

## 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