
CHAPTER 16:

ISSUES: THE COMPLAINT

Reviewable Decisions

16.1 In its sixth report the Committee noted that a small minority of consumer complaints were so serious that they constitute serious and wilful malpractice on the part of a very small number of participants in the industry. Accordingly, the Committee recommended that the proposed Tribunal adjudicate on consumer complaints arising out of personal superannuation contracts entered into after 1 July 1992, the date of commencement of the compulsory superannuation arrangements, where these have not been resolved at the company or industry level⁹⁴.

'Retrospectivity'

16.2 It was noted in paragraph 15.4 above that decisions of trustees made either before or after the commencement of the *Superannuation (Resolution of Complaints) Act* will be reviewable, unless otherwise excluded. This provision was one of a number of amendments to the SIS Bill successfully moved by the Government in the House of Representatives. The amended provision reads:

"Complaints

14(1) This section applies if the trustee of a fund has made a decision (**whether before or after the commencement of this Act**) in relation to:

- (a) a particular member....
- (b) a particular beneficiary...."

(The amendment is shown in bold type.)

⁹⁴ *Super - Fees, Charges and Commissions*, June 1993, paragraphs 3.85 and 3.9

16.3 Concerns have been raised by industry organisations that this provision could create a double liability for trustees who have made and acted upon decisions in relation to the payment of some benefits. For example, in the case of a death benefit where a number of parties are claiming to be entitled to the benefit, and the trustee has made a decision as to who is entitled to the benefit, and has made the payment accordingly.⁹⁵ If the Tribunal determined that a different person was the beneficiary, the trustee would be required to make a payment to that person and then attempt to recover the money it initially paid out.

16.4 It was also submitted that 'trustees have historically been advised not to enter reasons for their decision making processes, or the documents upon which they have relied, into their minutes'.⁹⁶ Trustees therefore may be required to enter into the dispute resolution process with no record of why the decision was so made and having forgotten the reasons that the decisions were taken. Although this may be so in some practices, the Committee accepts the submission of Mr Noel Davis that the common law requires principles of natural justice to be applied by trustees when they make decisions⁹⁷, for example, in respect to disability claims. In support of his submission, Mr Davis cited a decision of the New South Wales Supreme Court, *Chammas v Harwood Nominees Pty Ltd*⁹⁸. The Committee does not accept that past poor practices by trustees are sufficient reason to deny a complainant access to the Tribunal.

16.5 However, in some circumstances, it may be that where a decision has been made by a trustee, prior to the commencement of the *Superannuation (Resolution of Complaints) Act*, in respect to the issue of who is entitled to the payment of a benefit, that the Tribunal should not have the jurisdiction to review **that** decision. This would arise only in circumstances where more than one party is claiming the benefit **and** where the benefit has been paid by the trustee. The Tribunal would retain the jurisdiction to review decisions in respect of complaints made by the person who has been determined by the trustee to be the beneficiary. The Tribunal would retain the power to review decisions of trustees where a benefit has not been paid or where only

⁹⁵ William M Mercer Pty Ltd, SIS Sub No 72
Andrew Fairley & Associates, SIS Sub No 91

⁹⁶ Andrew Fairley & Associates, *op cit*, covering letter, p 2.

⁹⁷ Evidence p 104, 106

⁹⁸ (1993) 7 ANZ Insurance Cases 61-175.

one party is claiming to be the beneficiary, that is, where there is no risk of a trustee being liable to pay out a benefit twice.

Recommendation 16.1

The Committee recommends that the Government regulate to exclude from the Complaints Tribunal those matters involving trustee decisions, made prior to the commencement of the Superannuation (Resolution of Complaints) Act, as to who is entitled to a benefit which has already been paid.

16.6 The legislation does not allow decisions of trustees going back for many years to be heard by the Tribunal. The Bill provides a discretion for the Tribunal to consider complaints relating to decisions of trustees made more than 12 months prior to the complaint, but generally there is a 12 month cut-off.⁹⁹ The Committee supports this component of the Bill.

Non Reviewable Decisions: Excluded Complaints

Introduction

16.7 It was noted above in paragraph 15.5 that complaints relating to certain funds and matters will be excluded from the Tribunal's jurisdiction. The Government has stated that complaints relating to questions of disability will be prescribed by regulation to be excluded from the Tribunal's jurisdiction.¹⁰⁰ There was some concern that complaints relating to life office personal superannuation disputes may also be excluded however, the ISC stated that '[t]he Government has said that the Tribunal is going to hear those sorts of complaints'.¹⁰¹

⁹⁹ ISC, evidence p 190

¹⁰⁰ Attachment to Treasurer's press release of 27 May 1993, section 8, p 10

¹⁰¹ Evidence p 187

The debate surrounding the 'medical cases'

16.8 The Committee has received many submissions that express concern about the proposed exclusion of complaints involving medical issues. The consumers' concern is that if these type of complaints are excluded, the complainants, in reality, will have no forum in which to have their complaint heard. The Committee has also received submissions concerned that disability claims would 'potentially overwhelm the Tribunal' so that 'the Tribunal's time ... would be taken up in dealing with those matters rather than the other sorts of matters which are envisaged to come before the Tribunal'¹⁰².

Complaints involving medical issues - what are they about?

16.9 The types of complaints that are relevant to this debate are disability claims.¹⁰³ Within this genre of complaint three issues are normally disputed or potentially open to dispute, namely:

- whether the trustees have followed the correct procedures in reaching a decision, rather than, for example, having their decision dictated by the insurer;
- the definition of 'disability' in the trust deed; and
- the medical evidence.¹⁰⁴

16.10 The Committee did not receive any statistical evidence in relation to the proportion of disputes in each category. However, Mr Davis advised that 'the majority of the disputes are over procedures and whether principles of natural justice and so on are applied'. He further stated that disputes over medical evidence form the minority of disputes.¹⁰⁵

¹⁰² Mr Lockery, ASFA, evidence p 89

¹⁰³ ASFA, evidence pp 89-90
Mr Davis, evidence p 103ff

¹⁰⁴ *ibid*

¹⁰⁵ Davis, *op cit*, p 109

Correct Procedures

16.11 In discussing 'correct procedures', the Committee is referring to the principles of procedural fairness which, as it was noted earlier, trustees are required to observe. As noted above, the majority of disputes relate to procedural fairness in trustee decision making.

16.12 In a submission from Ms Sonia Nolan, who has been involved in a disablement dispute with a trustee, a number of the matters that can become the subject of a such a dispute were identified. These included allegations relating to procedural fairness, namely, the lack of consideration given by a trustee to a member's treating doctors' reports and the disproportionate reliance given to a trustee's doctors' reports; as well as inconsistencies in the definitions of total and permanent disability in the trust deeds and the 'group life policy'; and the prohibitive expense involved with taking action in a court.¹⁰⁶

16.13 In responding to the Committee's inquiry as to the types of procedures that might not be correctly followed, Mr Davis stated that members could be denied the opportunity to respond to an adverse medical report that trustees have obtained and based their decision upon. Evidence was also received that it is not uncommon for trustees to rely upon the decision of the insurer rather than making an independent decision. It was brought to the Committee's attention that there is expert evidence to this effect in a case that came before the New South Wales Industrial Court last year, *Fernance v Wreckair*¹⁰⁷.

16.14 It is the trustee who is required to make the decision as to whether or not a member is disabled under the trust deed. To rely on the decision of the insurer, the trustee as the decision-maker is allowing itself to be dictated to, which in administrative law is a ground for review. It was submitted that 'the Complaints Tribunal can have an important role to play in ensuring that the trustees have followed the correct procedures and done all that they should have done in deciding whether a member is permanently and totally disabled'.¹⁰⁸

¹⁰⁶ SIS Sub No 13

¹⁰⁷ Unreported, Industrial Court (NSW), 21 September 1992. Davis, evidence, p 104

¹⁰⁸ *ibid*, Davis, p 105

Definition of 'disability' in the trust deed

16.15 The relevance of the meaning of the term 'disability' in the trust deed is something that is rarely considered by a consumer until a claim is made. It appears that the term is not used consistently in the industry, rather the deed defines its meaning. Consequently, disputes as to the meaning assigned to the term in any particular deed are a common form of dispute between trustees and consumers. These disputes do not involve the issue of whether a person is disabled, or to what degree they are disabled, but rather involve the interpretation of the term used in the deed. This issue does not involve medical evidence. The ISC believes that this problem is something that will diminish significantly over time.¹⁰⁹

16.16 Notwithstanding the ISC's hope that this problem will diminish over time, the Committee has given consideration to whether this is the type of matter that should come before the Tribunal. The arguments that have been raised for the exclusion of certain matters from the Tribunal's jurisdiction do not seem to apply to this category of complaint.

16.17 The ISC is also aware of the problem where the trust deed has one definition of disability but the insurance contract has a different one. Mr Duval, the Australian Government Actuary, stated that this is a 'process' problem. He also stated that it is quite dangerous for the fund and that it is an issue that the ISC is aware of in conducting audits.¹¹⁰

Medical Evidence

16.18 As noted above, no statistical data was provided to the Committee, however, Mr Davis stated that disputes over medical evidence comprise a minority of disputes.¹¹¹

16.19 It is this category of 'medical dispute' that has attracted allegations of potentially swamping and overworking the fledgling complaints resolution system. In disputes of this nature each party would come armed with its medical expert(s) who would give evidence in support of that party's case.

¹⁰⁹ Evidence p 188

¹¹⁰ *ibid*

¹¹¹ Evidence p 109

That evidence would then be able to be tested by questions from the opposing party and from the Tribunal.

Options

Tribunal to examine procedural matters in medically related complaints

16.20 The Committee notes that the regulations may exclude all of a complaint or only certain parts of a complaint involving 'excluded matters'. In this way, the Tribunal could hear the part of a complaint relating to the procedure of the decision (or the interpretation of 'disability,') but be excluded from determining issues involving medical evidence. Therefore one option is to permit the Tribunal to accept complaints involving medical issues for the purpose of ensuring that the decision had been made in accordance with the principles of procedural fairness. Where the Tribunal finds that the principles of procedural fairness have not been applied, the Tribunal could use its power pursuant to section 37 of the *Superannuation (Resolution of Complaints) Act* to remit the matter to the trustee for reconsideration in accordance with the Tribunal's directions.

16.21 It was acknowledged by the ISC that it could examine the possibility of whether the Tribunal could deal with those sorts of cases where the mechanism has gone wrong, for example if the trustees had not actually considered the case, where they had just taken out disability insurance, passed the case on to the insurance company that rejected it, and not looked at the case itself. The Committee endorses the Commission's agreement to examine this possibility.

16.22 Mr Duval submitted to the Committee that due process issues should be filtered out in the conciliation stage.¹¹² This appears to the Committee to be an excellent reason to allow complaints involving medical issues to come within the jurisdiction of the Tribunal, at least to the stage of determining whether or not natural justice has been observed, with the power to remit the matter to the trustee with directions.

¹¹² Evidence p 186

16.23 The power to remit matters to the trustees with directions exists under clause 37(1)(b) of the Bill. Mr Duval stated, 'that power is there for due process issues, where the trustees have decided that something is irrelevant which the Tribunal feels is very strongly relevant'¹¹³. It appears to the Committee that in matters where procedure is being examined, it is irrelevant as to whether the substantive nature of the claim is a 'medical issue' or otherwise.

Tribunal to examine all complaints involving medical issues

16.24 Where the Tribunal is satisfied that a decision has been made by a trustee in accordance with the rules of natural justice, the issue arises as to whether the Tribunal should review the substantive issues, that is, the medical evidence.

16.25 It was submitted to the Committee that the Tribunal is an equally good position as a court to be able to decide this sort of issue. It was further submitted that the Tribunal would be in a particularly good position to conciliate and decide these matters if the Tribunal was constituted to include a member with medical training.¹¹⁴

16.26 It was submitted to the Committee that:

it is incongruous that a low cost tribunal that is being established to resolve disputes should not be available to resolve disputes where a member is normally unemployed, in a weak financial position and therefore ordinarily unable to take issue with an adverse decision that in the end result has a dramatic effect on the lives of the people involved¹¹⁵,

and further that disability disputes are 'the very sort of thing that this Tribunal ought to exist for.'^{116 117}

¹¹³ Evidence p 186

¹¹⁴ Davis, evidence p 105

¹¹⁵ *ibid*, p 107

¹¹⁶ *ibid*, p 109

¹¹⁷ see also:

Consumer Credit Legal Service (Vic) and Consumer Credit Legal Centre (NSW), SIS Sub No 53
Australian Federation of Consumer Organisations, evidence p 204-205

16.27 The Australian Consumers' Association submitted that it could see no reason why a superannuation complaints tribunal should not be able to hear medical cases. It noted that the trustees are not medical experts and this does not prevent trustees from making decisions. It submitted that the Tribunal could call on medical experts in the way that a court can do.¹¹⁸

16.28 The concept of the Tribunal having access to a medical advice panel was mooted by the Committee. This idea was put to Mr Davis as an alternative to appointing medically qualified members to the Tribunal should the Tribunal have the jurisdiction to hear 'medical complaints'. Mr Davis regarded this as a good alternative.¹¹⁹

Complaints involving medical issues to be excluded from procedural and substantive review

16.29 The Bill allows cases involving these types of complaints to be excluded from the Tribunal's jurisdiction by way of prescribing 'excluded complaints' and 'excluded matters' pursuant to the regulation making provision. The Government has made statements indicating that 'disability cases' will be excluded. In the course of the Committee's inquiry, the type of cases that fall into the 'disability cases' category were more clearly defined. These sub-categories of 'disability cases' have been outlined above. It has become clear to the Committee in the process of carefully examining the sub-categories of 'disability cases' and eliciting evidence in relation to each of these categories that the arguments for excluding 'disability cases' do not apply to all of the sub-categories.

Alternative forums for these complainants

16.30 The Committee explored possible alternative forums for complainants in 'disability cases'. When asked to address the issue of people who have complaints about disability having 'nowhere left to go', the ISC acknowledged that 'there are problems at the moment with the resolution of medical disputes'¹²⁰.

¹¹⁸ Mr R Drake, ACA, evidence p 161

¹¹⁹ Davis, op cit, p 109

¹²⁰ Evidence p 187

16.31 The Committee asked other witnesses of possible alternative forums. Mr Davis submitted that an alternative forum 'does not readily come to mind'¹²¹ and Mr Robert Drake of the Australian Consumers' Association gave evidence that the current alternative of going to court is really no option at all.¹²²

Floodgates?

16.32 Mr Davis submitted that in his experience it would not be the case that a majority of disputes would be of the nature of disability disputes although it is quite a common dispute.¹²³ He further submitted that, in his experience, by allowing disability claims before the Tribunal the floodgates would not open.

16.33 In response to questioning by the Committee on the issue of the floodgates problem, Mr Drake (ACA) submitted that the floodgates issue manifests as a result of problems with how complaints are handled, rather than as a result of delay.¹²⁴

16.34 With respect to permanent disability cases, Mr Pooley, Commissioner, ISC, was of the view that anybody who received an adverse decision from a trustee would not be satisfied and would go to the Tribunal. He submitted that if these cases were to be heard by the Tribunal it would be 'pretty swamped by all of those people and that would give it an awful lot of extra work'.¹²⁵ No data was provided in support of these claims.

Recommendation 16.2:

The Committee recommends that the Government not exclude from the Tribunal's jurisdiction, the parts of a complaint involving issues of procedural fairness and the legal interpretation of the term 'disability' in a deed.

¹²¹ Davis, p 109

¹²² Evidence p 160

¹²³ Evidence p 108

¹²⁴ Evidence p 162

¹²⁵ Evidence p 185