CHAPTER 11

DISPUTE RESOLUTION MECHANISMS

The Perceived Need

11.1 The substantial increase in the membership of superannuation schemes consequent upon the introduction of award superannuation, combined with the legal and taxation complexities surrounding the subject, will create a large pool of contributors with very little, or no, background knowledge of many of the principles involved. The large, and increasing, balances standing to the credit of members will, over time, become the major avenue of individual savings apart from home ownership. The fact that, in some circumstances, entitlements may be determined at the discretion of fund trustees adds to the already fertile ground for misunderstanding and disputation.

11.2 Some of the matters which may not be readily understood are:

- the charging to individual accounts of administration fees, contributions tax and insurance premiums;
- the failure in some instances to disclose all fees and commissions;
- the charges levied on the early cancellation of some policies;
- the methods of dealing with broken periods of service;
- the frequent provisions requiring trustees to allocate benefits between conflicting parties, for example, former and current spouses of deceased members, or between other dependants;
- the differences between defined benefit and defined contribution schemes, in particular, the consequences of major changes in asset values;
- the meaning and significance of technical terms such as vesting, preservation, reasonable benefits and the various types of annuity currently available; and
- medical problems, such as total and permanent disability and eligibility for life insurance.

11.3 All of the foregoing relate to the entitlements of individual members, but differences of a broader, more general character may arise over matters such as the election of trustees, investment policies, the alteration of trust deeds and the degree of employer influence over trustees. The difficulties may, in part, be the product of an environment in which the rights of members are limited and the providers of superannuation products have overwhelming power which, under the present regulatory regime, is difficult to question or challenge.

11.4 In August last year, the Treasurer stated that:

> *The Government considers that consumers should have an appropriate forum to settle any disputes between themselves and the superannuation funds. To this end, the Government will be working with industry participants to develop a suitable low-cost dispute resolution mechanism. Such a mechanism should raise consumers' confidence in the superannuation industry and increase their willingness to invest in superannuation.*[1]

11.5 The predominant view put to the Committee was that there was a need for the establishment of such a mechanism which was independent of the fund manager concerned and which avoided the courts as far as possible. Among the organisations taking this view were the ACTU, MTIA, Jacques Martin, Clayton Utz, LIFA, the principal accounting bodies, the TPC and organisations representing pensioners and consumers.[2]

11.6 Nevertheless, the Committee noted that there was very little quantitative evidence as to the actual extent of disputation, that is, how many disputes occurred each year, what the issues were, how they were resolved and at what cost. The Committee was therefore unable to gain any idea of the scale of the problem and had some difficulty in devising an appropriate solution.

11.7 A significant minority of witnesses held that no new arrangements were called for. MMBW felt that the nature and structure of trustee bodies provided for adequate review. Reliance on the courts discouraged frivolous claims while providing for the resolution of serious claims. An outside authority would be costly and might become a de facto regulator by making determinations which reflected its own thinking.[3] ACM also felt that dispute resolution was a matter for internal arrangement by each fund.[4] ANZ opposed the establishment of any new mechanism, expressing the view that most disputes could be defused by allowing greater freedom of choice so that members could 'vote with their feet'.[5]

11.8 On balance, the Committee concluded that, notwithstanding the paucity of factual evidence as to the extent of the problem, several considerations dictated that the establishment of an external review mechanism, within the compliance framework of OSSA, was highly desirable:

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1 The Hon John Kerin, MP; *Review of Supervisory Framework for the Superannuation Industry*, Press Release No. 73; Canberra, 20 August 1992.

2 Sub Nos. 106, pp 20, 24; Sub No. 55, p 17; Sub No. 90, p 16; Sub No. 20, p 2; Sub No. 114, pp 49-51; Sub No. 119, p 15; Sub No. 145, p 12; Sub No. 125, pp 21-22; 139, p 9.

3 Sub No. 66, Section 10.

4 Sub No. 95, p 16.

5 Sub No. 73, p 6.

- superannuation was already compulsory for a large section of the community and it was government policy that all employees should be covered. The Government therefore had a duty to ensure that members' rights were protected;

- it was highly desirable that justice should not only be done but should also be seen to be done;

- the cost of litigation was so high that it offered no real rights to members;

- the ability to vote with one's feet offered no comfort to, for example, dependants of deceased employees who might be denied access to benefits or to members who might suffer heavy losses on withdrawal from a fund; and

- the factors set out in Paragraph 11.2 above make it highly probable that there will be a sharp increase in disputation in the next few years.

Possible Models

Banking Industry Ombudsman

11.9 In 1990, the Australian banks, with the exception of two banks operating only in single States, combined to establish an independent ombudsman with power to deal with claims up to $100 000.[6] The procedures to be followed in the resolution of disputes comprise the following:

- the customer and the bank must endeavour to reach agreement;

- if the parties are deadlocked, the ombudsman may call a conference and act as a mediator.

- as a last resort, the ombudsman arbitrates the dispute; and

- the decision is binding on the bank if accepted by the customer.

11.10 The Ombudsman is appointed by, and answerable to, a council comprising three former bankers, three consumer representatives nominated in conjunction with the Commonwealth Minister for Consumer Affairs and an independent Chairman, currently Sir Ninian Stephen. The scheme is financed and administered by the banks, acting through a board on which the Reserve Bank is represented.

11.11 Every bank branch has literature describing the service and the ombudsman's staff is independent of the banks. The Ombudsman produces an annual report which is available to the public.

11.12 In 1991-92, the Ombudsman estimated that the office would receive 50 000 telephone inquiries and 5 000 written complaints.

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6 Evidence, pp 1975-79.

The LIFA Scheme

11.13 LIFA has recently established a formal disputes resolution procedure with the following components:

- an Industry Code of Practice for dealing with inquiries and complaints. The main elements of the Code are the nomination by each company of a senior officer to whom all complaints are referred, the entry of every complaint on a register and the establishment of time limits for the acknowledgment of, and decision on, each dispute;

- the establishment within the LIFA secretariat of an inquiry and complaints service charged with the provision of advice and assistance and which also carries out a conciliation role between the parties;

- a three-member Complaints Review Committee which arbitrates disputes not settled at the company or LIFA level. The members are chosen by the Insurance Industry Complaints Council (see below), LIFA and the Commonwealth Minister for Justice and Consumer Affairs, who nominates a consumer representative. The Committee's decisions are binding on the companies, but not the complainants; and

- The Insurance Industry Complaints Council, which oversees the whole complaints process, but cannot overturn Committee decisions. The Council is chaired by a former federal Attorney-General and has two industry and two consumer representatives.

11.14 The arrangements are fully funded by the companies, but both the Committee and the Council are required to report publicly each year.[7]

11.15 AFCO was highly critical of the LIFA scheme, 'primarily because of the lack of independence and the lack of accessibility'.[8] Any complaints body would need to be 'as fully independent of industry as possible' and to have 'strong consumer involvement in the management of the process'.[9] It regarded the banking industry ombudsman as the 'best possible alternative that we can obtain at the moment'.[10]

11.16 In the Committee's view, however, the two mechanisms have much more in common than is implied in the AFCO criticisms. Both are wholly industry financed but, in each case, the industry has gone to considerable lengths to obtain consumer representation on the controlling bodies, with ministerial involvement in their choice. Both require genuine attempts by the parties to reach agreement prior to arbitration and both schemes include provision for publishing annual reports.

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7 Sub No. 114, pp 45 - 49.

8 Evidence, p 1941.

9 *ibid*, pp 1942, 1944.

10 Ibid, p 1944.

State Insurance Office - Victoria

11.17 The Victorian State Insurance Office has established its own 'ombudsman' - the Consumer Appeals Centre, with power to make determinations up to $400 000.[11]

11.18 A major part of the Centre's activities is the provision of information and advice, since poor communication has been found to be the major cause of complaints.

11.19 Nearly all complaints are resolved by conciliation, with senior company officers participating. Only one complaint in every 200 proceeds to arbitration.

The Law Reform Commission's Proposal

11.20 In its report *Collective Investments - Superannuation* the Law Reform Commission proposed the establishment of two separate schemes - an advisory service and a dispute resolution service.[12]

11.21 The advisory service would be established within the ISC and would be responsible for the provision of educational material and the conduct of a general information service. It would advise fund members on their rights and should establish a panel of conciliators to assist in resolving disputes.

11.22 The report recommended that all funds should establish their own internal dispute resolution mechanisms and that all members and prospective members be fully informed of their existence.

11.23 The report also recommended the establishment of an external dispute resolution mechanism wholly financed by the Commonwealth, on the grounds that it would be part of a scheme to implement Commonwealth policy. Disputes would be determined by a panel independent of government, the schemes and the regulator. The panel would be selected by the minister from names submitted by interested parties.

11.24 The report expressed the view that the panel should not be able to decide issues on their merits but should confine itself to deciding whether the trustees had properly applied the provisions of the relevant laws or deeds, that is, whether they had taken all relevant material, and no irrelevant material, into account and whether they had acted in good faith. Bona fide decisions of trustees, exercising their discretion properly, should not be interfered with.

State Government Schemes

11.25 Most superannuation schemed operated by State governments give members the right, if dissatisfied with decisions of the superannuation board or trustees, to appeal to outside tribunals, such as the industrial commissions, an ombudsman or the courts. The external review bodies are able to reconsider the full merits of cases, not merely the

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11 Sub No 135.

12 Law Reform Commission, Report No 59, pp 185 - 196.

propriety of the procedures.[13]

Commercial Arbitration

11.26 Mr N Renton suggested to the Committee that the commercial arbitration system offered a suitable alternative to dispute resolution through the courts.[14] While there may be merit in this proposal, the Committee believes, in the absence of evidence to the contrary, that a specialist body is more likely to develop the expertise necessary to build up the required degree of public confidence.

The ASFA Proposal

11.27 ASFA, while questioning the need for an external dispute resolution mechanism in the absence of any 'rigorous statistical or other evidence', has drawn up a proposal for such a scheme.[15] The main features of the proposal are:

- every fund should nominate an officer to whom complaints may be referred;
- a member should have the right to have the matter reviewed by the trustees;
- these procedures should be advised to fund members on joining and annually; and
- an external, statute-based review panel, supported by a secretariat within the ISC should be established. The panel would comprise experienced fund trustees drawn from government, employer and union nominees. The panel, and a 'high-profile' chairman, would be appointed by the Minister.

11.28 The mechanism should deal with disputes over individual rights and the conduct of a fund as a whole. The panels should be limited to reviewing the bona fides of the processes, not the merits of the cases before them. Decisions should be in writing and binding on all parties. Some user contribution toward the expenses of the mechanism would be appropriate.

11.29 The ASFA proposal states that in the interests of simplicity and economy, funds with access to the LIFA scheme and the State government reviewing processes should be exempt from the proposed mechanism.

Dispute Minimisation and Resolution

11.30 The Committee endorses the view, expressed by many witnesses, that the better informed members of superannuation funds become, the less will be the likelihood of misunderstanding and disputation. Funds should be encouraged to produce their own explanatory literature, setting out in the simplest terms how they operate and the rights

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13 ASFA, Supp. Sub No 89, p 3.

14 Evidence, p 142.

15 Supp Sub No 89.

and obligations of members.

11.31 But there is also a need for general educational material outlining the nature of superannuation itself, the various types of schemes in operation, the taxation implications and the technical terms used. The Committee believes that the Government has the responsibility to produce such material.

Recommendation 11.1:

The Committee recommends that the ISC produce simply worded, descriptive literature on superannuation, suitable for distribution to all existing and prospective fund members through the individual funds.

Internal Review

11.32 The Committee recognises the desirability of encouraging the internal resolution of disputes on grounds of simplicity, speed and economy. Experience with the mechanisms described above indicates that the great bulk of disputes are amenable to resolution in this way. In the Committee's view, the procedures should be formalised, made compulsory and publicised.

Recommendation 11.2:

The Committee recommends that, as a matter of high priority, the OSS Regulations be amended to require that, as a condition of compliance, each fund should:

- *develop and publish its policies relating to dispute resolution;*
- *nominate a person or persons to whom queries and complaints should be addressed;*
- *undertake that, if that person cannot resolve the matter, it will be referred to the trustees, who should be required to make a decision within 90 days of referral to them and to provide reasons for that decision in writing; and*
- *notify full particulars of these procedures to members on entry and annually thereafter.*

Recommendation 11.3:

The Committee further recommends that these provisions should be fully implemented within two years of their promulgation and that the ISC should monitor their introduction and operation.

External Review

11.33 There will always remain a hard core of disputes that cannot be satisfactorily resolved internally. The only external avenue currently available to most members is through the courts - a costly, time-consuming and often distressing process.

11.34 The Committee therefore believes that decisions of trustees should be subject to external review and considered a range of options to give effect to this view.

11.35 A statutory body could be established by the Commonwealth along the lines of other quasi-judicial authorities, such as the Administrative Appeals Tribunal, the Commonwealth Ombudsman or the Human Rights Commissioner. Alternatively, the authority could be established by the industry, with government participation in some form.

11.36 The former would have the advantage of visible independence, but would run the risk of bringing into being a formal bureaucratic structure, involving the probability of high costs, delays and unnecessary formality.

11.37 The Committee prefers the approach adopted by LIFA and the banks and proposed by ASFA, whereby the review authority is established by the industry but the Minister appoints the arbitrators from names submitted by representatives of all interested parties. A joint management body could be established with similar representation. As the recent and prospective growth in superannuation is a key objective of government policy, the Committee believes that it is reasonable for the Government to bear at least half of the costs to be incurred.

11.38 While ASFA, in the interests of economy and simplicity, proposed that disputes involving superannuation should continue to be dealt with under the existing LIFA and State government procedures, the Committee believes that, as far as possible, all types of superannuation should be dealt with by a single authority. Accordingly, the LIFA mechanism, beyond the conciliation point, should no longer be involved with superannuation disputes. Constitutional limitations would probably require that participation by the States would be optional. Existing arrangements operating in non-participating States would remain undisturbed.

11.39 The reviewing authority could comprise one person acting alone, as with the banking ombudsman, a bench of say three, as employed by LIFA and as proposed by the ALRC, or one or more selected from a wider panel, as proposed by ASFA. A further refinement could be a permanent presiding member, or ombudsman, possibly with legal qualifications, sitting with two other members, chosen from an expert panel of persons experienced in the administration of superannuation.

11.40 The Committee is attracted to the latter structure, as it combines the benefits of continuity, which a single ombudsman would bring, with the wider range of views and experience which the panel of experts - for example, major fund trustees and professional fund administrators - would bring.

11.41 A matter of considerable importance is the scope of the authority's powers of review. As noted above, the powers proposed by both the ALRC and ASFA would not extend to a reconsideration of the merits of the disputes, but merely to the propriety of the procedures used and the relevance and completeness of the material considered, as is the current position of the courts.

11.42 The State tribunals, on the other hand, have unrestricted powers of review and are able to place themselves in the position of the trustees and exercise their own discretion as if they were the trustees.

11.43 In the Committee's view, the strict limitation of the role to procedural propriety and relevance of evidence would provide an adequate review mechanism. The proposed codification of trust law principles and duties of trustees set out in Chapter 4 will provide for a range of penalties enforceable against trustees if there is a breach of fiduciary duty. In addition, the rights of members will be clearly identified in the legislation and the ISC will be able to protect members' interests and to take action against trustees.

11.44 In cases where the matters in dispute concern the individual rights and entitlements of members, decisions of the authority should be final. In matters that concern fund policy and the interests of members in general, the authority should have the power to report the circumstances to the ISC, with any recommendations it sees fit. The Committee expects that the ISC would comment on all such reports, and any action taken on them, in its Annual Reports.

Recommendation 11.4:

The Committee recommends the establishment by legislation of an external disputes resolution mechanism, at the earliest practicable date, with the following features:

- *a management board comprising nominees of the Commonwealth and participating state governments, industry bodies and representatives of the unions, women's and consumer groups;*
- *a review authority chaired by an ombudsman, who would sit with two other members drawn from a panel of fund trustees and other people with appropriate experience. The ombudsman and panel members would be appointed by the Minister from names submitted by the board;*
- *staff and supporting facilities arranged by the board and financed equally by participating governments and industry groups;*
- *the functions of the existing superannuation review mechanisms conducted by LIFA and the participating states to be transferred to the new authority;*
- *the authority should not have power to review cases on their merits but should be confined to ensuring that the trustees' powers have been exercised properly and that all relevant evidence has been considered;*
- *decisions of the authority would be final and binding on all parties; and*
- *the ombudsman and the management board should publish annual reports.*