Inquiry into the life insurance industry

Submission #1 – The Regulators

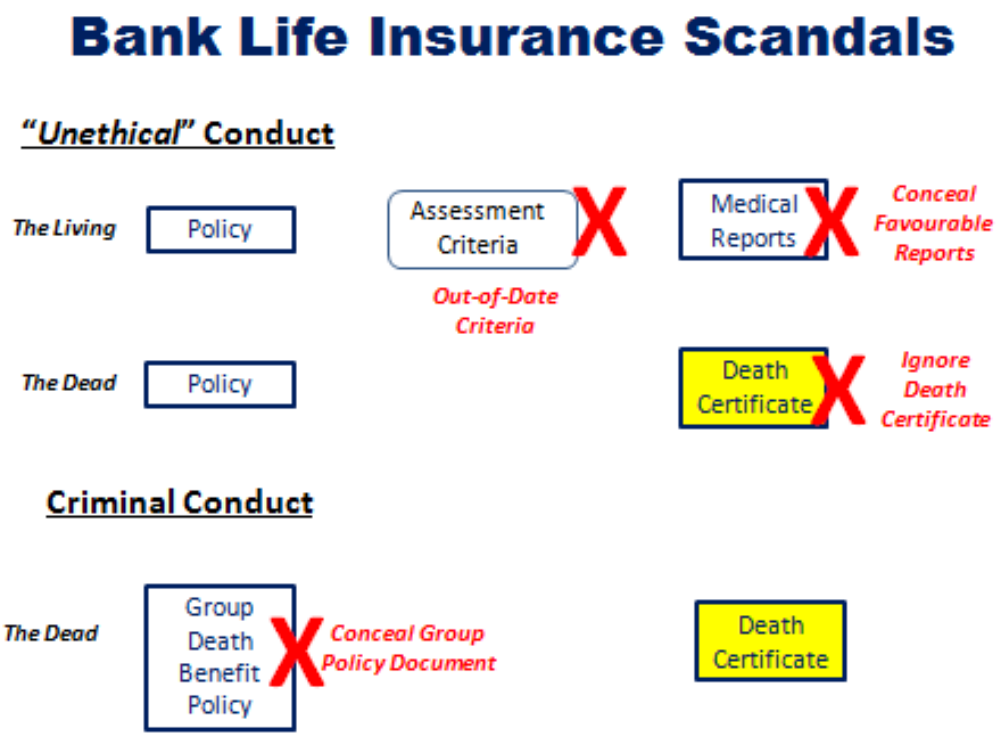
Introduction

Submission #1 will focus on aspect (f) of the terms of reference:

f. the roles of the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority in reform and oversight of the industry;

The inquiry being conducted by the **Parliamentary Joint Committee on Corporations and Financial Services** is being run concurrently with investigations being conducted by the Conduct Regulator – ***ASIC*** and the Prudential Regulator – ***APRA.***

There are two types of malfeasance associated with life insurance products as illustrated on the following diagram.



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Malfeasance can involved what might be described as "*unethical*" conduct where there is no dispute that a policy providing life insurance coverage exists, however what is otherwise a valid claim is rejected by the utilisation of *out-of-date* assessment criteria and/or the concealment of favourable medical reports from the final assessment panel.

This type of malfeasance has received extensive media coverage. Such conduct may be *unethical* but it does not amount to criminal conduct under current legislation.

However there is another form of malfeasance that amounts to criminal conduct where a group life insurance policy document is concealed not only from persons who have coverage under the policy but from the Regulators as well.

To understand how the second type of criminal malfeasance can occur, it is necessary to understand how insurance coverage can be obtained.

Life Insurance Coverage

Life insurance coverage can be obtained either directly from a life insurance company or via membership of a superannuation fund.

Since superannuation has been compulsory for all working Australians since 1992, the second type of coverage has become more important compared to obtaining coverage directly.

However there is an important difference in the legal framework between these methods.

If life insurance coverage is obtained directly then there are only two parties involved; the policy holder and the policy provider. Both parties will exchange contracts and the policy holder will have evidence of his or her coverage and the terms and conditions of the policy.

However where superannuation coverage is obtained via membership of a superannuation fund, there are three parties involved: the fund members, the trustee of the fund and the policy provider.

The trustee and the policy provider will exchange signed copies of the policy contract.

In the case of ***Defined Benefit*** fund, the trustee can also elect to self-insure. This often occurs when the common asset pool of the fund has accumulated a substantial actuarial surplus after many years of operation.

Where life insurance coverage is via superannuation fund membership, the fund member must make a written request to obtain a copy of the group life insurance policy document.

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However what happens if the fund member is unaware that the group life insurance coverage exists?

A trustee might either negligently or deliberately fail to advise members of the fund as well as beneficiaries such as widows of the existence of the group life insurance coverage.

To prevent people falling victim to this type of negligent or dishonest conduct, the Parliament enacted the ***Superannuation Safety Amendment Act 2004*** which amended the ***Superannuation Industry (Supervision) Act 1993 (SIS Act).***

These amendments empowered the Regulator ***APRA*** to license the trustees of large superannuation funds as well as empowering ***APRA*** to register the funds themselves.

Section 29L of the (***SIS Act***) requires trustees to lodge a copy of the Trust Deed that established the superannuation trust (fund) with ***APRA*** along with copies of all documents that form the "***governing rules***" of the fund so that ***APRA*** can register the fund.

If a fund provides life insurance coverage for members and their dependents then the type and scope of the coverage will be covered in the "***governing rules***". If the life insurance coverage is either by self-insurance or by out-sourcing then the method should be defined in the ***governing rules*** since a trustee commits a breach of trust if the trustee does not obey the ***governing rules*** of the fund.

Concealment of a Group Death Benefit Policy Document

The Chairman of ***ASIC***, , has been provided with a copies of two group death benefit policy documents attached to a letter dated 12 October 2016 (*Received 14 October 2016*).

Regulation 30A in the group policy document dated 20 November 1974 provides death benefits in the form of a survivorship pension to the widows of qualifying male fund members of an occupational pension scheme established by a Trust Deed executed on the 23 December 1913 in the State of South Australia.

Regulation 30A was added to the Regulations of this occupational pension scheme by a Deed of Variation executed on the 20 November 1974. Any earlier pension benefit was provided by a Deed of Variation dated 18 January 1955 which has been independently confirmed by a Select Committee of the Legislative Council of South Australia. Details of this have also been provided to the Chairman of ***ASIC***.

This group death benefit policy document was criminally concealed from the Regulator – ***APRA*** during the fund registration process in 2006.

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Evidence of this criminal concealment has been obtained under the ***Freedom of Information Act 1982*** and has been provided to the Office of the Solicitor-General so that the evidence and any legal opinion will be available to the Chair and the Committee Members.

The fund members, their wives and widows were not advised on the existence of this group death benefit policy document and the document was criminally concealed from members and wives who made inquiries as to what was included in the ***governing rules*** of the fund.

The Defined Benefit fund established in 1913 was not closed to new members until 30 November 1997.

Therefore there will be widows still alive until around 2060 to 2070 entitled to a death benefit under the policy documents that have been provided to the Chairman of ***ASIC***.

ASIC "*Review*"

The **Report 498 – Life insurance claims: An industry** is a preliminary report by ***ASIC*** which has covered a number of life insurers.

One of the insurers on this list became responsible for the payment of the death benefits to widows from 20 January 2014.

Table 1: Insurers covered in ASIC's review

Company	Company
• AIA Australia Limited	• MLC Limited
• Allianz Australia Life Insurance Limited	• OnePath Life Limited
• AMP Life Limited	• St Andrew's Life Insurance Pty Ltd
• Clearview Life Assurance Limited	• Suncorp Life & Superannuation Limited
• Colonial Mutual Life Assurance Society Limited	• TAL Life Limited
• Hannover Life Re of Australasia Ltd	• Westpac Life Insurance Services Limited
• Macquarie Life Limited	• Zurich Australia Limited
• Metlife Insurance Ltd	

In Paragraph 107 of the **Report 498 – Life insurance claims: An industry** notes that **ASIC** is undertaking work related to "**Insurance in Superannuation**" which includes:

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(b) *Effective disclosure project*—This project reviews disclosures by superannuation fund trustees to fund members, including disclosures such as significant event notifications, PDSs, and written reasons for decisions about insurance claims, and involves aspects of disclosure to members about insurance.

Members of the fund in question are currently attempting to obtain additional documents from the party on the list above relating to a purported "***successor fund transfer***", the importance of which has been highlighted in a recent judgement of the NSW Court of Appeal.

Progress of this attempt to obtain these documents will be covered in a future submission.

It is a criminal offence in its own right to conceal the documents that are being sought.

There is an interesting historical aspect of this case and that related to the Trust Deed executed on 23 December 1913 that established the occupational pension scheme.

The 1913 Trust Deed was drafted by Sir John Downer who was a former Attorney-General of South Australia and a twice elected Premier. Sir John also co-drafted the ***Australian Constitution*** **{Appendix A}**.

Summary

Submission #1 brings the Committee's attentions to two types of malfeasance involving honouring of life insurance policies.

Details of a specific case of the second type have been provided to the Chairman of ***ASIC*** along with copies of two group death policy documents that were criminally concealed from the Regulator – ***APRA***.

The Chairman's and ***ASIC***'s response to this evidence will set the ground work for further submissions related to aspect (f) of the terms of reference:

> f. the roles of the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority in reform and oversight of the industry;

It is expected that the Chairman of ***ASIC*** should be able to demonstrate a joint investigation with ***APRA*** has been undertaken to determine how these two group death policy documents that were criminally concealed from ***APRA*** and what regulatory action has been taken (or will be taken) against the Trustee Director who acted so dishonestly in breach of his statutory duty to act honestly.

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Appendix A

Photo of J.W. Downer, E. Barton and R.E. O'Connor
{1897 Committee for the Drafting of the Constitution}

♦ The 1897 committee for the drafting of the Constitution. *Left to right:* J.W. Downer, E. Barton, and R.E. O'Connor (NLA)

Reference: The Australian Constitution

Geoffrey Sawyer A.O. Emeritus Professor of Law, Australian National University
{Australian Government Publishing Service –Canberra 1988}

This submission dated 26 October 2016 has been lodged by Phillip Charles Sweeney

Inquiry into the life insurance industry

Submission #2 – Complaint Resolution

Executive Summary

The Committee in its report may recommend new laws and tougher penalties in relation to the life insurance industry.

However simply adding new laws and tougher penalties will be a waste of time if existing laws are not enforced by the "*Regulators*" ***ASIC*** and ***APRA*** and where the jurisdiction of complaint resolution bodies such as the **Superannuation Complaints Tribunal (SCT)** and the **Financial Ombudsman Service (FOS)** is subject to major constraints.

The **FOS** is unable to deal with claims where the amount exceeds that claim cap.

The **SCT** is unable to deal with complaints that allege unlawful or criminal conduct by superannuation fund trustees

That is the victims of the worst cases of malfeasance in relation to life insurance coverage are currently unable to seek redress for their crippling financial loss.

Tougher penalties will not alter this reality.

Introduction

Submission #1 included the following diagram.

There are two types of malfeasance associated with life insurance products as illustrated on the following diagram.

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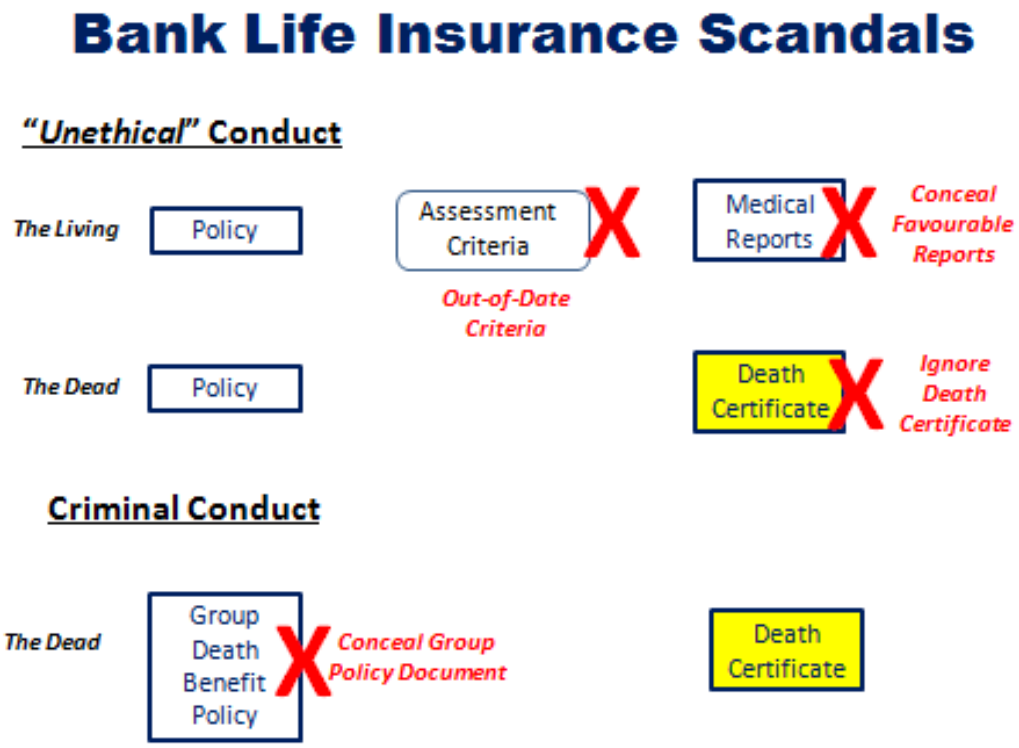

Malfeasance can involved what might be described as "*unethical*" conduct where there is no dispute that a policy providing life insurance coverage exists, however what is otherwise a valid claim is rejected by the utilisation of *out-of-date* assessment criteria and/or the concealment of favourable medical reports from the final assessment panel.

This type of malfeasance has received extensive media coverage. Such conduct may be *unethical* but it does not amount to criminal conduct under current legislation.

However there is another form of malfeasance that amounts to criminal conduct where a group life insurance policy document is concealed not only from persons who have coverage under the policy but from the Regulators as well.

These different forms of malfeasance then create a problem for the victims as to what avenues are available for redress.

In the case of a life insurance policy obtained directly from an insurance company the victim may seek redress from the industry sponsored complaint resolution body, the **Financial Ombudsman Service** (**FOS**). However there is a cap on the amount of a claim that the **FOS** can deal with which may rule out the **FOS** as an avenue of redress for many policy holders.

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In the case of life insurance coverage obtained via membership of a regulated superannuation fund one possible avenue of redress is the government agency - the **Superannuation Complaints Tribunal** (**SCT**).

However the **SCT** has limited jurisdiction and is unable to investigate allegation of maladministration of superannuation fund as can the UK Pensions Ombudsman.

That means the **SCT** can only deal with complaints where on a *prima facie* basis a trustee had not contravened any law or governing rule of the fund but may have made a mistake is the processing of a particular members life insurance claim.

Jurisdiction of the Superannuation Complaints Tribunal

The governing legislation for the Tribunal is the ***Superannuation (Resolution of Complaints) Act 1993 (SRT Act)***.

http://www.austlii.edu.au/au/legis/cth/consol_act/soca1993464/

The legislative history of this enactment is summarised in **Appendix A**.

Now there are two very important provisions of this enactment.

The first is **Section 14(6).**

(6) The Tribunal cannot deal with a complaint under this section that relates to the management of a fund as a whole**.**

The second is **Section 64.**

Reference by Tribunal Chairperson of contraventions of the law or of the governing rules of a fund to APRA or ASIC or both

If, in connection with a complaint made to the Tribunal under this Act, a Tribunal member becomes aware that a contravention of any law or of the governing rules of a fund may have occurred, the Tribunal member:

(a) if he or she is not the Tribunal Chairperson--must give particulars of the contravention to the Tribunal Chairperson; or

(b) if he or she is the Tribunal Chairperson:

(i) in the case of a contravention of a law that is administered by APRA--must give particulars of the contravention to APRA and, if he or she thinks it appropriate to do so, may also give particulars of the contravention to ASIC; or

(ii) in any other case--must give particulars of the contravention to ASIC and, if he or she thinks it appropriate to do so, may also give particulars of the contravention to APRA.

The Run Around Employed by ASIC

If a member of a regulated superannuation fund who suspects the trustee of their fund is not administering their fund properly contacts ***ASIC***, what do the public servants at ***ASIC*** do?

The ***ASIC*** officer says "**Do not bother us – take your complaint to the Superannuation Complaints Tribuna**l" The Tribunal however is just another arm of ***ASIC*** as **Section 62** of the ***SRC Act*** confirms

Staff and facilities

(1) The staff required to assist the Tribunal in the performance of its functions are to be persons engaged under the *Public Service Act 1999* .

(2) ASIC must make available to the Tribunal such staff and facilities as are necessary or desirable to enable the Tribunal to perform its functions.

Now if the Trustee is dishonest and stealing from the fund and denying widows their death benefits, the **Superannuation Complaints Tribunal** cannot resolve a complaint alleging any illegal conduct.

The Chairperson of the Tribunal must refer such a complaint to ***ASIC*** (and/or ***APRA***) pursuant to **Section 64** of the ***SRC Act.***

However here is what every white-collar criminal in the compulsory superannuation system relies on.

ASIC is not a "***complaint-handling agency***", as is the **Superannuation Complaints Tribunal**.

The bank life insurance scandals that have gained publicity to date have involved what might be described as "***unethical*** " conduct or conduct that is "***unfair or unreasonable***" and were the specifics of each case are unique to each claimant.

The conduct is not however in contravention of any law.

Therefore the Tribunal has jurisdiction to deal with such a complaint pursuant to subsection 14(2) of the ***SRC Act:***

Inquiry into the life insurance industry

(2) Subject to subsection (3) and section 15, a person may make a complaint (other than an excluded complaint) to the Tribunal, that the decision is or was ***unfair or unreasonable***.

However in the case of a dishonest trustee who has been engaged in unlawful and criminal conduct involving the concealment of the group policy document that provides a death benefit to widows, then the SCT is unable to investigate such a complaint.

The Tribunal would be acting ***ultra vires*** if the Tribunal were to deal with a complaint concerning the criminal concealment of a group death benefit policy document.

If such a complaint were to be lodge with the Tribunal the complaint would have to be withdrawn on the basis that the complainant was "***misconceived***" as to the statutory jurisdiction as per **Section 22** of the ***SCR Act***.

The Tribunal Chairperson should then refer the complaint to ***ASIC*** (and/or **APRA**) pursuant to **Section 64** of the **SRC Act**.

However ***ASIC*** is not a "***complaint handling agency***" and is under no statutory duty to resolve any given complaint. Therefore ***ASIC*** can simply ignore a complaint that alleges criminal conduct by the wealth management arm of a major bank that provides life insurance products.

This is what **Subsection 1(2)(d)** of the ***ASIC Act 2001*** provides:

(2) In performing its functions and exercising its powers, ASIC must strive to:

(d) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements.

It is important to note that the words "***strive to***" have been added after "***must***".

That is there is no statutory requirement for **ASIC** to enforce any law "***without fear or favour***". ***ASIC*** is free to choose those laws which will be enforced and those that will not be enforced.

How many whistleblowers who sacrifice their careers believing that ***ASIC*** will take enforcement action against white-collar criminals have failed to see this "*fine print*"?

How many politicians are also unaware of this "*fine print*" when they claim is made that ***ASIC*** is a "***tough cop on the beat***"?

The High Court of Australia

The High Court of Australia then considered the jurisdiction of the Tribunal in ***Attorney-General (Cth) v Breckler*** [1999] HCA 28; 197 CLR 83; 163 ALR 576; 73 ALJR 981 {**Appendix C**}.

The Appeal to the High Court arose from a ruling of the Full Court of the Federal Court.

The High Court stated at [7]:

> In *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd*, Heerey J set out a passage in which the primary judge in that case (Northrop J) summarised the effect of decisions defining the scope for challenges in courts of equity to the exercise of discretions reposed in the trustee of a settlement. In this Court, the accuracy of that summary was not disputed. It is as follows[2]:
>
> > "Where a trustee exercises a discretion, it may be impugned on a number of different bases such as that it was exercised in bad faith, arbitrarily, capriciously[3], wantonly, irresponsibly[4], mischievously or irrelevantly to any sensible expectation of the settlor [5], or without giving a real or genuine consideration to the exercise of the discretion[6]. The exercise of a discretion by trustees cannot of course be impugned upon the basis that their decision was unfair or unreasonable [7] or unwise [8]. Where a discretion is expressed to be absolute it may be that bad faith needs to be shown [9]. The soundness of the exercise of a discretion can be examined where reasons have been given, but the test is not ***fairness or reasonableness*** [10]."

The High Court Making reference to ***Federal Commissioner of Taxation v Munro*** [1926] HCA 58; (1926) 38 CLR 153 stated at [40]:

> "To those examples there may readily be added suits to obtain remedies to enforce compliance by a trustee with the terms of the trust in question. The institution of the trust had its genesis in curial enforcement of the trust and confidence reposed by the settlor in the holder of the legal estate[33]."

Therefore where a complainant alleges the contravention of "***any governing rule***" (ie a Breach of Trust) or the contravention of "***any law***" this type of complaint can only be resolved by a Court established under **Chapter III** of the ***Commonwealth of Australia Constitution Act***.

However a **Chapter III** Court is unable to impugn a lawfully made decision of a trustee on the ground that the decision was "***unfair or unreasonable***".

The **Superannuation Complaints Tribunal** however has been given a statutory power to review a trustee's decision on this basis.

Therefore there is no overlap of the jurisdiction of the Tribunal established under **Chapter II** and that of the **Chapter III** Courts

Kirby J stated at [90]:

> "Whatever may have been the position prior to the 1995 amendments, once the Complaints Act was altered to confine the powers of the Tribunal to issues of unfairness or unreasonableness, it was plain that the Tribunal's functions were not those normal to a court."

Referral of a Complaint to ASIC

Where a complainant alleges the contravention of "***any law or governing rule***", the Tribunal Chairperson is under a statutory obligation to refer the complaint to ***ASIC*** (and/or ***APRA***) pursuant to **Section 64** of the ***SRC Act***.

ASIC should then collect evidence and if the allegation is confirmed commence proceedings pursuant to either **Section 49** {criminal proceedings} or **Section 50** {civil proceedings} or both of the ***ASIC Act 2001*** so as to protect the welfare of the fund members in a COMPULSORY superannuation system.

However ***ASIC*** only ever takes such action when there is media or political pressure to do so.

ASIC is regularly derided in the media as a "***timid regulator***", "***keystone cops***" or a "***watchpuppy***".

> http://www.smh.com.au/business/banking-and-finance/tough-cop-asic-too-timid-on-enforcement-fels-20160414-go6jqe.html
>
> http://www.smh.com.au/business/banking-and-finance/asic-good-cop-bad-cop-keystone-cop-20160421-gocfrg.html
>
> https://www.crikey.com.au/2016/04/12/asic-the-keystone-cop-on-the-beat-wont-save-the-liberals/

ASIC is a "*regulator*" that was described by a Senate committee report by Labor, the Nationals, the Greens and independents in 2014 as "***a timid, hesitant regulator, too ready and willing to accept uncritically the assurances of a large institution that there were no grounds for ASIC's concerns or intervention***".

In the **Trio Capital Superannuation Fraud**, the Whistleblower – was a former Treasury Official who knew the former Secretary of the Treasury, .

contacted who then put pressure on the Chairman of ***ASIC*** to investigate the allegations made by the whistleblower - .

However ***ASIC*** whistleblower, , has confirmed in testimony before a Senate Committee that the **National Australia Bank** embeds its own lawyers into ***ASIC*** so as to ensure "***favourable regulatory outcomes***" for **NAB**.

The exchange of personnel between the "***Regulators***" and the "***Regulated***" is a common practice and not just limited to the **National Australia Bank**.

> http://www.smh.com.au/business/revolving-regulators-how-one-door-opens-another-in-australias-financial-system-20150527-ghb6n4.html

Refer to **Appendix B.**

ASIC in these circumstances is unlikely to take regulatory action to protect the welfare of several hundred widows who have been denied their death benefits in their time of need and distress, even when a white-collar criminal with a prior conviction is the author of the fraudulent document on which the incumbent trustee relies on as justification for not paying the widows their death benefits.

Summary

If a trustee acts honestly and lawfully but makes a decision that might be considered to be "***unfair or unreasonable***", then such a decision can be reviewed by the **Superannuation Complaints Tribunal** which has been established under **Chapter II** of the ***Australian Constitution***.

This is a power that a **Chapter III** Court does not have.

However if a complainant alleges that a trustee has acted unlawfully then the Tribunal is unable to deal with such a complaint and the complaint must be withdrawn.

An example is where a dishonest trustee conceals a group death benefit policy document from the members and beneficiaries of the fund.

Such dishonest conduct "***relates to the management of a fund as a whole***" and so is beyond the jurisdiction of the **SCT** pursuant to **Section 14(6)** of the ***SRC Act***.

The Tribunal Chairperson is under a statutory duty to then refer such a complaint to ***ASIC*** (and/or ***APRA***).

Inquiry into the life insurance industry

However ***ASIC*** is not a "***complaint-resolution agency***" (and neither is ***APRA***). So the complaint can be ignored and the victims of the misconduct of the trustee will not receive redress even though superannuation is COMPULSORY in Australia.

Both ***ASIC*** and ***APRA*** are classic examples of "***Regulatory Capture***" where these agencies act in the "***best interests***" of the financial institutions they regulate and not in the ***best interests*** of the Australian Public.

The cost of seeking redress through the **Chapter III** Court system is beyond the resources of most victims such as widows and even victims with a solid case can suffer a massive adverse costs order if their case is poorly pleaded as happened to ex-**Commonwealth Bank** employee, , who was a victim of a negligent if not dishonest trustee.

The Committee will need to report on the limited avenues of redress currently available to the victims of malfeasance related to life insurance coverage obtained either directly from a life insurance company or indirectly via superannuation fund membership.

Simply adding new laws and penalties will be a waste of time if existing laws are not enforced by ***ASIC*** and ***APRA*** and where the jurisdiction of complaint resolution bodies such as the **Superannuation Complaints Tribunal (SCT)** and the **Financial Ombudsman Service (FOS)** is subject to major constraints.

The **FOS** is unable to deal with claims where the amount exceeds that claim cap.

The **SCT** is unable to deal with complaints that allege unlawful or criminal conduct by superannuation fund trustees

That is the victims of the worst cases of malfeasance in relation to life insurance coverage are currently unable to seek redress for their crippling financial loss.

Appendix A

Legislative History of the SCT

The Keating Government made superannuation compulsory for all working Australians in 1993 and enacted the ***Superannuation (Resolution of Complaints) Act 1993*** {**SRC Act**} which established the **Superannuation Complaints Tribunal** (***the Tribunal***) under **Chapter II** of the ***Commonwealth of Australia Constitution Act.***

Under s 14(2) of the ***SRC Act***, as originally enacted, a person could make a complaint to the Tribunal that the decision:

> *"(a) was in excess of the powers of the trustee; or*
>
> *(b) was an improper exercise of the powers of the trustee; or*
>
> *(c) is unfair or unreasonable."*

This gave the Tribunal extensive supervisory powers over the administration of large superannuation funds.

For example if an amending power was not conferred on a trustee and a trustee purported to exercise such a ***power*** to amend the Regulations of a fund to reduce member entitlements the Tribunal had jurisdiction under both limbs (a) and (b) to intervene.

Another example might be where the sponsoring employer held the amending ***power*** subject to the consent of the trustee and the employer sought to reduce member benefits and the trustee gave its consent, then again the Tribunal could intervene under limb (b).

The following is stated in ***Neil Wilkinson, Tony Tuohey & Marita Wall v Clerical Administrative & Related Employees Superannuation Pty Ltd & Ors*** [1998] FCA 51:

> "An amendment in 1995 introduced by the *Superannuation (Resolution of Complaints) Act 1995* (Cth) ("the amending Act") deleted the grounds in s 14(2)(a) and (b). The only ground of complaint now available under s 14(2) is that "*the decision is or was unfair or unreasonable*" (the words "*or was*" having been inserted by the amending Act). The Explanatory Memorandum to the Bill for the amending Act makes it clear that the amendment to s 14(2) was prompted by concern that a determination of the Tribunal that a trustee's decision was in excess of or an improper exercise of power would be an exercise of Commonwealth judicial power, having regard to the decision of the High Court in ***Brandy v Human Rights and Equal Opportunity Commission*** [1995] HCA 10; (1995) 183 CLR 245.

The extent of the statutory powers of the Tribunal was greatly reduced by this amendment and the ability of the Tribunal to supervise the conduct of dishonest and corrupt trustees was effectively eliminated.

Now the Tribunal could only supervise the conduct of honest trustees who had made an "*honest mistake*" that might be impugned on the grounds that a decision made by the trustee was "*unfair or unreasonable*".

An example of such a complaint is where a fund member is seeking the early release of his or her superannuation benefit on the grounds that he or she has become "***permanently and totally disabled***".

It is not always an easy decision for a trustee to make such as assessment since even if a person has suffered a serious accident that person might still be fit for work in a year's time depending on the qualifications of that person. If the trustee's decision was that the fund member might recover, then the fund member could challenge that decision in the SCT.

There is no question that the trustee has contravened "***any law or governing rule***" which would disqualify the SCT from dealing with such a complaint.

Now it is important to note that this is a power that a Court does not have. A Court can impugn the decision of a trustee on a number of grounds, such as the decision was made in *mala fides* or without proper consideration, however a Court cannot impugn a decision of a trustee on the grounds that was "*unfair or unreasonable*".

Therefore after the 1995 amendment there was no overlap of jurisdiction between the SCT and the Courts.

However the Full Federal Court of Australia in ***Neil Wilkinson, Tony Tuohey & Marita Wall v Clerical Administrative & Related Employees Superannuation Pty Ltd & Ors*** [1998] FCA 51 struck down the power of the Superannuation Complaints Tribunal ("SCT") to review the decision of a trustee of a superannuation fund on the basis that such a decision was "*unfair and unreasonable*". A majority of the Court found that this power was a **judicial power**, and that its conferral upon a non-judicial body breached the separation of judicial power achieved by the ***Australian Constitution***. The effect of the decision in *Wilkinson* was to remove the capacity of the SCT to act as an informal, quick and cost-effective means of resolving disputes arising from decisions made by trustees. The decision then left the SCT with only the power to conciliate such disputes.

The High Court of Australia then considered the jurisdiction of the Tribunal in ***Attorney-General (Cth) v Breckler*** [1999] HCA 28; 197 CLR 83; 163 ALR 576; 73 ALJR 981.

Inquiry into the life insurance industry

Now the status of trustees of regulated superannuation funds is different to that of other financial service providers.

Trustees have to make a non-renounceable election to become part of a compulsory superannuation system in exchange for tax benefits and to amend the terms of the Trust Deed constituting the superannuation scheme to agree to be subject to regulation under the ***Superannuation Industry (Supervision) Act 1993*** and the ***Superannuation (Resolution of Complaints Act 1993***.

Therefore the trustees of regulated superannuation fund are quasi-government agents.

It was on this basis that the High Court ruled that the Tribunal has jurisdiction over these quasi-government agents for a similar reason that the **Administrative Appeals Tribunal** has jurisdiction over the decisions of 100% Federal Government agencies.

However with respect to their other areas of commercial activity the banks are not quasi-government agents and do not operate through trustee companies.

The High Court in ***Brandy v Human Rights & Equal Opportunity Commission*** [1995] HCA 10; (1995) 183 CLR 245 stated at [22]

> "Thus, it has always been accepted that the punishment of criminal offences and the trial of actions for breach of contract and for wrongs are inalienable exercises of judicial power (36 ***Federal Commissioner of Taxation v. Munro*** [1926] HCA 58; (1926) 38 CLR 153 at 175 per Isaacs J) . The validity of that proposition rests not only on history and precedent but also on the principle that the process of the trial results in a binding and authoritative judicial determination which ascertains the rights of the parties (37 Reg. v. Davison (1954) 90 CLR at 368-370 per Dixon CJ and McTiernan J) . So, when A alleges that he or she has suffered loss or damage as a result of B's unlawful conduct and a court determines that B is to pay a sum of money to A by way of compensation, there is an exercise of judicial power."

Appendix B

Regulatory Capture

FAIRFAX INVESTIGATION

Revolving regulators: How one door opens another in Australia's financial system

http://www.smh.com.au/business/revolving-regulators-how-one-door-opens-another-in-australias-financial-system-20150527-ghb6n4.html

Too close to the big end of town?

Allegations of regulatory capture – where the regulator becomes too close to the regulated – were sharpened in the financial planning scandals involving the Commonwealth Bank of Australia and the National Australia Bank.

Despite several tipoffs by whistleblowers, ASIC was slow to act on the CBA's planners – and when it did act, it issued only an enforceable undertaking. This practise was lashed in the committee's report.

As one former ASIC employee, told the committee: "***These undertakings were discussed and fought over, over months, by armies of lawyers in secret behind closed doors and few details ever emerged"***.

Even as that financial planner scandal was breaking, ASIC gave NAB, one of the banks at the centre of the storm, the opportunity to review a media release ASIC planned to put out to journalists on the subject. The release was changed after the regulator received the bank's feedback.

A LinkedIn search reveals that there are at least 21 current employees at ASIC who have worked at the **Commonwealth Bank** in the past.

> *"At ASIC, where I saw that revolving door in play ... the culture there was not a culture of doing things by the book, it was a culture of facilitating business."*