37</sup> Ibid

## CHAPTER 6

### AN INDEPENDENT CONSUMER ADVICE SERVICE

6.1 The Committee examined the evidence for and against the establishment of an independent advice service and whether such a service should be government funded.

#### **Yes please - the case for an independent consumer advice service**

##### *For consumer protection*

6.2 Throughout the evidence there was an impression of the complexity of superannuation arrangements producing confusion and an imbalance in the relationship between funds and their members. Ms Jenni Mack, former Director of Australian Federation of Consumer Organisations (AFCO), was clear in her view:

there is an obvious need for a special community based superannuation legal service. The limitations of the tribunal are obvious. It is not able to provide detailed advice to consumers and it does not provide legal representation, nor should it.<sup>1</sup>

6.3 Ms Mack indicated how the need for special legal centres had been well acknowledged and already existed in the tenancy, credit and welfare areas. She said:

Superannuation is very complex and the public is very confused about it. I think there is a need for such a service to provide advice, education, legal representation, policy advice to government and to negotiate with industry to improve its practices.<sup>2</sup>

6.4 The role of such a service in education and information was highlighted by Mr John Goldberg who considered 'the consumer elements of it have to be addressed'. He considered:

Tribunals, disputes resolution, complaints, et cetera all have that adversarial feel about them.<sup>3</sup>

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<sup>1</sup> Evidence, p 162

<sup>2</sup> Evidence, p 162

<sup>3</sup> Evidence, p 132

6.5 Educational needs were also considered by Mr Philip Noonan, Executive Director of the Federal Bureau of Consumer Affairs (FBCA). He said of superannuation:

because of its inherent complexity, consumers need not only access to information, but also assistance in interpreting that information. Ideally, that interpretation or oral advice needs to be independent.<sup>4</sup>

6.6 The FBCA recommended the establishment of a superannuation advisory service through the use of an existing consumer credit legal centre. If such a service were to be funded by government 'it could be reviewed after two years to ascertain its effectiveness'.<sup>5</sup>

6.7 Superannuation is becoming something of a specialised field with lawyers becoming important players. With the great percentage of all workers now members of superannuation funds as a result of the government's initiatives, there is a push for lower income workers to be protected. The Australian Council of Social Service (ACOSS) indicated the need for 'separate and distinct services' and said:

There are advantages in locating such services within community legal centres; which have a high profile in the local community and can provide much of the infrastructure such a service requires.<sup>6</sup>

*As a means of comparing funds*

6.8 One of the problems for members and potential members of superannuation funds is how to assess the relative performance and integrity of different funds. Where choice of fund is available to an individual, the question is then on what rational basis can the choice be made. The WA Shearing Contractors Association submitted:

if a consumer advisory service was established, it would be the ideal organisation to ensure that a mechanism to provide a uniform comparison of the performance of all superannuation funds, especially those open to the general public, could be implemented.<sup>7</sup>

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<sup>4</sup> Evidence, p 202

<sup>5</sup> SCTREV Sub No 16

<sup>6</sup> SCTREV Sub No 30

<sup>7</sup> SCTREV Sub No 8

*The last word - from a consumer*

6.9 Given the potential complexity of a superannuation dispute it was put to the Committee that assistance from a specialist legal service was considered appropriate:

A private Lawyer at \$180.00 per hour is not a viable option.<sup>8</sup>

**No thanks - the case against an independent consumer advice service**

6.10 The Insurance and Superannuation Commission (ISC) did not consider such a Government funded service to be 'necessary or desirable'. It submitted two 'administrative and policy reasons for this view'.<sup>9</sup> First, it considered such a service could jeopardise the ability of the Tribunal to operate as a fair, economical, informal and quick disputes resolution mechanism as it is required to do under the Act. Lawyers from such a service would apply pressure to represent complainants before the Tribunal according to the ISC. It said:

This could make the SCT more legalistic in its approach and expanded members of staff would be needed to interpret complex legal submissions. The result would be a Tribunal that is slow, expensive, formalistic and unlikely ... to produce outcomes that are any fairer.<sup>10</sup>

6.11 Secondly, the ISC pointed to the 'range of administrative measures to assist consumers in making complaints' already put in place by the Government. These measures were listed as:

- the obligation imposed on the Tribunal (section 16 of the Act) to assist persons in making a complaint (for example the Tribunal assists persons in putting their complaint in writing);
- the Tribunal provides an interpreter service where necessary;
- the Tribunal can be rung from anywhere in Australia for the cost of a local call;
- regional offices of the ISC can assist people wanting to make complaints to the Tribunal;

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<sup>8</sup> SCTREV Sub No 34

<sup>9</sup> SCTREV Sub No 17

<sup>10</sup> SCTREV Sub No 17

- the existence and functions of the Tribunal are required to be disclosed to all members on joining a fund and each year in annual statements;
- the ISC and the Tribunal are conducting a joint educational campaign about the Tribunal (including advertising in community newspapers);
- the Tribunal has distributed over 32,000 copies of its publication on how to lodge complaints; and
- there is no application fee for lodging a complaint with the Tribunal and no costs are charged to the member or the fund.<sup>11</sup>

6.12 The ISC considered the Tribunal and its secretariat can be relied upon to provide accurate and impartial assistance in resolving complaints.<sup>12</sup>

6.13 Mr Mikula, who at the time of the inquiry was the only community lawyer with the specific brief of superannuation, responded to the ISC's assertion that it could assist complainants. He told the Committee that 'the ISC has already approached me to see where and how it can refer people to me where it is basically unable to assist them'.<sup>13</sup>

6.14 Perhaps the best summary of the ISC case was put by its Commissioner, Mr George Pooley, when he said the 'formal, adversarial and selective approach of a consumer legal service is in contrast to the Tribunal's charter to be informal, quick and low cost'. He continued:

The tribunal is intended to provide an alternative to legal avenues, not an extension of them. In effect, consumer legal services seek to uncover and litigate disputes in a selective manner, while the intention with an informal complaints handling body is, ultimately, to encourage better industry practices so that disputes do not arise in the first place or else are resolved through internal processes.<sup>14</sup>

#### *Additional bureaucracy*

6.15 Always a legitimate question when proposing additional government funded bodies is the potential for increasing the administrative complexity of a situation for no added value. UniSuper considered that an independent advisory

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<sup>11</sup> SCTREV Sub No 17

<sup>12</sup> SCTREV Sub No 17

<sup>13</sup> Mikula, Evidence, p 70

<sup>14</sup> Evidence, p 191

service should not be established regardless of the source of funding. It submitted:

A fourth bureaucracy, alongside the ISC, SCT and ATO, would add to the confusion about superannuation which has already been observed in the community.<sup>15</sup>

6.16 UniSuper considered the boundaries between superannuation and other financial services as blurred. Accordingly, 'any consumer service should refer to all financial services'.<sup>16</sup>

#### *The Tribunal in the advisory role*

6.17 The role of the Tribunal in providing advisory services to people was alluded to by the ISC in evidence discussed earlier in this chapter. However, that tends to be only at the stage when people are ready to lodge a complaint against a fund. It was suggested that the Tribunal could play the role of a consumer advice centre in the way that 'equal opportunity tribunals around the country have a similar sort of role'.<sup>17</sup>

6.18 The Law Society of New South Wales submitted that the Tribunal was 'not an appropriate body to provide legal advice to consumers given its functions'.<sup>18</sup> It submitted:

The Tribunal is there to determine rights between parties, and it would detract from its public standing if it were to agitate on behalf of one party.<sup>19</sup>

#### *The final word - from a lawyer*

6.19 Mr George Raitt is a partner in the legal firm of Blake Dawson Waldron, a superannuation lawyer and a mediator accredited with the Australian Commercial Disputes Centre in Sydney and the Law Institute of Victoria. Mr Raitt submitted that an independent superannuation advisory service would be:

an unnecessary expense ...[given] ... the focus of SIS upon internal complaints handling procedures and review by the Tribunal.<sup>20</sup>

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<sup>15</sup> SCTREV Sub No 6 (Supp)

<sup>16</sup> SCTREV Sub No 6

<sup>17</sup> Paatsch, Evidence, p 118

<sup>18</sup> SCTREV Sub No 10

<sup>19</sup> SCTREV Sub No 10

### **The role of the service**

6.20 It was submitted that a specialised superannuation consumer advisory service should operate within the current structures.<sup>21</sup> The existing legal advice structures are the private legal sector and the community legal service sector. Representatives from both of these sectors supported an advisory service.<sup>22</sup>

6.21 In response to the ISC's concern that such a service might make the Tribunal too legalistic, the community legal sector submitted that what the advisory service would provide would be:

ongoing support to people who were able to represent themselves ... [who] might ring up for advice occasionally or need to be told what documents to collect or to discuss particular issues that arise within those documents.<sup>23</sup>

6.22 It was also put to the Committee that in cases where legal argument is needed, 'the Tribunal clearly would benefit by having them properly argued before it'.<sup>24</sup>

6.23 ACOSS envisaged the role of such services extending to 'information provision and education about consumer rights, as well as individual casework with clients who have complaints'.<sup>25</sup>

### **Should the Commonwealth government fund such a service?**

6.24 If the decision is made to establish an independent advisory service, the Commonwealth's 'policy decision to promote superannuation as the vehicle for national savings' provides a strong argument for government funding of advice services for consumers.<sup>26</sup>

6.25 Certainly the industry would be particularly unhappy with funding such a service.<sup>27</sup> ASFA commented on a proposal to establish an industry-funded legal centre to redress the imbalance between consumers and superannuation

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<sup>20</sup> SCTREV Sub No 33

<sup>21</sup> Mikula, Evidence, p 65

<sup>22</sup> Mikula, Evidence, p 65; Goldberg, Evidence, p 132

<sup>23</sup> Mikula, Evidence, p 65

<sup>24</sup> Mikula, Evidence, p 65

<sup>25</sup> SCTREV Sub No 30

<sup>26</sup> SCTREV Sub No 10

<sup>27</sup> Lockery, Evidence, p 35



trustees. It said there was 'no merit' in requiring funds to support another organisation as they already finance the Tribunal, and added:

If there are any shortcomings in the roles of the SCT it would be much better to extend its function than to require funds to support another body ...<sup>28</sup>

6.26 The Committee concurs with the comments of John Berrill, a partner in the legal firm of Maurice Blackburn & Co:

It is our experience that there is much public ignorance and misunderstanding of superannuation. Many fund members are unaware of their rights and benefits. For example many are unaware of their entitlements to claim death and disability benefits and are confused as to their avenues of complaint.<sup>29</sup>

6.27 While undoubtedly there is more information available as a result of the current 'prudential regime',<sup>30</sup> the Committee agrees with Mr Berrill that:

there is still a significant information gap which an independent superannuation advice service would assist in addressing.<sup>31</sup>

## Conclusions

6.28 The Committee considers there is a case for a limited government funded superannuation consumer advice service and proposes that it operate out of existing community legal or credit advice centres. The Committee believes the track record of the funds is not yet at a satisfactory level, and this combined with the compulsory and complex nature of superannuation arrangements, is sufficient justification for the establishment of such a service.

6.29 A concern of the Committee is that such a service needs to be contained. That means a restricted service to the individual service users, generally limited to two appointments, and restricted to advice and information only; not for the running of cases before the Tribunal or elsewhere.

6.30 The Committee believes that over time people will become more aware of their superannuation rights and entitlements through the education and information programs of the ISC and other bodies. Therefore, the Committee

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<sup>28</sup> SCTREV Sub No 15 (Supp)

<sup>29</sup> SCTREV Sub No 28

<sup>30</sup> SCTREV Sub No 28

<sup>31</sup> SCTREV Sub No 28

advocates the life of the advisory service outlined in the above two paragraphs be limited to two years, at which time a further assessment of the advisory needs of superannuation members would be made. At that time, the government must review the experience of this type of educational advice and assess whether it is adequate.

**Recommendation 6.1:**

**The Committee recommends that a limited government funded superannuation consumer advice service be established within the existing community legal or credit advice centres; that there be a general limit of two appointments for each client; and that the service be restricted to providing advice and information only and not extend to the running of cases before the Tribunal. The Committee further recommends that this arrangement be reviewed after two years and an assessment as to its adequacy be made at that time.**

## **APPENDIX A**

### **LIST OF WRITTEN SUBMISSIONS**

No 1	Superannuation Consumer Coalition (Syd)
No 2	Louise Wood-Bradley (Melb)
No 3	Consumer Credit Legal Service (Melb)
No 4	Australian National Audit Office (ACT)
No 5	Mr David Thornton (Qld)
No 6	Unisuper (Melb)
No 7	Dr Shane S Stark (Qld)
No 7A	AMP Society (NSW)
No 8	WA Shearing Contractors Association (WA)
No 9	Legal Aid Commission of New South Wales (Syd)
No 10	Law Society of New South Wales (Syd)
No 10 Supp	Law Society of NSW
No 11	Trustee Corporations Association (Melb)
No 12	Construction + Building Unions Superannuation (C+BUS) (Melb)
No 13	Barker Gosling Legal Group (Syd)
No 14	Australian Taxation Office (Cth)
No 15	Association of Superannuation Funds of Australia (Syd)
No 15 Supp	Association of Superannuation Funds of Australia Ltd (Syd)
No 16	Federal Bureau of Consumer Affairs
No 17	Insurance and Superannuation Commission (Cth)
No 17 Supp	Insurance and Superannuation Commission (Cth)
No 18	Australian Retirement Funds and others
No 19	Superannuation Complaints Tribunal (Vic)
No 19 Supp	Superannuation Complaints Tribunal (Vic)
No. 20	Jacques Martin Industry (Vic)

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No 21	Andrew Fairley and Associates (Vic)
No 22	Consumer Credit Legal Service & Others (NSW)
No 22 Supp	Consumer Credit Legal Service (NSW)
No 23	Seafarers Retirement Fund Pty. Limited (Vic)
No 23 Supp	Seafarers Retirement Fund Pty Limited (Vic)
No 24	Australian Society of Certified Practising Accountants (Vic)
No 25	Investment Funds Association of Australia Limited (NSW)
No 26	Australian Federation of Consumer Organizations (ACT)
No 27	Australian Institute of Superannuation Trustees (Vic)
No 28	Maurice Blackburn & Co (Vic)
No 29	Life Insurance Federation of Australia Inc (LIFA) (Vic)
No 29 Supp	Life, Investment & Superannuation Association of Australia Incorporated (LISA) (Vic)
No 30	Australian Council of Social Service (ACOSS) (NSW)
No 31	Transformation Management Services (Vic)
No 32	Mr Larry Rees (ACT)
No 32 Supp	Mr Larry Rees (ACT)
No 32A	British Aerospace (SA)
No 33	Mr George D Raitt (Vic)
No 34	Mrs Vivienne Lynn (SA)
No 35	Mr R A Poole (NSW)

## **APPENDIX B**

### **LIST OF WITNESSES AT PUBLIC HEARINGS**

#### **SYDNEY, 9 AUGUST 1995**

Mr Mark Abramovich, Associate, Barker Gosling Legal Group

Mr Noel Davis, Member, Superannuation Committee, Law Council of Australia

Mr Peter Hutley, Executive Director, Investment Funds Association of Australia

Mr Peter Kell, Senior Policy Officer, Australian Consumers Association

Mr Kenneth Lockery, Federal President, Association of Superannuation Funds of Australia

Mr Christian Mikula, Solicitor, Consumer Credit Legal Centre

Mr John Moratelli, Legal Officer, Legal Aid Commission of New South Wales

Mr Ben Slade, Manager, General Law, Legal Aid Commission of New South Wales

#### **MELBOURNE, 10 AUGUST 1995**

Mr Anthony Ashton, Secretary, Seafarers Retirement Fund

Mr John Berrill, Partner, Maurice Blackburn & Co

Ms Ellen Cardiff, Executive Director, Superannuation Complaints Tribunal

Mr Colin Cassidy, Manager, National Claims and Insurance, Jacques Martin Industry

Mr John Goldberg, Andrew Fairley and Associates

Ms Helen Hewett, Deputy Fund Secretary, Construction and Building Unions Superannuation Fund

Mrs Sonia Nolan

Mr Dean Paatsch, Executive Officer, Australian Institute of Superannuation Trustees

Mr Ian Proctor, Director, Consumer Credit Legal Service

Ms Mavis Robertson, Fund Secretary, Construction and Building Unions Superannuation Fund

Mr David Vernon, Manager, Market Development and International, Jacques Martin Industry

Mr William Wilkinson, Chairperson, Superannuation Complaints Tribunal

**CANBERRA, 24 AUGUST 1995**

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

Ms Jenni Mack, Australian Federation of Consumer Organisations

Mr John McCutcheon, Life Insurance Federation of Australia

Mr Lawrence Rees

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

**CANBERRA, 28 AUGUST 1995**

Ms Nerida Wallace, Principal, Transformation Management Services

Ms Ellen Cardiff, Executive Director, Superannuation Complaints Tribunal

Ms Amanda Doherty, Senior Officer Grade C, Federal Bureau of Consumer Affairs

Mr Roger Freney, First Assistant Commissioner, Superannuation, Insurance and Superannuation Commission

Mr John Larkin, Director (Policy), Policy, Legal and Actuarial Group, Insurance and Superannuation Commission

Ms Janet Murphy, Assistant Secretary, Access, Education and Finance Branch, Federal Bureau of Consumer Affairs

Mr Philip Noonan, Acting Executive Director, Federal Bureau of Consumer Affairs

Mr Frederick Pooley, Commissioner, Insurance and Superannuation Commission

Mr William Wilkinson, Chairperson, Superannuation Complaints Tribunal





## APPENDIX C

### LIST OF COMMITTEE REPORTS

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

Papers relating to the Bymwood 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)

Fourteenth Report of the Senate Select Committee on Superannuation - *Super Regs II* (November 1994)

Fifteenth Report of the Senate Select Committee on Superannuation - *Super Guarantee - Its Track Record* (February 1995)

Sixteenth Report of the Senate Select Committee on Superannuation - *Allocated Pensions* (June 1995)

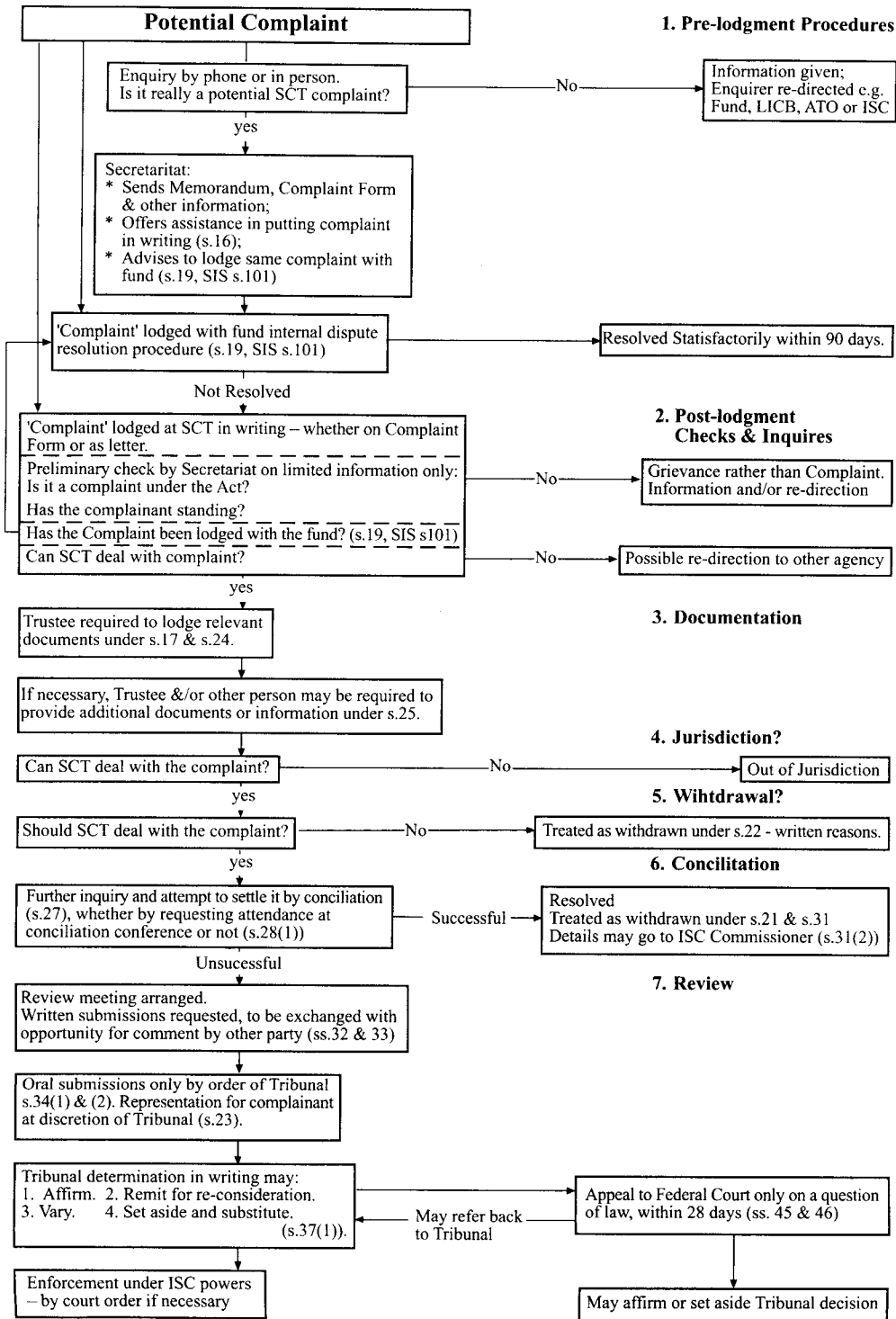
Seventeenth Report of the Senate Select Committee on Superannuation - *Super and Broken Work Patterns* (November 1995)

Eighteenth Report of the Senate Select Committee on Superannuation - *Superannuation  
Complaints Tribunal Review* (April 1996)



# APPENDIX D

## COMPLAINT PROCEDURE



Adapted from: SCTREV Sub. No. 19 (Supp.)

