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SELECT COMMITTEE ON SUPERANNUATION

Reference: Superannuation Complaints Tribunal

TUESDAY, 28 APRIL 1998

SYDNEY

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SENATE

Tuesday, 28 April 1998

SELECT COMMITTEE ON SUPERANNUATION

Members: Senator Watson *(Chair)*, Senators Allison, Conroy, Evans, McGauran, Ferguson, and Sherry

Senators attending the hearing: Senators Watson, Conroy and Sherry

Matter referred by the Senate for inquiry into and report on:

Options for dispute resolution consequential on the Federal Court decision concerning the powers of the Superannuation Complaints Tribunal.

FORUM PARTICIPANTS

Mr Paul Bean, Life Insurance Complaints Service

Mr John Berrill, Consumers Federation of Australia (rep)

Mr Mark Cerche, Corporate Superannuation Association

Mr John Edstein, Editorial Board, *Superannuation Bulletin*

Mr Andrew Fairley, IFS Fairley

Mr John Fox, Australian Securities Commission

Mr Steve Gibbs, Australian Institute of Superannuation Trustees

Mr John Larkin, Insurance and Superannuation Commission

Ms Jenny Lawton, General Insurance Enquiries and Complaints Scheme

Mr Michael Lillicrap Industry Funds Forum (Represent)

Mr David Maclean, Barrister

Mr Christian Mikula, Australian Consumers Association

Mr John Morgan, Law Council Superannuation Committee

Ms Janet Murphy, Consumer Affairs Division, Department of Industry, Science and Tourism

Mr George Raitt, Blake Dawson Waldron

Ms Lynn Ralph, Investment and Financial Services Association

Hon. Andrew Rogers QC, Clayton Utz

Mr Dennis Rose QC, Blake Dawson Waldron

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Mr Neil Wilkinson, Superannuation Complaints Tribunal

Mr George Williams, Law Program, Res. School of Social Sciences, ANU

Superannuation Complaints Tribunal

SYDNEY

Forum commenced at 9.35 a.m.

CHAIR—Good morning. I welcome everybody to this forum on the Superannuation Complaints Tribunal. As you are all well aware, the Federal Court has effectively removed the powers of the tribunal to make determinations and this has created a serious impasse. The committee has convened this forum to provide an opportunity for a broadly representative group of industry and government stakeholders and parliamentarians to discuss possible options for establishing an alternative dispute resolution mechanism to deal with superannuation complaints by members.

The government has been working actively on this problem, and Mr John Larkin of the ISC—who I am sure is well known to you all—will be providing us with a short briefing about the government's initiatives and perspectives. Thank you, John. I am aware that a number of other groups, particularly the Association of Superannuation Funds of Australia, have also convened a number of meetings to help find a solution and I congratulate them on their initiative. We will also be hearing from ASFA shortly, when they will bring us up to speed with the latest developments. We will also hear briefly from their chairman, Mr Neil Wilkinson.

The process we are embarking upon today is very much part of the processes that have already started. We are, after all, all working for a common solution—and that solution must be found urgently. However, it must be workable, must achieve a broad consensus and, above all, must be beyond further constitutional doubt. It is important that this exercise not have to be repeated in 12 or 24 months time.

I think it is useful that parliamentarians should be part of the process of seeking such a solution. I thank my colleagues for being here today: Senator Nick Sherry as Deputy Chair, Senator Stephen Conroy and later on maybe Senator Chris Evans from Western Australia. As I said, I think it is useful that parliamentarians be part of the process of seeking a solution. The government may well, at some stage, introduce legislation to validate whatever solution is decided, and we will be asked to vote on that legislation.

You will all have received two documents from the committee. The first is a paper prepared for the committee by Mr Andrew Fairley, whom we have at the table today. The second is a program for today, about which I will be making a few comments shortly. The committee commissioned the paper prepared by Mr Fairly to provide a basis for our discussions today. I would like to emphasise that Mr Fairley's paper is intended as a starting point and I hope there will be vigorous discussions about whether the possible approaches outlined in the paper are the correct ones, or whether there are alternatives that we should also consider. Mr Fairley's paper is in several parts. The two key parts that I hope we will discuss today are part D, the essential elements of a superannuation complaints handling scheme; and part E, the alternatives to be considered.

I turn firstly to part D. Before we start discussing alternatives, in my view it seems logical to first set the criteria which we will use to evaluate alternative solutions. In other

words, what are the essential features that we are looking for in any dispute resolution mechanism that the government may establish? Part D of the paper identifies 10 essential features. In the first discussion session listed on your program, I would like the forum to discuss whether these are the appropriate criteria; if not, what other basis should be used to evaluate the alternatives. Part E of the paper identifies three alternatives that can then be evaluated against the essential features list. The first alternative is to establish a complaints body to be run by the industry along the lines of the Life Insurance Complaints Service, for example. The second alternative is to reconstitute the SCT as part of the Federal Court. The third alternative is to amend the complaints act, to ensure constitutional validity. We may even have a hybrid of a number of the proposals.

As part of the first threshold discussion, I ask that the forum consider whether these are the only available options or whether there are others, or combinations of options, that may offer a solution. It has to be said that alternatives considered do not necessarily have to be mutually exclusive. We must also consider whether the solution is to be a stopgap measure until the High Court considers the Commonwealth's appeal, or a more permanent solution. In my view, there is a need for a permanent solution because the court made two key findings.

In addition to striking out the tribunal's determination making power, the court also found that the SCT is only entitled to receive complaints concerning discretionary decisions made by the trustees as opposed to decisions which are not discretionary. Consequently, even if the High Court was to overturn the finding on the constitutional issue, the tribunal's ability to deal with a full range of member complaints could still be significantly impaired. It is estimated that only around one-quarter of complaints to the SCT deal with discretionary decisions. We need a solution that will allow those complaints dealing with non-discretionary decisions to be resolved.

However, it must also be acknowledged that there is a considerable backlog of cases and it might take some time to put the new arrangements in place. Perhaps it might be sensible to implement a method of dealing with a portion of those cases. A possible option may be by way of an agreement between the parties, binding under the contract, for the SCT to arbitrate.

Before I conclude my remarks, I would like to turn briefly to the program that we have circulated for today. You will note that following the group discussion schedule to start at 10 o'clock, we have proposed that the group divide into three groups to each discuss one possible solution. The reason we have proposed this is because of concerns about whether it is possible to adequately discuss all of the options in the context of what is admittedly a rather large group of people. This was an attempt to streamline that process.

However, I would appreciate some guidance from the group as to whether you think that is an appropriate way of dealing with the issues or whether you would prefer to evaluate the available alternatives as a single group. If it is your preference to continue as a single group, the session is scheduled to commence at 11 o'clock and two could be merged to a single continuing session of a little more than three hours duration.

The final area of discussion on the program this afternoon is a group discussion on the fate of matters previously decided by the tribunal. I would be interested to hear the group's views on the subject this afternoon.

Before we get under way, I would like to advise you that this forum is being conducted with the authority of the Senate, provided by way of a formal reference. Consequently, proceedings are protected by parliamentary privilege. For the benefit of those of you who may be unfamiliar with the concept, parliamentary privilege means special rights and immunities attached to parliament or to its members and others necessary for the discharge of functions of the parliament without obstruction or without fear of prosecution.

Before asking Mr Larkin, the Assistant Commissioner, Policy, of the Insurance and Superannuation Commission, to give us a short briefing, I would like to give my colleague the Hon. Nick Sherry an opportunity to make a few comments.

Senator SHERRY—Thank you, John. I was not going to say anything, other than to thank you all for coming. Because you are protected by parliamentary privilege, you can abuse each other and criticise each other as you want.

CHAIR—I invite Mr Larkin, Assistant Commissioner, Policy, of the ISC, to give us a short briefing on the government's initiatives and perspectives.

Mr LARKIN—My brief statement will focus on Commonwealth initiatives to date in response to the full Federal Court ruling in the Bishop Leshem case and the policy options under consideration for addressing the issue. The government is committed to the policy outcome of ensuring superannuation fund members have access to an efficient and effective alternative dispute resolution mechanism to the courts. Over the last four years this policy outcome has been delivered through the Superannuation Complaints tribunal.

However, the February 1998 Bishop Leshem decision of the full Federal Court has significantly impaired the ability of the tribunal to achieve this policy outcome in two ways: first, by unanimously affirming Justice Northrop's July 1997 decision that the tribunal's review jurisdiction is confined to complaints about discretionary trustee decisions; and, secondly, by holding, by a two to one majority, that the tribunal's review powers involve the exercise of judicial power and are therefore invalid under the constitution. The full Federal Court ruling has left the tribunal's review powers, both in respect of discretionary and non-discretionary decisions, completely inoperable.

The government and the SCT have initiated three broad responses to the Full Federal Court decision. First, the government has lodged an application for special leave to appeal the decision to the High Court. The special leave application, which had to be lodged within 28 days of the Full Federal Court decision, effectively keeps the government's options open on this front. We hope the special leave application will be considered in June this year. If leave is granted, there would be a reasonable chance of getting a hearing date later this year—some time between August and December. Obviously, given the time delays and

uncertain prospects associated with a High Court appeal, other measures need to be explored.

The second initiative concerns the tribunal, which is pursuing its inquiry and conciliation role with greater creativity and determination since the Full Federal Court decision. In this regard, the tribunal will aim to build on its record in the 1996-97 income year of resolving 79 per cent of complaints prior to review. The government's legal advice is that the tribunal's inquiry and conciliation role is unaffected by the court's ruling on the validity of its review powers.

The third response has been to examine options for addressing the complaints review gap left by the Full Federal Court decision. The ISC has obtained legal advice and is consulting with peak industry associations, consumer groups and the tribunal on the viability of various options.

We understand there has been some concern about apparent inaction on the part of the government in respect of the tribunal issue. In fact, there has been a lot going on behind the scenes. Consideration of the policy options is necessarily an exacting and time consuming exercise since the issues are complex and a range of policy considerations and risks must be balanced. What has become clear is that there is no single perfect solution. All of the options have certain disadvantages and advantages in terms of sustainability against future legal challenge, workability, efficiency, flexibility, cost, enforcement, accessibility, coverage and implementation time frames. This means the government's eventual decision on this matter will inevitably involve some risk management compromises and trade-offs.

The ISC considers there are four main options. Not all of them are mutually exclusive, in the sense that one could be adopted as a short-term interim measure. I would now like to briefly discuss these from an ISC perspective. The first option would create a special division in the Federal Court or use judicial registrars to exercise the SCT's review functions. This option would clearly overcome the judicial power issue. However, it would necessarily involve greater cost and formality for complainants. The second option would be to amend the SRC, SIS and RSA acts in an attempt to overcome the current jurisdictional and constitutional problems. The most practical way of doing this would involve conferring an unrestricted merits review power on the tribunal like that of the AAT and altering the enforcement mechanisms for tribunal determinations.

An advantage of this option is that it preserves the existing tribunal infrastructure with its public profile and familiar procedures and enables continuity of the complaints on hand. A disadvantage is that there will continue to be some risk of successful legal challenge to the tribunal in future. This is because the option addresses some but not all of the cumulative factors that led to the Full Federal Court majority judgment that the tribunal's review powers are unconstitutional. If a court in future were to attach a greater relative weighting to a factor that has not been addressed under the legislative fix—for example, a fact that the tribunal is dealing with rights and obligations between private persons—then we could conceivably find ourselves in the same situation in two or three years time. Whether the government can live

with this legal risk is ultimately a policy decision, as is the question of the likely effectiveness of the altered enforcement mechanisms.

A third option is to dismantle the tribunal and establish an industry based complaints handling scheme. Industry based schemes are now a familiar feature of Australia's financial landscape with at least seven schemes currently in place with industry, consumer and government involvement. Legally, the option would involve trustees and RSA providers voluntarily opting or being required to contract with an industry scheme and complying with its determinations. The industry scheme or schemes would be approved by the regulator on the basis of criteria consistent with the August 1997 benchmarks on industry based complaints handling released by the Minister for Customs and Consumer Affairs.

One advantage of an industry based scheme is the sense of industry ownership and accountability that can potentially flow from such arrangements and the flexibility of a non-statutory scheme to adapt and respond quickly to the changing superannuation environment. A disadvantage could be the implementation lead times and the challenge of obtaining universal coverage and compliance in the highly diverse superannuation sector. There will also need to be some further examination of legal issues associated with coverage and enforcement mechanisms, but our preliminary legal advice is that the option of requiring funds to be a member of an industry based scheme appears feasible. Achievement of an industry based solution ultimately depends on a critical mass of industry and consumer group support and close consultation with government on such matters as funding, structure and procedures.

A fourth option would involve amending the SRC Act to enable the tribunal to arbitrate with the consent of the parties. The parties in dispute would enter into agreements to be bound by a tribunal award on a case-by-case basis. The arbitration award would be enforceable under contract law and state arbitration laws. Since the effectiveness of the scheme depends on the consent of the parties on a case-by-case basis, it is probably not a viable, long-term option. However, one possible strategy would be to graft this consent to arbitration function onto the tribunal as an interim measure pending the implementation of a longer term solution.

In closing, I would reiterate that the government is fully committed to an accessible, low-cost and effective alternative dispute resolution mechanism for fund members. There does not appear to be a perfect solution to the problem of achieving this policy objective in the light of the Bishop Leshem case. This means the eventual government decision on this matter will have to involve some balancing of risk and some element of compromise. At the same time the eventual solution must be sufficiently robust and certain to promote stability and public confidence in the superannuation sector. Thank you.

Ms SMITH—I was asked today to give something of an update on ASFA's position and where we got to in a number of the workshops that we have held. We have held two in fact: one with a range of lawyers and the second with a range of industry representatives covering the industry super funds, corporate, retail, government, a range of consumer groups and statutory bodies. We have also put out a discussion paper raising some of the options and

discussion, which I think most people have had available to them. The issue has not been discussed formally at the ASFA council level so, by necessity, what I am saying today is really a progress report of some of the debates and discussions that have been held.

Today I want to cover a number of things. One of them is the structural issues and where we got to in those discussions but, probably most importantly, there are the operational issues: what type of animal do we want at the end of this in terms of how it operates and its flexibility and style? First up, I think what has come through is just the need to be aware of the special features of superannuation: its compulsory nature, the preservation nature of it, the way that it fits into the retirement incomes policy of government and the need to ensure that that is a public policy objective. All those issues, where we point to the need for an accessible and fair scheme, underline the need for public confidence in that scheme because of the special nature of super, and I will come back later to that. That goes importantly to the governance issue of any body.

Trustee issues are also seen to be of particular importance because of the history of trustees in superannuation funds and the particular responsibilities they have in terms of members as a whole—but also the emerging issue of how the individual faces up to those responsibilities of trustees. The issue of double jeopardy is of concern to trustees, and those trustees and the need for expertise in any body about trustees issues is very important.

Then we looked at going back to some of the confidence issues. It really comes back to some of the legal issues that need to be there. We need to ensure coverage of the industry—100 per cent if possible—the ability to enforce decisions so that they are determinative, and some relative certainty into the future about what is happening. The end conclusion that we have formed from discussions we have had in both workshops about shoring up the SCT—and I am sure it will be discussed today—indicate that there is concern about the ability of having certainty into the future.

In terms of looking at the industry alternative for the moment, we saw, if we were going to go the industry alternative option, that there had to be legislative backing for that requiring membership of an approved scheme, and that being backed up by contractual undertakings of the funds to be a member and to abide by the decisions of the scheme. That, in essence, would give the determinative powers and hopefully reinforce the legal stability of that arrangement. We also suggested that one other option would be to have in the legislative arrangements—like the SIS—some mention of a code of conduct or some other arrangement in terms of an alignment of the SIS requirements and responsibilities and trust responsibilities. As to the discussion paper provided by the Senate, I do not think it adequately looked at the industry alternatives and the potentials and ways of ensuring those issues of coverage and determinative powers, because our briefing is that there are ways of achieving that.

As I mentioned before, we saw the governance issues—or public confidence issues—as being critical in any scheme. Because of that, we saw that probably—if you are looking at an industry alternative scheme—a co-regulatory structure would be necessary and that this be spelled out in legislation, and the board or governance body include industry consumer representatives from the regulatory bodies. Again, I think the discussion paper assumes, in

effect, self-regulatory structures, not a co-regulatory structure backed up by legislation. The latter, I think, is important for confidence. I would also point out that it is a model that is different from the LICS model when it comes to the governance issues.

On the trustee issues, the ASFA workshop identified the need to balance trustee responsibility with legitimate consumer rights. This is an issue that needs to be teased out further and examined but the sorts of things that really do need to be teased out are things like duty to give reasons—certainly to the dispute body—and duty to act fairly and reasonably. Our position differs from the Senate discussion paper in that the discussion paper seemed to be saying that the issues are just private property matters. We would see us needing to address other trust issues surrounded by public policy. We will probably address that by evolution because things have been changing over time. Again there is alignment of SIS and trust but it certainly does highlight the need for special expertise about trust responsibilities on any disputes body.

In terms of the charter of the disputes body, we saw it as probably having to cover the following issues on other matter: Is it lawful?; Does it meet industry standards? Is it fair and reasonable in all the circumstances? It would be a pity to drop 'fair and reasonable in all the circumstances' because it opens the test up both ways. You would have to look at each decision from scratch. It might be a merits review but it may not address the question is it fair and reasonable in the circumstances from the trustee perspective. At the same time it also needs to address it from the consumer perspective of operating standards.

I will just touch on the scope of the body quickly. We have mentioned before the special features of super and confidence. The super products we saw as being the primary focus in terms of setting standards had to be looking at it from the perspective of the importance of super products and what that meant from their perspective. That tentatively would include insurance sold as part of super, the RSAs, the banking products, certainly point of sale issues by tied agents and fund trustee matters. Hopefully, it would include both discretionary and non-discretionary issues. It points again to be need for expertise about those issues being available. We did not see it as covering employer or employee issues, but it does leave unanswered questions like untied agents selling super products. Also raised at the discussion was that potentially into the future there may be marriages with other like products that are being sold in the investment area. Those marriages may be possible. We thought, in thinking through this, that we had to work out the test for super products first.

I am now getting to what was probably stressed by the group as being the most important aspect of where the discussion is today, and that is the way it should operate. This was highlighted at all the meetings. The problem is that the legal issues raised at threshold are questions about certainty and other things but at the end of the day the most important question to us is: what sort of animal are we left with in terms of the way it operates? Very clearly the messages coming through to us are that we wanted something that was non-legalistic, accessible and low-cost. By that we mean at a low cost to the industry and free to complainers. Looking at that more carefully, the key also is flexibility and having a range of tools available to it, largely drawn from the alternate dispute resolution kit of tools that are there.

Very strongly being said to us was the importance of active case management and the inquisitorial way of doing things. By 'active case management', we mean that the person dealing with the cases would be ringing up to test that information, getting the necessary information, filling in the holes, getting to the bottom line; and in that argy-bargy, hopefully, being able to resolve and fix a lot of the issues that were there. It also implies, probably, use of telephone rather than correspondence and other ways. So the advantage is that it can hopefully clarify and resolve issues more quickly. It reduces or eliminates the need for legal representation and that was seen to be important because most people cannot afford lawyers. The active case management approach was seen to be more accessible, fairer and quicker for most people. So there may be seen to be a bit of a trade-off there; but the feeling was that for most people that was a better outcome. Regarding flexibility and range of tools according to case: I have talked about the case managers and conciliation also being another tool that should be there. We saw that as being not necessarily compulsory and ideally face-to-face, as telephone does not do it; so it is not necessarily a low-cost option but does work in certain cases. We support single-member panels or adjudicators in cases that are small amounts, and panels drawn from consumer and industry groupings where the cases involve larger amounts or are of a more complex nature.

Finally, reporting arrangements—we saw it as important that this body could draw on the pattern of complaints and the range of complaints, so it is not just dealing with a case-by-case approach but being able to report to industry regulatory bodies or the public as a whole in terms of the causes of those complaints.

The emphasis, in all of this, is on being non-legalistic, accessible and low cost. There was one caveat from the industry perspective—you will notice the big 'No'. We were saying that this should not be of additional cost to the industry. A levy is already raised and, if we do pursue an industry alternative option, we say the money already raised by that levy should be utilised for both the establishment and ongoing operation of any industry alternative. I have to stress that that is a very real caveat from the industry's perspective.

On interim measures—as John Larkin already suggested at the last workshop last week—I think there was a consensus that whatever option we do pursue, there is an imperative to try to get something operational within the shorter, rather than the longer, term. But there will be a space where we really have not got certainty about the future. And we did support what John was saying on an interim basis—that is, that there should be legislative change to allow the SCT to have voluntary arbitration. That would appease some of the backlog that is there, but only for those cases where both parties are willing to sign a contract to abide by the voluntary arbitration. So while not resolving the harder cases, it does help ease some of the backlog. We thought that would help in the interim—maybe for six to 12 months—and that there should be a sunset clause in it. I am sorry I went over time.

CHAIR—Could I have one point of clarification? ASFA's interim position in relation to changing the existing structure was not quite clear.

Ms SMITH—I'm sorry, changing?

CHAIR—The first option—changing the tribunal arrangements at the moment—modifications to that.

Ms SMITH—The advice that has been given to us raises, I have to say, increasing doubts as to the ongoing certainty or stability of that and, probably more important, concerns that the way that it is being proposed—that certainty would be created through it—creates an animal that is legalistic and, in effect, either a formal tribunal or a court structure, which does not meet our bottom line of being non-legalistic and informal. Also, removal of the words 'fair and reasonable' is another concern for us.

CHAIR—Thank you very much. We will now hear from Mr Neil Wilkinson, the tribunal chairman.

Mr WILKINSON—I did not come prepared to say anything, so I want to keep my remarks quite brief. Operating under these conditions has been an enormous dilemma for the tribunal, and our concern has been always that we get a viable option up and running as quickly and effectively as possible. Anybody who has spent the last nearly four years of their life trying to get a tribunal working does not look kindly at the prospect of developing a new beast and getting it working. It will take a lot of time, a lot of effort, and we will have to reinvent the wheel. I suppose this guided the tribunal to look at the case: is the problem that has emerged because of the Full Court decision fixable legislatively?

Philippa has said, 'Well, if we can get an interim thing through legislation, then we can get that running for six months or 12 months and then we'll do something else.' If we can get something through legislatively, why not try to get something through that will continue to work beyond six or 12 months? We do not want a constant process of change if we can possibly avoid it. At the same time, we do want a degree of certainty. Why I welcome this particular initiative today is that it is the first serious look at the options by a number of people with relevant expertise and experience. Today is really the first serious attempt, and it has taken 2½ months to get to this point, and that is a bit sad. Nevertheless, we are here and we have a job to do.

The tribunal has done a considerable amount of work—mainly Carol Foley, an administrative lawyer at the tribunal—and many of you have copies of a model act which we prepared on 27 February. We had it out a fortnight after the decision. Unfortunately, there has been no way to discuss this sort of proposal, although subsequent Attorney-General's advice confirmed that a merits review body was probably a viable way to go in a legislative cure. We have also produced other papers; one most recently which we circulated today on the enforcement proceedings that exist and how we believe they could be dealt with under the proposed merits review approach.

I was interested in what Philippa was saying. But, basically, all the features that she seems to be saying were necessary for an effective complaints handling scheme are the very things that we do at the tribunal, and we have been doing them very well of late. Initially we had problems, but we have been doing them extremely well. They are all there and they can

be in a statutory scheme quite effectively—probably more effectively perhaps, in our view, than in an industry body where fairness is not required and underlined by court procedures. So I do not think it is true to say that we are talking about the things that Philippa was talking about. They are there. They can be there under a statutory scheme. They can be there under an industry scheme. It seems to us that they are the two most serious options that are before us today to be explored. I have not been involved in any discussions by the industry on industry models, but we have done quite a deal of work on industry models too. Our problem is that you are moving into a new area.

It is not a gentleman's club of banks—26 of them—who have a market interest in making sure that whatever system is set up by the banks will work and be seen to be working by the public. Insurers are in exactly the same boat with the life insurance complaints service. They have a market interest in belonging to Paul's scheme and making sure that they do whatever the panel says they should do in correcting the problem. But we are talking about something quite different.

I am not aware of any comparable scheme where you have 4,500 regulated superannuation funds, plus RSA's, plus insurers and other decision makers that get involved in TPD matters and somehow expecting them to be forced to comply and to ensure that they will comply, even though you have enforcement mechanisms written into the legislation. What we are talking about is a legislative fix by an industry scheme, a legislative fix by some sort of temporary arbitration scheme or a legislative fix by a merits review proposal. They are the three options. I can leave it at that.

CHAIR—If anyone would like a copy of any of Neil's papers, please let me know and the secretariat will make those papers available. We will now move to group discussion. Item 1 covers the essential elements of a superannuation complaints handling scheme and then, secondly, the dispute resolution mechanism.

Mr FAIRLEY—I would like to make a couple of comments in relation to the paper that you asked me to prepare. I am thankful to the committee for convening this meeting, because I think it is a very important issue that has to be resolved as quickly as possible. In preparing the options, Philippa referred to the fact that I did not deal with the detail of the industry model as I might have. I actually did not deal with the detail of all of the options because that really wasn't my remit. The request was really to set out a framework for discussion.

Of all the essential elements for any alternative superannuation complaints process, probably the overriding important one is that it simply be unassailable in the courts. I do not believe that the government can afford to be going forward with a scheme that simply is unclear and in a year or two or three years time, we are back in exactly the same situation as we are in today. In that sense, I sought to raise all the difficulties and then for this meeting to have the various views put, whether it be the view that Neil or Philippa has put or any other view.

I am extremely grateful for the assistance that David Maclean has given me in the preparation of the paper. David is a barrister from Melbourne who is present today and who appeared in the Bishop matters. I am also very grateful for the assistance that Neil Wilkinson provided in terms of the preparation of that material also.

CHAIR—We now turn to the group discussion. Does anyone wish to lead off on this issue?

Ms MURPHY—I would be happy to lead off on the discussion. I am coming at this from the perspective of a set of benchmarks which the previous Minister for Customs and Consumer Affairs issued last year to guide good industry based dispute resolution schemes. I think those benchmarks would apply irrespective of whether you are talking about an industry based scheme or a scheme set up under some kind of other auspices.

From the elements that are outlined in the paper that was circulated the other day, I think there are probably three main features which I would say are missing from that fairly long list of essential elements. Those three, I suggest, are accountability, efficiency and effectiveness.

I will run through them very quickly. Under accountability, I think any scheme which was set up or amended would have to be able to publicly account for its operations. You are not going to get public confidence without public accountability. Part of accountability is highlighting any systemic industry problems for the relevant body or bodies. This is not just dealing with complaints as individual complaints. Where there is a systemic issue with a particular company, a particular trustee or across the industry, complaints should be brought to the attention of the appropriate bodies.

Efficiency is very important. Consumers do not want to get caught up in a process which is going to take years to resolve. They want to avoid, wherever possible, legalistic approaches and they would like to have a fairly efficient consideration of the disputes.

The final criteria that is missing, effectiveness, would entail the scheme's having terms of reference that are clearly understood by all parties, so its jurisdiction and what it can and cannot deal with must be clearly spelt out and clearly understood and there should be periodic review not only of its terms of reference but of the way it is operating.

The paper does address what we see as three other key issues. They are accessibility, independence and fairness. The paper addresses them at a fairly superficial level, but they are there as key features. Thank you.

CHAIR—Are there any further contributions from the table?

Mr MORGAN—I hate to be a little legalistic about these issues but I think that as for moving from the standards, which are at a fairly high level, there are some matters which

need to be put on the table about whatever solution that is designed involves. Firstly, in the main we are dealing with trustees who are volunteers. We are dealing with entities which do not have capital. The outcomes of these dispute arrangements, to the extent that they involve a cost for the funds, are borne mainly by the members of those funds, not by someone else. That is a factor which needs to be kept high on the agenda.

I agree with the view that there is a role for a cheap and efficient system but I think we need to consider very carefully five questions: what type of action or decision is going to be reviewed by that body—we need to define that—who is going to be subject to the review process, who can seek a review, what criteria are to be used in that process, and the procedural method of review. When you answer those questions, it does not mean that all matters that may be the subject of disputation or claim should appropriately be considered by exactly the same body. I can give an example of that: there are some very complex matters of fact and law which are capable of arising in the context of superannuation funds and they are not necessarily appropriately decided by bodies which use a very simple paper driven system.

The other matter, which I think has been touched on by Philippa Smith, is that it is very important that you remember that trustee decisions are being reviewed and that the method of review must have a proper symmetry with the duty of the trustee. If we are to change the duties of the trustee, that ought to be done expressly. That raises the issue of fairness and reasonableness. We can enter a legal debate about the duty of a trustee in making a decision and how that lines up with a general administrative law duty of fairness and reasonableness or procedural fairness or merit or fairness in its full merit sense but the trustees, when they make their decision, must be able to do so confidently, knowing what the test is that is going to be applied and that it is the same test which they are required to apply.

There are a number of other issues of a more minor nature which need to be taken into account and perhaps they can be left for further discussion. They are the principal issues which we believe, from the legal point of view, need to be considered in whatever is established.

CHAIR—I call for further contributions.

Mr BERRILL—I represent the Consumers Federation of Australia. From the consumers perspective there is a couple of matters that we want to mention. First of all, one of the key issues we see is a speedy resolution of the current debacle, if I could call it that. The uncertainty and delay for those persons with complaints before the SCT at the moment are intolerable. Many of those people have had complaints in various stages for anything up to one to two years—for claims processing it is anything up to two to three years. The delay is unacceptable. The ongoing uncertainty of the review mechanism will affect decision making of trustees on an ongoing basis if there is no effective review in place. It is also certainly undermining consumer confidence in the superannuation industry.

It is certainly our preference for a solution that does not involve major legislative redrafting. Therefore, we think that the use of existing mechanisms and structures such as the Superannuation Complaints Tribunal or the Life Insurance Complaints Service are preferable. If you are establishing a completely new system with new infrastructure it is going to take a lot of time and that is an undesirable result.

Secondly, an essential element of any dispute resolution mechanism must be a full merits review. Under trust law principles, courts have limited powers of review. Given the compulsory nature of superannuation, the need for consumer confidence, the need for accountability of trustees and third parties to decisions, such as insurers in disability benefit claims, and general principles of fairness and reasonableness, we think a dispute resolution mechanism, whatever it be, must have full merits review powers. I do not know that there is any controversy about that; everybody seems to accept that. Another element is certainty. That has been touched on. The constitutional uncertainty of the various models being proposed is going to be a millstone around the necks of any review bodies. This works against the Superannuation Complaints Tribunal fixed model, in particular, and perhaps the industry based scheme model. The whole premise of the establishment of the Superannuation Complaints Tribunal was to provide an alternative to the traditional court system. The court system over the years, particularly in the area of superannuation, has been too expense, too slow, too legalistic and it has certainly not been user-friendly. Therefore, what we are looking for is an economical, speedy and user-friendly mechanism. In the options paper the discussion of the tribunal as part of the Federal Court option appears to be too costly and legalistic. The idea of a de novo appeal review before a federal judge, with the cost and time implications that will have, appears very unattractive to us.

Another point is the independence. There is nothing controversial about that. Whatever structure we have in place must be independent of industry, although we recognise that industry has a key role to play. It must also be independent of government of the day, although government of the day certainly has a role in setting it up. In that sense, consumer representation on whatever the review body is is important. The circumstances under which consumers are selected is a matter that needs attention. Consumers are looking for confidence in the independence of the body and for their complaints to be dealt with fairly, reasonably and without being seen to be beholden to industry.

Finally, I would like to talk about accessibility. The whole idea of the Superannuation Complaints Tribunal when it was set up was as an alternative to the courts, and accessibility was a key element of it. We need a system that is less legalistic and bureaucratic—as little as possible—and, in particular, we think that that requires a system that has a secretariat that gives general advice and assistance to complainants, many of whom will have no idea about superannuation and very little knowledge about how to have their matters determined, how to have their complaints dealt with and what their rights are. We also think it is important that they have access to independent advice and advocacy where appropriate.

CHAIR—Mr Rose, you have some views about the appeal. Would you like to comment on that?

Mr ROSE—The option of giving these powers to the Federal Court, of course, encounters the problem that it would not succeed if the High Court were ultimately to hold that these powers are non-judicial, so we have got a fundamental problem there. How do we proceed in the meantime pending the High Court decision on an appeal? Either the High Court would refuse special leave—in which case we would have to proceed on the basis of the Full Federal Court judgments in Wilkinson—or the High Court would grant special leave and proceed to a hearing. We heard earlier, I think, that that might not be until some time between August and December, and I suppose one should expect a few months at least to be added on to that for the court to give its decision. So we are looking at a period of about 18 months before we get any guidance from the High Court, unless it refuses special leave and we have to proceed on the basis of the Wilkinson decision.

When we make assessments as to whether it is worth while to amend the present act to try to shore up the non-judicial option, it is no good my saying that I do not think the Federal Court got it right. It is no good other lawyers around here saying what they think because nothing will resolve it until the High Court tells us. Nevertheless, there may be some things we can do, guided, for the time being, by the majority judgments in the Wilkinson case, to shore it up in terms of Justice Heerey's criteria. I am not really sure how far it is worth going there. We heard earlier that the government's lawyers have said that a full merits review looks safe enough. We have not seen a copy of that, but I think there would be prospects of moving down that road. I would be interested to hear what other lawyers around the table think on these issues.

CHAIR—Is there a paper on that merit review approach?

Mr LARKIN—There is, but I would need to consult the minister before releasing it or before tabling it.

Mr ROSE—One of the problems I have with the judgment of Justice Heerey is that he proceeds as though all the tribunal had to do was to decide whether the trustee's decision was fair and reasonable. In fact, the powers given—or purportedly given—to the tribunal went further than that. They included the power to proceed as if it were a trustee and to make a decision in substitution for the trustee's decision. If the tribunal's powers ended simply with deciding whether the trustee's decision was fair and reasonable, then one could understand why Justice Heerey quoted those High Court decisions about the Industrial Court from round about 1960, I think. The Industrial Court had to decide whether union rules were oppressive, unreasonable or unjust. If it decided that the union rules were unreasonable et cetera, it could declare them invalid. But the Industrial Court, of course, did not have power. It was not purportedly given power to go on and substitute new rules. I would have that thought that that plainly would have been a non-judicial function, because the court would have to choose between quite a range of alternatives, each of which could be reasonable—just as here, when the tribunal is deciding whether to substitute a decision for that of the trustee, it may have a range of options available, each of which is quite fair and reasonable.

I think on that basis one could say that that further power of the tribunal to make a decision as if it were a trustee in substitution for the decision that had been set aside is not a

judicial function, that the addition of that extra power takes it out of the judicial power problem. There are some cases which give some support to that that are mentioned for other purposes in the majority judgment, but what surprises me is that Justice Heerey's judgment proceeds as if the tribunal only had to decide whether the trustees' decision was fair and reasonable and completely overlooks that further element of the scheme. Justice Sundberg mentions it in the context of enforcement but does not consider its implications for the basic question of judicial power. So those are the general thoughts along which I have been proceeding.

Of the cases I have in mind which would support the idea of this double-barrelled process, the first one is an objective test applying fair and reasonable or harsh, oppressive and unjust, whatever you like, the first limb being an objective decision but supplemented by a power to make a decision which is of a broader kind. In the cases of Precision Data and so on, that second limb involved a decision as to whether certain things should be prohibited in the public interest or whatever. That is a pretty broad criterion, but the pattern of having a basic objective decision supplemented by a decision which involved a choice between a number of alternatives on a broader range might provide a way forward here. It is certainly not as clear as the Precision Data legislation, but my tentative impression is that we might make some progress along those lines.

The trouble is, though, that in the meantime we just have the unavoidable uncertainty. If the legislation were to be amended, presumably there would be challenges in the meantime that go back to the Federal Court. A single judge of the Federal Court would consider whether the legislative changes made any difference to what had been decided in the full Federal Court by which the single judge would be bound, and eventually you would have the revised legislation awaiting a High Court decision as to how that stood, as to whether the changes made any difference. That is an outline of how I have been trying to come to grips with it.

Mr WILLIAMS—I wanted to make a few comments on the criteria themselves and also a few comments on what Dennis Rose has said. Firstly, I think what has not been discussed in any detail is the relevant relative weightings of the criteria, particularly the criteria relating to constitutional validity, but in a sense that is crucial to which option might be selected as being the most appropriate. There are a couple of ways of looking at it. One is that we should be dealing with a body that must be unassailable from constitutional challenge, and to my mind that is set far too high as a criterion. I think it is almost impossible to ever establish a body like this, given recent High Court decisions, that could be described as unassailable. However, there are a couple of options which would go some way towards doing that. The court based option would be less assailable than most, but then again it might need to be a greater reconstruction than has been suggested in the papers. Indeed, you would need to be careful with legislative change to ensure that it was judicial as opposed to non-judicial power that was being exercised.

The second way of perhaps making the body unassailable is actually an option which has not been canvassed, and that is to say that the Commonwealth is unable to legislate with any degree of certainty in this area and indeed the only way of achieving a great degree of

certainty is to establish a state based body. The states themselves are not subject to the separation of judicial power in the same way as the Commonwealth. Indeed, if the states were to have established a body such as this via complementary legislation, it is likely that the body would not have been found unconstitutional because they again are not subject to the same limitations as the Commonwealth.

That, of course, raises some political issues as to potentially a fracturing of the superannuation legislation and problems with gaining a unified system. There is a further way which might perhaps build the states in which might also achieve the degree of certainty that is required. That is for the Commonwealth to legislate for the Australian Capital Territory to establish a body such as the complaints tribunal and then for that legislation to be taken across the states via complementary state legislation. That is exactly how the corporations scheme works and that is exactly how a like body, the Corporations and Securities Panel, has been established by the Commonwealth, with it exercising its power for the territories.

The reason it is done in that way is that the High Court has held for many years that the Commonwealth's exercise of power is not subject to this judicial power legislation when it is exercising power for the territories. If the complaints body was established as a territory body, the law says, as it currently stands, that it would not be subject to the limitation that the Federal Court has found. You would then seek to apply that body across the states with state legislation. That is not a particularly elegant way of looking at this, but it is one that offers far greater chances of a body that would not be subject to constitutional attack.

They are the options which look at the body and try to maximise the level of certainty, and there are problems with all of those options. I think you also need to see that there is a degree of risk management here. You should not set the level of certainty so high that you do away with the other criteria, such as establishing a body which is fair, economical, informal and quick. For example, if you went down the road of the court solution, in my view you would be jettisoning those criteria and you would be having a completely different body.

I would like to comment briefly on what Dennis Rose has said. Dennis is right in saying that we do not have any High Court guidance on what the Federal Court's decision was. Like Dennis, I agree that the decision was unsatisfactory. I think there are some prospects of a successful High Court challenge, but I would not put any money on it. It is uncertain in the High Court because, with a rapidly changing court, we are left with a number of judges whose views are not clear on this issue. I personally would not want to predict how that decision would go. However, it is not true to say that there is no guidance from the court.

Dennis pointed out the Precision Data case in 1991. That was a unanimous decision of the High Court which upheld the powers of a like tribunal as to Corporations Law, the Corporations and Securities Panel. In my view, if we are looking to guidance from the High Court, the appropriate thing would be to adopt some of the criteria which the High Court has said enabled that tribunal to be upheld in exercising the power it did. That, to my mind, would lead us to three things. It would mean we would need in the enforcement area to

adopt a system where there was the ability for review by a court of a decision of the tribunal.

Secondly, we would probably need to drop the fair and reasonable requirement, and I think we would need to seek to adopt a different, more explicit policy based formulation. The Corporations Law does that by adopting the Eggleston principles, which identify certain policy formulations as to shareholders' rights. Thirdly, I think the legislation would need to make far clearer the fact that the tribunal would be making its decision by standing in the shoes of the trustee. Obviously that was sought to have been done, but it could be done far more clearly, and that would establish a merits review process like the AAT, which I also agree would do a lot to insulate this body from attack.

To pull these threads together, in my view there are some more unassailable options but perhaps they are quite unpalatable. If we are looking to achieve a body which has some of the characteristics of the current body, then there is a high degree of risk management involved. We cannot get away from that, because it is impossible to give legal advice with any degree of certainty in this area. My suggestion would be that we look to the Corporations Law and the Corporations and Securities Panel and ask why that was upheld by the High Court unanimously in 1991. Perhaps we can adopt some of those criteria here.

Mr Rogers—My name is Andrew Rogers. Presently I am a consultant at Clayton Utz and have offered my services for such assistance as I can provide. I would suggest that the first thing you have to do is decide what you are aiming to achieve. The reason we are gathered here today is that of the constitutional doubt of this legislation. I am duty bound to tell you that this is not a newly born child. Four years ago at some conference I said there was some doubt, and I gather the Law Council of Australia did likewise. So it is not a new crisis that we are confronting. What flows from that is that you have to make up your mind whether you are aiming to achieve a permanent solution or an interim solution, or are you going to wait for the High Court to make up its mind as to what the true position is?

I would suggest to you that the people of Australia want a permanent solution and do not want to wait for events to develop. Let me take a quick glance at what would happen if you were to go with one of the other solutions. One of the concepts that was suggested for an interim solution was voluntary arbitration. I support an indigent senator very well on the proceeds of arbitration. It is a most expensive form of dispute resolution known to mankind. I would strongly counsel you against even entertaining the idea of arbitration. Put it out of your mind, I would suggest.

What other bridging solutions are available? Listening to Mr Rose and Mr Williams, I would suggest that you would have got the impression that there is no safe solution to be found. One other aspect that I would venture to add to what they have said is that the High Court's concept of what is judicial power is a continuously evolving one. If one looks back to 1925, or whenever the Privy Council first tackled this topic, you would not recognise the sorts of things they were talking about with what is happening today. To try to predict what the High Court is likely to do is to read the entrails of oxen. I think we have got past those days.

There is no mileage to be had, I would suggest, in trying to predict how it will go and trying to work out solutions anticipating a likely outcome. What would be the permanent solutions? Mr Williams suggested what I will inelegantly describe as the Santow-Williams solution, which they submitted I must admit with some support from me to Senator Campbell in relation to the format of the takeover panel in the context of CLERP. It has not attracted any real discussion, I do not think, in the legal community. For whatever my personal views were, I would think that legally and constitutionally the notion that you should have the exercise of the territory power and then adopt it state wide would be a sound one. How politically feasible it is is almost like trying to predict what the High Court is likely to decide in a given case.

One alternative that has not been canvassed—and I was wondering if you would like to put it on the table—is having an industry code of practice under the amendments to the Trade Practices Act. That would have the force of law. It would have an industry wide coverage, and you could prescribe all those indicia of desirability that has been canvassed in Mr Fairley's paper and has also been added to by the speakers today.

You would enable a situation in which it would be compulsory for every participant within the industry to submit to a method of dispute resolution which would embrace all these indicia. I think it was Mr Morgan who said—and he was quite right—that you need to tailor the dispute resolution process to a particular dispute. You do not need the whole armory of dispute resolution for a simple dispute. Ideally, you should have a gatekeeper who would direct the complainants to the appropriate dispute resolution mechanism which would be appropriate to his or her case. To give an illustration, if it is something involving permanent disability, you would most likely want to get a doctor or some person like that.

CHAIR—Who would be the gatekeeper?

Mr ROGERS—I am glad you asked. It depends on the salary! No, seriously, it would be a very difficult job and it would be somebody well versed in dispute resolution techniques, and there are more and more people coming along like that. There are a number of people currently working at the Australian Law Reform Commission on the adversary procedure references who would be very good.

CHAIR—Where would his position be?

Mr ROGERS—That person would be situated at the heart—if I can call it that—of the dispute resolution mechanism that you would be erecting. It does not matter, for the purposes of the exercise, whether you call it 'the tribunal', except that you would want to get away from that name. It would be a 'functionary'—for want of a better word—within the organisational structure which would be required in order to administer the scheme. It seems to me, if I may so, that if you can get away from the court system and get these complaints into a dispute resolution mechanism which has as little involvement with legalism and lawyers as possible, you are travelling down the right path. For almost 50 years I have been

a lawyer, but that has not convinced me that that is really a great way of resolving disputes. Sometimes you need them; sometimes you do not.

I could go on for hours telling you what sort of scheme this would be and I do not want to do this to you, but I would like to suggest to you that, if you combine contract underpinned by the code of practice, then you would be achieving a constitutionally valid scheme which could have all these attributes that people desire.

Mr RAITT—My name is George Raitt. I am from Blake Dawson Waldron. I have submitted a paper to the committee looking at some of these constitutional aspects of the merits review function. As a lawyer, I am stunned and disappointed to believe that the options that are open to the community are limited because lawyers believe that it is impossible to predict what the High Court may do, and so, therefore, we examine our options with one hand tied behind our back.

I think the committee is correct in that we identify, first, the essential elements of a scheme—work out what the community wants to achieve. Leave aside constitutional issues. We will come back to that when we have identified what the community wants and how we are to achieve it. Then we go to the lawyers who are versed in constitutional law and say, 'How can we do this?' That is the time to worry about the constitutional issues. I would endorse the committee's approach of looking at the objectives we want to achieve, and on page 3 of my paper I set out some of those objectives—a couple more than have been identified in Andrew Fairley's paper. I believe we ought to look at the options on their merits and identify the one that best meets the community's objectives and, when we have done that, there are enough smart lawyers around the place to be able to say how we can achieve them.

CHAIR—Mr Maclean, would you like to give us your ideas on this 'gatekeeper' approach that Mr Rogers has raised? That could be a hybrid alternative.

Mr MACLEAN—My name is David Maclean. I am barrister from Melbourne. I thought I might ask Mr Rogers how his scheme would actually work. My first question would be: does his system lead to a legally binding decision being made by anyone and, if it does, who is that person? Secondly, in what way would the binding decision, if there was one, be enforceable? At this stage, I do not actually understand the proposal.

Mr ROGERS—It would be a legal decision in as much as it would be part of the code of practice that the parties would undertake or have imposed on them the obligation to accept the decision as binding. In a sense, what I am trying to do is combine the notion of arbitration in the sense of having an agreement which accepts as binding the outcome of the dispute resolution process together with the binding force of the code of practice.

Mr MACLEAN—Who would be the parties who were party to the code of practice? Is it just the corporate trusts?

Mr ROGERS—All industry participants.

Mr MACLEAN—It wouldn't include the members of the superannuation funds?

Mr ROGERS—It would through the funds.

Mr MACLEAN—How would that work?

Mr ROGERS—It seems to me that the power to make a code of practice is wide enough to require anybody who joins a fund to accept the obligations or the provisions of the code of practice.

Mr MACLEAN—The obvious difficulty that strikes me is that if you go down that track, it looks to me like the Superannuation Complaints Tribunal under another name if you have to use a federal statute to compel the members of the fund and the trustees to submit to the binding decision of some third party. That is my reaction.

Ms MURPHY—The Minister for Customs and Consumer Affairs will have the responsibility for prescribing codes under these proposed amendments to the Trade Practices Act. One of the issues that we have been considering is the possibility of having the minister prescribe a code and possibly having a dispute scheme hanging off that code. However, I have to say that we are in the process of seeking legal advice to see whether there would be constitutional problems in requiring members who sign up to a code to also be bound by a dispute resolution scheme. I think the concept has a lot of attractions, but again I guess we are mindful of possible constitutional limitations.

Mr MACLEAN—The constitutional position has to be nailed down. There does not seem to be much point in considering various models in an ideal world if you cannot say very quickly that they are obviously safe.

Mr ROGERS—I think that some will be safer than others. In this veil of tears nobody is going to say to you that something is completely safe unless you take George Williams's concept which is politically difficult.

Mr GIBBS—At this point the AIST has not determined a final position as to which of the options we would support. A couple have been mentioned today that we had not hereto before thought of. The most appropriate way to go forward is to actually look at the three or maybe now four that are before us and to have a consideration of the advantages and disadvantages of each one of those.

I am inclined to agree—and I am not a lawyer—that we could spend all day speculating about the High Court and constitutional challenges, both the current one and likely future ones, to any alternative. I do not think that will get us very far. It will certainly not get complainants very far. It will certainly not get trustees very far in understanding what their

obligations are and being able to make decisions under a regime with some certainty—that is, not with certainty that their decisions will never be overturned but at least with certainty as to how their decisions will be reviewed. I think that is a fundamental consideration in this issue.

I think that we should be looking at each of the alternatives and discussing the advantages and disadvantages. Seeing I have the floor, I might take the opportunity to be first in with the view that I think, notwithstanding the size of the gathering, we should do that as one group not as three groups. I cannot divide myself into three for a start, and many organisations represented here cannot, yet they would all want to have the ability to hear an explanation of the advantages and disadvantages and perhaps to make comments. When you break off into three, you waste as much time in the reporting back mechanism as you could have used with the ability for everybody to make a contribution.

Finally, whilst the option put forward by Mr Williams might be the surest constitutionally, I think one could equally say that it will certainly be the surest to take the longest possible time—if it ever happens. Notwithstanding that, even if it does happen, I cannot imagine trustees having to contemplate six different—even if equally established—bodies; and which one—or other of them—would be the appropriate one to deal with a complaint, depending on where the complainant lived, where the superannuation fund was constituted, where the insurer was incorporated, et cetera.

CHAIR—Thank you.

Mr BEAN—I am from the Life Insurance Complaints Service and I just want to point out that the scheme described by Mr Justice Rogers is our scheme. We have a code of practice that requires our members to be members of our scheme and our decisions are binding on those members. So a scheme like that is already in operation. Most of the schemes that operate in the industry area do operate in a similar manner to that already. We have said, and I think other people are saying, that you should use that kind of basis.

The only thing that we do not have is the gatekeeper. The ASC, the ISC, the consumer movement and ourselves have long been discussing the position of gatekeeper and what should and should not take place in relation to that because there is a great deal of difficulty in directing people to the right scheme. At the moment the ASC have set up a telephone-type gatekeeper, whom people ring when they do not know where to go and they are directed to particular schemes. But, of course, I support what you are saying, because it actually describes our particular scheme. I just wanted to point out that they do already exist in that manner.

Mr WILKINSON—The code of practice is just a gentlemen's agreement at this stage; there is no legislative force behind it.

Mr BEAN—At this stage—but the Life Insurance Act may be taking some measures to make it a permanent arrangement.

Ms SMITH—The comment I was going to make, Senator, was not dissimilar in that the model I was trying to tease out before did take on board contractual underpinning and the development of a code of practice; but I make the point that the significant difference was that we saw the need for legislative underpinning and alignment of that.

I think that, whatever we do here about the gatekeeper element, we need to ensure that there are protocols and a coordinating point between either the alternate industry bodies or other mechanisms that might be available. That needs to be done between the bodies. The gatekeeper role of the ASC is also facilitating that. But I was also trying to draw out the fact that in the body that you are developing—whether it is the enhanced SCT or an alternate industry body—there should be a screening process of complaints coming in, and a flexibility to deal with them according to the nature of the case. I would say that is an important criteria.

One other point which might come up is that the screening process is an important mechanism which can be intrinsic to the body itself. I think we have to remember the relative weighting, though—and it has been raised—relative to the objectives of where we are going. Perhaps I did not flesh it out properly, but I see a problem if we are thinking of a merits review body which will stand in the shoes of a trustee, without the words 'fair and reasonable' being there; because you are then creating a real risk of double jeopardy from the trustee's point of view, which has to be considered.

The other concern that we have is one that has been raised in the discussions I have had and it is that we do not want an AAT look-alike. If it is an AAT look-alike, it is a court process and we are back into legal representation and we have not gained the objective or the animal that we want, which is a non-legalistic, low-cost, informal proceeding.

CHAIR—We might perhaps make the next contribution the last.

Mr LILLICRAP—I really have no comments on the evaluation criteria except to say that I agree with the additions proposed by Janet Murphy. But I strongly agree with the comments made by John Berrill that there is an urgent need to fix the problem. There are large numbers of our members and members of many other superannuation funds who have issues that they believed were being considered by a disputes tribunal but which are in abeyance. We certainly cannot wait for 18 months to sort their problems out. It is grossly unfair, and nothing we do or fail to do will have a bigger impact on the public credibility of superannuation than not doing something. However much it may be in the long term not a viable solution, we have to find an interim solution that works.

I am not a lawyer but I believe, from listening to the comments of the lawyers here, that any solution that involves reviving the Superannuation Complaints Tribunal is not going to be a quick matter: we are not going to know the answer to whether it can be done or not for quite a long time. We cannot wait for 18 months, I believe, to start work on an alternative. Maybe the decision to pursue the alternative, as against a changed Superannuation Com-

plaints Tribunal, can be deferred. But, on the day we decide between the tribunal and an alternative, the alternative must be on the table with all its details agreed.

I would hope that one of the things we can help you and the government to do is identify what is a workable interim solution and what sort of longer term solution we here—and the people we represent—would favour if it turned out that the constitutional problems prevented the SCT being revived in any form. Thank you.

CHAIR—We now have six alternatives that have been on the table: industry body; reconstituted SCT in the Federal Court; amend the complaints act; a state body, which was put forward by Mr Williams; industry code of practice under the TP Act, from Mr Rogers; or voluntary arbitration, which is the sixth one, under contracts law. Given the comments made by Mr Lillicrap and Mr Gibbs on the time that would be taken to set up a state body right across the various jurisdictions, do you think we should rule that out or not in our deliberations today?

Mr CERCHE—I am from the Corporate Superannuation Association. I believe that that method is the only effective method where a dispute resolution along the lines of a tribunal is satisfactory, because it is legally defensible.

CHAIR—Where does that fit in?

Mr CERCHE—I would like it as an option because I see it as a long-term solution which will withstand constitutional challenge. My association is concerned principally with certainty. We are dealing with the property rights of individuals and it is intolerable not to know whether the decisions we take are correct or not and then, on review, whether the decision-maker reviewing our decisions has the power to do so. That simply causes the system to fall into disrepute. So I believe that we should aim for legal certainty as the ultimate goal here. If that means that the system is not as cheap and as efficient as others would like it to be, that is a price we have to pay for the certainty that property rights demand.

CHAIR—In terms of workshops, Mr Cerche, where would you like that to be grouped—1, 2 or 3?

Mr CERCHE—Item 3.

CHAIR—Item 3, okay.

Mr WILLIAMS—If that option is going to stay in, I might just respond to one earlier comment. The body, as I have set it up, would actually be created by Commonwealth legislation for the territory with state adoption legislation, but there was one earlier comment that perhaps this would lead to different bodies in different states. It would not. There would actually be only one body. For a complainant coming before the body, the process of setting

it up would be completely transparent. That person would be unaware of the fact that it may get its power from a state or the Commonwealth. That would not matter. It would be one body with one membership, which would have the commonality of interest across Australia, but it would be created by the Commonwealth—perhaps in the ACT—with an act of parliament passed by each state adopting that across Australia. That is how it would work.

Mr ROSE—Like the ASC.

Mr WILLIAMS—Yes, like the ASC is established.

CHAIR—It is agreed that arbitration under contracts law should go to group 1, the industry body, for discussion. The industry code of practice perhaps should go to group 2—reconstitute the SCT in the Federal Court.

Senator CONROY—I have a procedural question. Are all the three groups going to be minuted in *Hansard*?

CHAIR—No. Is it the wish that we should go into a committee system breaking into three groups or would you like this larger group to consider each of the issues? I am in your hands.

Mr ROGERS—I would strongly urge you to keep it in the one group because we are feeding off each other's ideas. It is unlikely that the same intellectual input will emerge if we break into committee groups, and people will not have the chance of making an appropriate input.

Mr FAIRLEY—I would certainly support going into groups in the sense that I do not believe that we will get through in detail the issues that have to be dealt with in each of the options, particularly if you add these three additional ones. In three groups, you have got three times the horsepower to be able to deal with all the issues. I am not sure that I agree with Andrew that, in groups, we will not get the intellectual input or the sort of cerebral analysis that we need.

CHAIR—And there will be reporting back.

Mr FAIRLEY—And there will be a reporting back process, one would hope.

Ms RALPH—I am Lynn Ralph from the Investment and Financial Services Association. I see that I am assigned to a group which I think I will have a hard time giving a contribution to because I am not a lawyer and there are a lot of learned lawyers around this table. I would like to hear what goes on in all three groups. In terms of my being able to inform my membership about all of these options, I think I would benefit enormously from being able to hear the discussion on all three of them. I never came to the table thinking that we would come to a solution at the end of today and, therefore, breaking down into three groups to try

to progress the thing into some detail is something that I am prepared to sacrifice in order to hear the wider debate on all of the options.

Mr EDSTEIN—Despite the fact that we have a lot to go through, I think that we will need to sit as one group. For myself, if the other two groups come back and I hear what they have to say and I do not agree, then I will not accept it, and I think the same would apply with respect to the group I am in when we come back. I would expect that other people, if they were not participating in the discussion of that group, may well not accept what we would say.

CHAIR—So far, the people who have commented around the table would prefer to sit as one group. I think I see a general consensus.

Mr BEAN—Perhaps I could suggest a show of hands.

CHAIR—Could I have a show of hands in favour of splitting three ways? Thank you. And could I have a show of hands by those who want to sit as one group? I think it is fairly unanimous that we sit as one group. Before we break for morning tea, I would ask Senator Sherry, the deputy chair, to make a comment.

Senator SHERRY—I want to make a couple of quick observations. Firstly, I agree with dealing with the urgency of the problem. Some of you may not be aware of the implications of the proposed choice of superannuation legislation which is scheduled to be debated sometime in May or June when we resume. From my perspective, that increases the urgency of dealing with the issue. 'Choice', depending on the final model that is adopted by the Senate, is effectively the deregulation of the retail delivery of superannuation in this country. That will certainly mean an increase in disputes—the level is debatable and will depend on the final model. Notwithstanding the current problems that are unresolved, I have a great concern that that process will lead to an increased pressure in the disputes area. With the advent of choice in superannuation, everyone with superannuation in this country has a right to know that there is an effective disputes forum, whatever that may be, to determine disputes in the new climate that will emerge.

The other thing is that from a political process point of view I am very concerned. It is apparent that there has to be some legislative change, whether there is an intermediate solution or a final solution. A legislative change to deal with intermediate problems will inevitably take a significant time, anyway. The legislative program is such that a relatively minor change might take you a year or 18 months. The political process moves very slowly even for the most innocuous minimal changes to legislation—even where there is agreement between the political parties and even if the various organisations unanimously request change to legislation. And there may be an election in the next three or four months. So with any legislative change, no matter how minor, you are looking at some time next year.

So my personal preference is to work for a final solution, if one is achievable, in the knowledge that with a final solution, even if it is difficult and does not attract unanimous

support, there is some reasonable degree of certainty that it would be through the parliament by the end of next year. I do not know what the government's proposed date on choice will be or the final date that the Senate will agree to but it seems that a final solution has to be arrived at, if it is possible, by whatever the proposed date of implementation of choice is—and we should know that in the next month or two.

Mr FAIRLEY—Are you saying that whatever option we recommend to the committee is going to take 18 months—whatever happens there is 18 months of uncertainty about what the decision making process is? The High Court may well have deliberated on the issue before then, anyway.

Senator SHERRY—There is a good possibility that you may be looking at a year to 18 months. There is the drafting of the legislation. There will almost certainly be an election this year—parliament may be prorogued. I hope I am wrong but it is very difficult to see legislation being finalised by the end of this year.

Mr ROGERS—Arising from what Senator Sherry has just said, I suggest that you aim to emerge from this meeting with two schemes. One is the long-term solution. But on this timetable you have to have a bandaid so you may need to form a subcommittee of this group to prepare a bandaid. I do not think we have a bandaid on the table at the moment.

CHAIR—Thank you. We will have a short break.

Proceedings suspended from 11.20 a.m. to 11.38 a.m.

CHAIR—Given that we are not splitting into three groups, I thought that between now and lunch we would look for the short-term or the bandaid solution because that is an imperative. After lunch, we will then look at the three to six options. I will now ask Mr Andrew Fairley, followed by Mr John Larkin and maybe Mr Fox, to make a short contribution in terms of the bandaid solution.

Mr FAIRLEY—I want to follow up on a question that I asked Senator Sherry just before the break, and that was in relation to the timing of any legislative change. That clearly seems to be central to the discussions on a bandaid solution or a temporary solution vis-a-vis any permanent solution. Senator Sherry's comment was that it could be up to 18 months before there was any capacity for any legislation to be amended. If that is the case then, clearly, we need to pursue with vigour that path of a temporary solution.

The superannuation industry amendment bill that is currently in the Senate—which I understand the Senate committee has determined not to review, and which will be coming up for debate presumably in the budget sessions—already has provisions in it that relate to the amendment of the SRC act. It would seem to me that there is every prospect—if the government had the wish to do it—of being able to actually move further amendments to that bill. If the amendments can go through the Senate and go back to the House, that could actually be effective in the next two or three months. So there does seem to me to be an opportunity, if there can be some consensus, to actually take some fairly decisive steps right now because the avenue is there. Therefore, I just question whether we really want to devote a massive amount of time to coming up with a bandaid solution if the capacity exists to have a permanent solution. If it works and everybody is in agreement with it going forward, we could actually have it in the legislation or have some legislation—if it involved an amendment to the SRC act or it could be incorporated into the superannuation industry amendment bill—in a much shorter time.

CHAIR—I have one matter on referral. Generally, matters get referred to our committee by the Senate rather than the superannuation committee making its own references. We can go down that path but generally, in relation to bills, they are referred by the Senate.

Senator CONROY—I am on the Selection of Bills Committee. The Selection of Bills Committee works on the basis that, if any party disagrees with any part of any bill, it is automatically referred to a committee. Even if the Labor and Liberal parties said, 'We completely agree with where the industry and this forum has gone,' we cannot guarantee you that the matter can be treated as non-controversial because the Democrats, the Independents or Mal Colston could request that it be delayed and not go through as what we call a non-controversial item. As pessimistic as Senator Sherry sounded, I would probably have to say that it would be almost impossible to get a bill through before any proposed likely election, and that would probably push us through to next year by the time parliament got reconstituted some time towards the end of the year.

Mr LARKIN—I can only comment on the procedural matter. I can confirm that there is a superannuation legislation amendment bill currently before the Senate. The bill makes miscellaneous housekeeping amendments to the Superannuation Industry (Supervision) Act

1993 and the Superannuation (Resolution of Complaints) Act 1993. It was passed by the House of Representatives in the 1998 autumn sittings and is currently before the Senate. Procedurally, it should be possible for the government to move amendments during the Senate debate on that, which is expected to occur in the winter sittings. However, the government would need to agree to this course of action and, indeed, would need to approve the policy underlying the substance of the amendments if that were to be followed, and I cannot, of course, commit the government to that.

Mr FOX—The item I was going to mention actually goes to the permanent solutions. It simply flags that one of the options available is to take advantage of the proposals under the sixth corporate law economic reform program paper, which includes a mandatory requirement for complaints schemes—bearing in mind that that legislation will involve an amalgam of state and territory powers and may well be able to take advantage of the solution that Mr Williams has floated. But I do think that is more towards the permanent solution side.

Mr LILLICRAP—I believe there must be at least a reasonable possibility of a non-legislated bandaid solution. I represent the Industry Funds Forum which in turn represents more than four million superannuation fund members. I believe that most, if not all, of these funds would be prepared to enter into some voluntary arrangement using the superannuation complaints tribunal—shorn though it is of its review powers—and agree voluntarily to submit to its decisions.

That is not a solution for the whole of the membership of superannuation funds in this country, but I believe that if it were publicised and if the government were able to take some very modest measures like according those funds that did enter into such an arrangement some sort of title—say, 'dispute regulated funds'—there would be some pressure on other funds, particularly large funds, to comply. I think there would be a rump of smaller funds that would not comply; I cannot see any short-term solution for that group of funds. I think it would be a significant achievement, and certainly one that I would welcome, if there could be such a bandaid solution which would cover a very large number of people. I believe that that solution is a viable one. I would welcome comments from the combined legal expertise in the superannuation field—which appears mainly to be in this room.

Mr MORGAN—I think you would need to think through that sort of bandaid in so far as what binding effect that decision would have on parties other than the trustee. As we know, in death benefit claims those parties can include infants who may not have a capacity to contract, and other parties can be affected by claims. One of the problems in the way the tribunal works at the moment is that it has regard to the interests of the claimant in making its initial decision as to fairness and reasonableness, whereas there are a lot of other parties in a trust fund who may be affected by a particular decision—other members, other beneficiaries who have claims.

It is noted that the general insurance complaints system works on the basis that the insurance company is bound but that the claimant is not. The structure of that arrangement is, as I understand it, that the insurance company agrees to abide by the determination of the

claims review panel up to a monetary amount of $110,000 or $120,000. Thereafter, either party can elect whether or not they agree to follow the decision.

If you are really looking at a bandaid solution I find it difficult to understand how you would rope in all the parties that may be affected. The further problem is: do the trustees actually have the power under existing deeds to enter into these arrangements? This is something which may end up being a question for each trustee under each deed.

Mr EDSTEIN—A further problem consistent with what John was saying would, as I see it, be to question how an individual trustee, when being asked to join up to some industry based temporary measure that was a sign-on type arrangement saying: 'This is a temporary dispute resolution process', would react in relation to their members. We have to keep in mind that they are charges, fiduciaries, to act in the best interests of their beneficiaries, not for the industry. We have got case law that supports that. The Cowan and Scargill type decision of the last decade in the UK said it would be improper to take into account external considerations in coming to a view of what you should do for your own beneficiaries.

I pose a question in relation to the four million members that Mr Lillicrap referred to. What percentage of those have complaints on the table at the moment? I suspect if it were 200, 300 or even 1,000 it is still a very small percentage of four million. The other 3,999,000—whatever number it is—might well say, 'Why do we need to sign up to this because the chances of me ever having a dispute that will go before this body is fairly remote.' An individual trustee would have to look at the aspirations of their own beneficiaries, not the industry at large.

Mr LILLICRAP—Thank you for that comment. John, you have raised a question; are you at the same time giving us an answer? Are you saying that if you were advising REST, for example, as a trustee you would say, 'You do not have the power or you are likely to get sued if you join up to this voluntary arrangement'?

Mr EDSTEIN—Possibly, being a two-handed lawyer. The answer has to be that each trustee will have to look at their own individual circumstances. For example, if I were advising REST and you had never had a complaint, for argument's sake, in the history of your scheme—and we might be talking about a corporate trustee that has a very low level of complaints—the attitude of the corporate trustee would be one of benevolence. They are benevolent dictators, if you like, and the beneficiaries accept their judgments. So why would they sign up to an industry scheme when the members are very happy with what the trustees are doing? The members would not really see a need for the trustee to sign up to an industry scheme which possibly was going to come with a cost—at least, the time and participation of the trustees as a cost.

Mr MACLEAN—I think the position is a little bit stronger than the current discussion assumes. The actual rule under the law of trusts is that trustees must act independently and personally and cannot bind themselves to having their decisions made by someone else or accepting decisions made by someone else. So if a trustee did enter into an industry scheme

and bind himself to doing whatever the industry scheme personal body decided, as far as the members are concerned that would be a breach of trust which they could just ignore.

Mr EDSTEIN—I was reading this as though the member would accept the outcome. So, effectively, a member who complained to this industry body would, by complaining to the industry body, agree to accept its outcome.

Mr WILKINSON—Perhaps I ought to say something as a background to all of these discussions. When the full court decision came out we immediately asked what we could do. When we were reassured that the inquiry and conciliation powers were not affected by the loss of the review powers we then looked at the powers for conciliation in our act. Our act does not spell out exactly what conciliation might cover. In the end, a resolution of the matter leads to the complainant withdrawing the complaint on the basis of some agreement that has been worked out. Part of the conciliation powers is that the tribunal, if it thinks it desirable, can ask the parties to come together for a conciliation conference. But of course if the parties do not want to come together they do not. There is no compulsory aspect to that.

We immediately set about trying to get more of the parties to come to conciliation given that there was no review option and the courts were in the background as the only possible way that the dispute could be resolved. So we have tried to beef up the conciliation role. But it should be understood that, in the last reporting year, 79 per cent of matters were resolved prior to review. Many people have the idea that all the matters go on to review; 21 per cent go on to review. Our feeling is that about 20 per cent is the realistic figure. Most of them are not resolved by the conciliation conference but are resolved prior to a conciliation conference in the discussions—the sort of thing that Philippa was talking about earlier—with the inquiry officer dealing with the parties, seeing a possibility of a solution and raising it with the parties, and the parties deciding between themselves, 'Yes, that is the way to go. We will do it,' and the matter then being resolved.

We believe that in the present climate we have to try to improve on 79 per cent if we can, and we are trying to do that. We then suggested that—very tentatively, because we were unsure about the legalities of it, and the points that have been raised here are quite important—after we have not resolved it at the inquiry stage or with a formal conciliation conference but the parties are wanting a resolution, we make a recommendation for a solution, with reasons, much like our former determinations but with no power to determine, and submit it back to the parties.

I think legally we can probably do that if the trustee says, 'We will have another look at it because you are bound to dig up further evidence, so it is reasonable for us to revisit the decision. We will look at it quite seriously. We are prepared to go to a second phase in the conciliation; refer it on to the chairperson to make a recommendation with reasons and we will take that very seriously.' I think there is probably no legal objection to that. We suggested the possibility that you could go further in getting the parties to bind themselves before the recommendation and that they would agree with whatever is recommended. That is where you run into the legal problems that John and David referred to.

That is where it is at the moment, and I suspect there are a number of funds where the trustees would very seriously look at a recommendation by the chairperson with reasons, having been through all the other conciliation inquiry processes without resolution and, very likely, adopt it. But it is a very voluntary situation and it is no good trying to impose it. You cannot, and it is no good expecting that some hard-bitten insurers might readily come to the party. They probably will not. Nevertheless, some of them may because they are in a very close business working relationship with some very big funds, of which they are the group insurers. So there is a bit of leverage there that can be used.

Mr LARKIN—Returning to the interim measure, our view is that any attempt to build a consent to arbitration function on to the Superannuation Complaints Tribunal would require legislative amendment. It depends on the consent of the parties and would be contractually based. You could bring in other parties, like an insurer, through the contract but our legal advice is that the Superannuation Industry (Supervision) Act could be amended to override any restriction arising from trustees' equitable obligations and any restriction on trustees entering into such arbitration agreements on a voluntary basis.

CHAIR—Could those amendments be incorporated into the current bill before the Senate, expeditiously?

Mr LARKIN—Procedurally that would be possible, but the government would need to approve that course of action.

Mr MACLEAN—There are two things arising from Mr Wilkinson's comments. The first one is that there is a solid body of legal opinion—and I must say it is my opinion—that the result of the decision of the full court of the Federal Court is that the only kind of complaint that the tribunal can entertain, even by the conciliation process, is a complaint about a discretionary decision. Mr Wilkinson assumes, I think, that the tribunal can continue to conciliate in relation to discretionary and non-discretionary decisions but that is not my reading of the judgment, and I know that many other lawyers here would take the same view as me on that. That is the first thing.

The second thing is that I find it difficult to understand how the tribunal could have the power to recommend a particular decision that is not provided for in the act. I can see some pretty obvious dangers for trustees in being a party to that kind of thing.

CHAIR—What about the solution suggested by Mr Larkin?

Mr MACLEAN—I would need to see the detail, I think.

CHAIR—I am interested in pursuing the issues that were raised by Mr Larkin. Perhaps they can provide an intermediate solution.

Mr ROGERS—If I may say so without offending anybody, we are very good at raising objections and difficulties; I have yet to hear anybody talking constructively about how we can overcome these difficulties. There are any number of ways that we can overcome the difficulties, I would suggest. Firstly, anybody in this country can resolve a dispute provided the parties agree to appoint a person as a dispute resolver.

Secondly, the parties can agree that the resolution should be binding or non-binding. Mr Wilkinson was saying, in effect, 'There can be a determination which is non-binding.' But you can build on that too. If the parties have to go to court—and if they are trustees they might have to go to court to get approval to the arrangement; alternatively the complainant may go to court—the judge can appoint the superannuation tribunal as the referee to report on what he should do. The whole procedure becomes much cheaper and the resolution is ready to hand. In other words, in that circumstance you would be using the tribunal as the court's right arm and have its cheap and ready dispute resolution process incorporated into court process.

CHAIR—That would require legislative amendment.

Mr ROGERS—It would not require any amendment. Anybody can go to court and make a complaint. The judge says, 'Off you go to the superannuation tribunal or to Mr Wilkinson.' The Supreme Court has the power to appoint anybody as the referee.

CHAIR—I think we want to try to avoid that situation in the first place. Part of the new arrangements—

Mr ROGERS—Sure, but that is the ultimate. The way that you would do it is this: a complainant—I guarantee they have never heard of Bishop's case—trundles along to the tribunal and says, 'I've got a problem.' Mr Wilkinson's people then try to deal with the problem by suggesting that the parties accept conciliation. It does not require a statutory basis if the parties contractually sign up to a conciliation process. No amendment to the act—no nothing except a simple document.

Let us say that the conciliation does not work. The parties can either agree to a binding or non-binding determination. If the trustee has doubts about whether it is appropriate to indulge in that exercise, the trustee can go to court and get judicial approval. That is the trustee's option. It is a regular procedure.

Thirdly, if the parties will not agree to a binding determination, the complainant can trundle along to court, and the judge then sends everybody back to an expert determination.

These bandaid solutions with a bit of constructive thinking are well within the accepted methods that are currently in use in dispute resolution processes. If I may suggest to everybody here: let us try to think of how we overcome difficulties instead of saying, 'Oh, there's a problem here.'

Mr ROSE—I am not quite sure I fully understand Andrew's proposal that the Supreme Court could send off matters to the tribunal to act as a 'referee'—I think that was the word. I can understand that it would not need any additional statutory powers from the states, but for the tribunal to be able to accept that or be able to do that function there would need to be amendments to the Commonwealth legislation, wouldn't there?

Mr ROGERS—An imaginative judge would appoint Neil Wilkinson as the referee or whoever else he has got on his tribunal can be the referee. You just use the tribunal under another name. You might not get paid, but—

Mr ROSE—But that meets my point. If it is the tribunal to do it—the tribunal as such—you do need to amend the Commonwealth legislation.

Mr ROGERS—Sure. You just use the individuals, but you are using the tribunal's facilities and structure.

Mr ROSE—There may be a problem in using the tribunal's facilities and so on because that may need Commonwealth statutory authorisation. I would certainly agree with Andrew that, if the Supreme Court were to appoint Neil or anybody else just as a persona designata, there would be no problem, but the use of Commonwealth facilities may raise a need for Commonwealth legislation. But I would have thought it would be a simple amendment.

Mr MACLEAN—There is another problem with the proposal from Mr Rogers. It sounds a bit like it will cross the line to do with the rules about delegation of judicial power. It is certainly okay to appoint judicial registrars to act as delegates of Federal Court judges to hear some part of the Federal Court's jurisdiction, but the referee proposal, as I have understood it, sounds to me like it is the kind of job that a judicial registrar could do.

Mr ROGERS—Let me explain. In my former life, we introduced referees back in 1982, and the way it works in practice is that the referee makes a report to the court which the court then adopts without any problem. That is a state court exercise, so there is no question of judicial power of the Commonwealth. That is not, if I might say so with the utmost respect, an objection.

Mr MACLEAN—Does the referee determine questions of fact or questions of fact and law?

Mr ROGERS—No, he determines the whole caboodle.

Mr ROSE—Including legal questions.

Mr ROGERS—Including legal questions. The judge has the power of review, but I have yet to encounter too many cases where the referee's report is not accepted, particularly in

situations where Neil's people would have an expertise which, by definition, the judge would not have.

Mr BEAN—That is the problem: it starts to be an appeals system again. The judge has the power to review the decision, and that can go on and on. What I think people look for is an ADR where there is a final solution, and to me that is the best process. We should be looking at that. It may involve more than one scheme dealing with these issues. My scheme dealt with superannuation before the SCT came along. We bound people where we dealt with the insurers. We still deal with superannuation issues and we still bind the insurers in relation to TPD matters and agent matters and any issues that deal with these. Part of the solution I see is that my scheme goes back to dealing with those issues, and that resolves those ones instantly.

Ms SMITH—In terms of just finding the interim stop-gap solution, I would like to go back to the suggestions that were made by John Larkin and Michael Lillicrap. I think what we were getting hung up on in the legal argy-bargy that then happened was whether the trustees were able to enter into that sort of contractual arrangement. As I understand it, if you go back to the SIS legislation and, in particular, section 101, which requires internal complaint mechanisms and the trust deeds which have provision for those complaint mechanisms, that in effect moves the trustee's powers away from private property trust law to requiring or allowing trustees to enter into those contractual arrangements. In terms of the development of SIS and trust deeds and internal complaint mechanisms in particular, I would have thought that it does in fact allow what John Larkin said. Michael, as I heard him, said, 'Well, let's voluntarily do it.' John was just trying to put some extra certainty around it by further amendments to the SIS legislation to make that alignment crystal clear.

But, in terms of interim measures, that is the best one I have heard going at the moment, as long as we are clear it is an interim measure, because it only deals with those matters where people voluntarily want to sign up for that voluntary conciliation-arbitration process—whatever we call it—or accept the recommendations of the SCT. It will not deal with the harder ones, so it does not take away the necessity for us to punch through for a more permanent solution, but it is the best interim one I have heard around the table at this point. I would like to come back to it.

CHAIR—I would like members to concentrate on a sunset clause or the period for which this interim arrangement should run. Maybe Mr Gibbs would like to make a comment on the interim arrangement and how long it should run, and the issues that have been raised so far?

Mr GIBBS—Yes, I would like to support what Philippa said. It seems that what we were getting towards was the best interim solution that I have heard of, particularly from a trustee's point of view. Obviously trustees want to be sure that any action they take to agree to such a system is not in some fundamental breach of their duties. If I am right, it sounds to me that John was indicating that the advice that he has had or the department has had is that that is certainly able to be done by legislation by amendment to the SIS.

If that is the case and if an amendment will give the tribunal the ability to conduct those sorts of arbitrations or hearings, that seems to me to be a very good solution. I would be pretty confident that trustees would find that a very acceptable interim solution. I agree also, though, that there are a whole lot of issues in terms of scope—if I can use that term—that that would not necessarily solve, and so I think we are looking at an interim solution and a sunset clause.

Whilst we would all like to have a permanent solution as quickly as possible, I think the last thing we need is an interim solution with a sunset clause that we find comes and goes without having given us all enough time to get the permanent solution right. So, without having much of a chance to think about it or consult, I would have thought you are looking at at least a 12 months sunset clause. I would not like to see it being much more, if we can work towards that, because we need some discipline as well. With anything less than 12 I do think we run the risk that we just have not had the time not only to think through the issues but, more particularly, to get them in place, to get legislation amended again if we have to, and so on. Those are my comments.

CHAIR—Can members perhaps give John Larkin some guidance as to the issues that should be in the amendments to pick up the thoughts that have been expressed around the table today?

Mr ROSE—I have a couple comments to make. Firstly, I am not sure that I understand how Philippa Smith's proposals and the other references to the 'statutory underpinning' of the agreements escape the objection that David Maclean made earlier this morning that one eventually comes back into the constitutional objections that afflict the Wilkinson decision.

Secondly, to revert to Andrew Rogers's scheme: the references by supreme courts to members of the tribunal or other people as designed persons. If that was a reference to engage in a full merits review of fair and reasonable, et cetera, wouldn't there be a need for amendments to state legislation on trustee law? At the moment, as I understand it, the state courts do not engage in a merits review of trustee's decisions, so you would at least need amendments to state laws to achieve that.

Mr MORGAN—This is really a question I have of John Larkin as to whether there is a non-legislative way to do this which is nevertheless legislative; that is, that under the SIS legislation there is a provision which allows the prescription by regulation of operating standards. The operating standards are expressed to be standards which are not limited to but may include various matters. Unfortunately, none of these matters seem to touch on complaints handling. I wonder whether the Commonwealth has given any consideration to the fact that they could actually make a regulation relying on starting with section 101, which is the internal mechanism, and establishing an operating standard which could move to protect the trustee in entering into any arrangement.

That still leaves the underlying issue as to whether that will end up having a constitutional problem, which Dennis Rose has raised. It also raises the issue as to whether an operating standard could be made. Section 101 requires the resolution of complaints internally within 90 days, which is a relatively short period if you are going to an external process. Is it

possible to have an operating standard so that, if the complaint is not resolved in that period, certain other things are to be done by the trustee? There are the problems about making regulations and their conformity to legislation, and there is a problem which arises in that—from my understanding of the principles—if there is actually expressed statutory material dealing with a particular matter, a regulation really cannot contradict that or run against it.

Mr LARKIN—I will respond briefly. Under this interim measure there would be no compulsion on trustees to do anything. Their decision to enter into a contract whereby they would voluntarily accept an arbitral ruling of the tribunal is purely voluntary and any enforcement of the SCT's ruling would rely on contract law. It therefore overcomes any suggestion of judicial power in the enforcement of the tribunal ruling because the enforcement is derived from the consent of the parties rather than from any other mechanism.

Mr MORGAN—I was picking up Michael Lillicrap's point, which gave rise to my comment and John Edstein's comment about the ability of trustees to enter into such contracts. The operating standards typically deal with matters relating to trust deeds in this way by saying that there will be included in the governing rules of a fund certain provisions. Is it possible to have a regulation which says that there is to be included in the governing rules of a fund a provision that empowers a trustee to enter into certain types of arrangement explicitly and to act in accordance with the terms of those arrangements as a method of giving the trustee express trust deed power to what is being contemplated? That is my contribution.

Mr LARKIN—The detail of how the amendments would be structured need further work and further examination but certainly that is one option that could be looked at since section 52 of SIS currently deems certain covenants to be included in the governing rules of a regulated superannuation fund, so one option would be to add an extra covenant which would empower trustees to enter into such agreements.

Mr MORGAN—The point that I am really making is that it could be done now and it would not require a lengthy period of parliamentary consideration. It is a regulation that is being made: the government just has to make it and table it.

Mr LARKIN—Again, the precise way of achieving the outcome would need to be studied very carefully with the parliamentary draftsmen. One matter which led us to the conclusion that the implementation of this interim measure would require amendment to the SRC act is that currently the parliament has not conferred any arbitration role on the tribunal under the SRC act and so, to give it that role, it would require amendments to the primary legislation, but certainly other aspects of the scheme could possibly be implemented through mere amendments to the regulations.

Mr RAITT—On the powers of the trustee to agree to arbitration, there may be other lawyers present who can comment on this, but most trust deeds would have power for the trustee to compromise disputes and I believe that most state trustee legislation would imply powers to compromise disputes. These powers have been the subject of some comment by

the tribunal in one or two decisions, I believe, and if those either expressed provisions or implied provisions under state law have sufficient coverage of the industry it may not be necessary to amend the act or the regulations.

Mr LILLICRAP—I wanted to extend the point that Mr Morganmade and ask: given that funds are obliged to have internal disputes resolution procedures under section 101, is there is any way of incorporating within those internal procedures a provision which accepts some form of arbitration or decision making by an external body without exposing trustees to the adverse legal consequences earlier referred to?

Mr MACLEAN—My initial reaction is that you would run into the same problems. The other thing I was going to say was that all trustees have an inherent power to compromise any dispute with beneficiaries. That is quite clear.

Mr FAIRLEY—One of the difficulties of a system—and I do not mean to raise this as another difficulty—is that when we are talking about this bandaid approach, we are talking about it from the point of view of an arbitral process where everybody agrees, so that the beneficiaries and the complainants all agree and the trustee agrees. How are we going to deal with the circumstance of infant beneficiaries, because they have got to be part of the binding process, and I query whether there is power for next friends or best friends or guardians to actually commit to the determination of this tribunal in an arbitral process?

CHAIR—It could solve part of the problem but not all of it.

Mr FAIRLEY—In any event it is not going to solve all of it because there will be a number of complainants. Certainly, some of the clients that I have come across simply would not agree to enter into that sort of arrangement where they were going to be bound. It may well be that there will be a number of people who will be very happy to do this to get the matter out of the way, but everyone is going to have to agree before it can proceed.

Mr EDSTEIN—The suggestion has been put to me—and it is a useful one to consider—if we are looking at legislative amendment via standards that part 3 is a modifiable provision. That may rest in the hands of the ISC rather than going near parliament to modify the standards with a sunset provision and then introduce a standard, if we are looking for a legislative result.

Mr LARKIN—That is a useful suggestion and worth looking at. Again, our presumption has been that you would also need to amend the Superannuation (Resolution of Complaints) Act to confer this function of consent to arbitration, which parliament did not originally confer on the tribunal, but some of these other suggestions are ancillary to the scheme and are well worth looking at.

Mr MORGAN—We are not assuming that the complaints tribunal would be the party who deals with the dispute. I do not think that assumption is necessarily the case. I agree that you have to have the Superannuation Complaints Tribunal legislation amended if it is

going to do anything at all which is not within its current powers. But I understood us to be discussing whether there is a short-term solution to this problem which could be achieved without waiting two years. John and I have been discussing whether there is some method of using the operating standards to overcome some of the initial impediments that might confront a trustee in entering into some arrangement, whatever it may be.

Ms SMITH—Just on that latter point—and I again stress the interim—looking at a voluntary arrangement, we have heard today that the SCT is dealing with the conciliation. From where we sit I think it would be of benefit if we could also use the expertise that is there in terms of these other complementary arrangements in relation to the interim. I would be somewhat concerned about setting up voluntary arbitration of a whole range of other people where we get into problems of consistency or lack of expertise.

Ms LAWTON—I want to inquire why Mr Larkin thought it was necessary that complainants be bound to some sort of arbitration proposal. That would actually be quite inconsistent with a number of industry schemes that operate at the moment, where the particular industry participant in the dispute will be bound by the industry body scheme but not the complainant. The practical reality is that most complainants will not have the resources to take the matter further. My experience on IEC is that, in any event, a losing complainant at least feels satisfied that an independent umpire, if you like, has stepped in and considered the matters and expressed a view about them, notwithstanding that the complainant was not happy with the conclusion reached. It is rarely taken further.

Mr BERRILL—Just one word of warning on this interim proposal and that is that, as Michael Lillicrap mentioned before, smaller corporate funds are probably going to be less likely to sign up to the interim arrangements. Whilst the larger industry funds make up the bulk of superannuation members in Australia, it is the small corporates that are going to be the problem. In our experience it is the small corporates that have a greater level of disputation. If they are not going to sign up to it then those people are still going to be left out on a limb. I suppose it does not mean that you do not make arrangements for others but you are still going to have a substantial pool of potential complainants who are going to have nowhere to go in the interim.

Mr WILKINSON—Our statistics reveal very clearly that there is a very high percentage of complaints from small corporates. They are the ones that are going to be the problem area and the most difficult to tie up in any way. For example, though the big industry funds have a number of complaints the percentage per membership is very small indeed. The other funds that we have a higher percentage of complaints from are the public offer funds, which currently have been the insurance industry based funds, although industry funds are now moving into that area.

CHAIR—How could we bring in the corporate satisfactorily?

Ms RALPH—Easy—just have the ISC crawl all over them if they are not in a scheme and they will get to know that the easiest way to get the ISC off their backs is to join a scheme.

CHAIR—Is that practical?

Mr LARKIN—There will be an element of market pressure and funds driving to meet industry best practice, which will give them incentives to enter into these consent to arbitration arrangements on a case-by-case basis.

Mr WILKINSON—Surely it has been the practice under the existing legislation that the ISC has the power to crawl all over them, and that is in fact why enforcement has never been a problem. We have not had one case having to be enforced. Everybody has either appealed it to the Federal Court, which they were entitled to do, or paid up and done whatever we said.

CHAIR—Do we feel we have some suggestions that we can pass on to Mr Larkin in terms of a short-term solution? Would you like to continue this discussion after lunch? Otherwise, we will conclude this session now and go on to the longer term solutions after lunch.

Mr LILLICRAP—I was going to ask for somebody to articulate in 60 seconds what the solution might be so that I could see whether I understood it.

Mr LARKIN—Referring back to my opening statement, it would involve amending the Superannuation (Resolution of Complaints) Act and probably the SIS act as well to enable the tribunal to arbitrate with the consent of the parties. The parties in dispute would enter into agreements to be bound by a tribunal award on a case-by-case basis and the arbitration award would be enforceable under contract law and state arbitration laws. There would be no compulsion on parties enter into the arrangements and there will probably have to be amendments to the SIS act to remove any restrictions on trustees arising from their equitable obligations from entering into such arbitration agreements voluntarily on a case-by-case basis.

CHAIR—Would there need to be changes to the operating standards?

Mr LARKIN—Possibly there would need to be changes to the operating standards, the trustee covenants in section 52 and possibly also the restrictions in section 59 of SIS on trustees receiving directions. But we would need to explore precisely what elements of SIS needed to be amended to facilitate the solution.

Mr LILLICRAP—Could I ask whether in the short term, before these legislative amendments could be made, there would be legal impediments to funds agreeing to have the SCT make recommendations which they would then take away and consider—and which one

might suspect in most cases they would agree to implement—or would that be legally improper?

Mr LARKIN—I would not want to rule out the option altogether, but our presumption has been that it would be beyond the tribunal's power under the Superannuation (Resolution of Complaints) Act as it currently stands to make such recommendations. Therefore, you would need to amend the act to clearly give it that kind of role.

Mr WILKINSON—In clearing that up, I can see Dennis might have something to contribute on that. I started with an explanation that there is a conciliation power and we are trying to look at what you can do with your existing powers. If a matter is conciliated, the parties have come to an agreement, the complainant withdraws the complaint and the tribunal has the power to accept a withdrawal at any time.

The tribunal would not be putting any pressure on the parties. It would be simply assisting the parties to conciliate the matter where they have failed to do so up to that stage in whatever conciliation process we have adopted. I wonder whether it should be termed arbitration in the traditional sense or a variation of conciliation which is wide open under the act.

The restriction under our act that is a bit of a problem is that the conciliation powers under section 59 rest with the chairperson—that is all right; I am still there, but the deputy chairperson is not there—and with the staff, not with the part-time members. They are not included under section 59, so I could not use them in any of this process. But the chairperson or staff can be used under the legislation to conciliate, providing this could come under the heading of a variation of the conciliation process, which, after all, will only resolve anything if the parties agree.

CHAIR—Do we have another comment on that?

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CHAIR—Do we have another comment on that?

Mr WILLIAMS—I just wanted to make the point that I think it is difficult to extend the conciliation power as far as you are suggesting. That might be because the nature of conciliation ordinarily is that it involves no determination by the third party. Perhaps you might get the extension you are seeking but that would be a matter for a court, and you would not want to predict how that might go.

I also wanted to respond to something Philippa Smith said about involving the complaints tribunal and making use of its expertise without the need for a legislative change. Even though I also believe that the complaints tribunal would be unable to arbitrate or make recommendations as it is currently constituted, there is no reason its members could not do so as private persons, as long as—as Dennis Rose earlier said—they were appointed in that capacity and not because of their membership of the complaints tribunal. The law does recognise that distinction, and that is perhaps the best solution that could be offered.

Mr WILKINSON—Then there is payment.

Mr WILLIAMS—Then they could be paid in their personal capacity, yes.

Mr MACLEAN—I just wanted to comment about the alternative put forward by Mr Lillicrap. I think that the tribunal members could make recommendations after hearing a complaint. It would seem to me that if it were given power to do that, there would be two scenarios. The first one would be that, as a result of the recommendation, the trustees and the member making the complaint agreed to compromise their dispute. There is nothing wrong with that.

The second scenario would be when there was no agreement to compromise entered into between the trustees and the members. In order for the trustee to carry out or implement the recommendation, there is a grey legal area that would be entered into because the law is not very well developed in regard to when or under what circumstances trustees can revisit decisions they made earlier and change their minds later. It would be a pretty bold lawyer who would say that in any case, most cases or a lot of cases the trustee could validly do that.

Mr GIBBS—Going back to Mr Larkin's summary of the proposed interim solution—the one that relies on amendment to the SRC act and the SIS act—you said that you were contemplating something which would allow the tribunal to arbitrate with the consent of the parties. I just want to take up this point of the parties. Is it an absolute requirement that both parties have to consent? I can see, if a trustee were enabled by the legislation to enter into a process, many trustees might be prepared to do so without the other side necessarily agreeing to be bound by the decision. In other words, they might be quite happy to agree to be bound by the decision without the other party having agreed before the event, simply as a mechanism for having disputes resolved; understanding what was said before about many people being unlikely to take the matter further—win, lose or draw—and they would be quite happy to have their day in something other than a court, if you know what I mean.

I am concerned about trying to tie this down too much to requiring every individual to agree before the event because that might prevent this process being workable. I repeat that, just from my experience, trustees may well be prepared to go into such an exercise without the opposite side agreeing before the event, simply as a way to get these things moving, and understanding that not many people will take it further anyway, even if they lost.

Ms RALPH—I want to take up the point about parties because we have not talked much about the insurers in all of this, and a large number of the complaints relate to insurance issues. If we are talking about people volunteering to submit to a process, I would be concerned about whether or not we were talking about binding the insurers to this process as well and how that would actually work. I just want to understand the proposal that is sitting on the table. Would this option to volunteer for some sort of arbitration apply only to the SCT, or, as was raised earlier, would trustees be able to volunteer to submit themselves to existing schemes in the marketplace? Are we just talking about the SCT?

Mr LARKIN—As the ISC has been considering this option it would only apply to the complaints tribunal. Obviously we are very open to the variations that have been suggested today and they deserve further exploration. On the point about insurers, it is contemplated that tripartite contracts can be developed that would cover the insurer, the trustee and the complainant. Again, we would need to explore that further.

Mr FAIRLEY—On this issue of parties, it seems to me that where you have three or four or five claimants, for example, in relation to a death benefit, if you do not get agreement to this process of arbitration from all of those people then the trustee may well consider itself bound. But those parties who are perhaps unsuccessful in the process still then have rights against the trustee which they can pursue in state courts. A trustee would be very brave to pay out those moneys with the knowledge that the unsuccessful complainants were still around and had the potential to pursue those claims in another jurisdiction. Without their consent the trustee would have to have a very robust view of the quality of his decision.

CHAIR—Thank you. We have certainly made progress this morning.

Sitting suspended from 12.41 p.m. to 1.42 p.m.

CHAIR—Rather than break into workshops, we have decided to keep to this forum style and discuss each of the issues. We have allocated the time accordingly: from 1.30 p.m.—we are a little bit late—until about 2.20 p.m. we will look at the question of an industry complaints body and, if you do not mind, at the same time we will look at the voluntary arbitration under contract law. Following that we will look at a reconstituted tribunal as part of the Federal Court—I think that was option 2 in Mr Fairley's paper—or amendments to the complaints act which shore up constitutional validity. The third item will be following afternoon tea, which we have brought ahead to 3 o'clock. So from 3 o'clock until 3.15 p.m. will be afternoon tea, and from 3.15 p.m. until 4 p.m. we will look at the amended complaints act and a state body. From 4 p.m. to 4.15 p.m. we will look at the status of matters arising from the High Court hearing, and from 4.15 p.m. to 4.30 p.m. we will have the summing up.

Because we are now in an assembled gathering, our time is going to be very tight, so I would ask that comments be kept to the absolute minimum since we are now trying to look for a long-term or permanent type of solution. We are weighing up the various options and we want the pluses and the minuses to see which way, ultimately, we have to go with the greatest of certainty in terms of meeting the 15 criteria. I call for volunteers in terms of an industry body.

Mr BEAN—We have had some input into discussions, as I said earlier, in relation to perhaps the SCT becoming a private scheme or developing a private scheme, or actually a new private scheme being developed out of the schemes that are available in the area. To do that, it would require all the players, such as ASFA and IFSA, and all the other members of the trustee groups to come together and talk about what they want in a private scheme. A private scheme is basically industry owned and consumer owned, and all the parties have to have an input into what comes out of it so that, at the end of the day, when people are being bound—particularly the industries being bound—they say that they had an input into it. Equally, although private schemes do not bind consumers, it is important that the consumers have a big input into it so that they can be happy with the scheme and at least know that the process is going to be just and fair.

The key to private schemes is that they use the criteria of what is fair and reasonable in the circumstances, the law and industry practice. Those criteria are very important to private schemes and any private scheme would be using those criteria. A private scheme can either have an ombudsman at the head of it—one person making decisions—or a panel, much as the SCT have at the moment. In relation to what Mr Rogers said earlier, when starting a private scheme it is preferable that you have a code of conduct that requires people to belong to a private scheme. There could be a number of private schemes that they could choose from and they could belong to one that is approved by the regulator. That scheme may be developed out of the existing schemes, be a combination of a number of schemes or be a new scheme altogether. It could equally be a scheme based on the way the SCT operated in the same manner having a panel—at the end of the day—with a chairman such as Neil Wilkinson is at the moment and being constituted in much the same way.

The preferred model of panel, as we see it, is that there is someone from the industry on that panel, someone from the consumer movement on that panel and an independent chairman. I believe—I guess I wouldn't be here if I didn't—that industry self-regulation is probably the best way to go at the moment. I believe that all the industry schemes are operating effectively and well. It is a common process throughout Europe and it is a very common process throughout the UK. And I think you will find that industry players who have an opportunity to belong to a self-regulation scheme are far more cooperative. Listening to the solutions being proposed throughout the day, they require people to cooperate voluntarily. If they do not have any input into it, I do not believe that some groups will volunteer, when we are talking about problems that small corporate funds would have. But I believe they do volunteer where they have had an opportunity to have input into the structure and possibly have some representation on boards of directors.

Mr FAIRLEY—One of the issues that was raised when Philippa presented her option for a private scheme was that a caveat that was very heavily lodged was that there was simply to be no cost to industry as a result of that scheme.

Ms SMITH—No extra cost.

Mr FAIRLEY—No extra cost. I guess one of the principal issues that needs to be dealt with up-front in a discussion of such an alternative is to put to the regulator whether or not it is feasible, put to the government whether it is an option, for some of the money which is collected as part of the superannuation funds levy, which is currently funding the tribunal, could in fact be placed in the hands of a private industry scheme, which would then put us in a situation where there was not going to be the significant additional cost which is carried by other dispute resolution tribunals in other industries. I see that as a threshold issue, because it is certainly a threshold issue from the point of view of ISFA's recommendation.

CHAIR—That is a good point. Mr Larkin, are you in a position to respond?

Mr LARKIN—Yes, it is a threshold issue. If the government were to announce a preference for an industry based scheme, it would probably need to see that there was sufficient momentum and support for the scheme to be established and would need to see that the structures had reached a certain stage of maturity and development before it could begin to talk about funding. But once the funding issue came up it could no doubt explore various options, for example, a corresponding reduction in the levy for superannuation funds.

CHAIR—If there were a corresponding reduction, that reduction would effectively have to be picked up by other players or segments of the industry.

Mr LARKIN—If all fund members were required to belong to the scheme then there would be no cross-subsidisation.

Mr FAIRLEY—So you would put a user-pays principle in place where you would reduce the levy across the board and then anybody who was complained against would

actually pick up the cost of that particular hearing, as opposed to the industry funding whomever was complained about.

Mr LARKIN—I am only putting that as one possible option. The government has not addressed its mind to the range of options or indeed made any in-principle commitment.

CHAIR—People have other views about government moneys going off virtually to an independent body.

Ms RALPH—Before I talk about money, I will just talk a little bit about what I would like to think is called a private sector scheme as opposed to a public sector statutory based scheme, because I think industry scheme is actually a misnomer. I think the sort of scheme we are all envisaging is one which is actually jointly owned by the members—the funds, the investors and the consumer groups—with representation from government. So I guess, whilst we are really conceiving something that has some legislative backing, it is not run by the public sector or set up by the public sector. So I think we should start calling it either a private sector scheme or a private scheme or whatever, because I think it is a misnomer to call it an industry scheme. It gives somehow the illusion that the industry that runs super funds would actually own or run that, and I think that is really not necessarily what we are envisaging.

Because I have privilege, I get to use it today. Having sat around here for half a day now, I am more convinced than ever that this thing should be in the private sector, primarily because of the inflexibility that we have created by putting this inside the public sector. I know we did that to try to give the members of these funds confidence but we have really created a problem for ourselves. I fear that leaving it in the public sector will continue to create problems for ourselves.

Whether we can fix this scheme or not, I fear that in the longer term the inflexible ways that unfortunately the public sector sometimes has to operate—having been there for a while, I know the difference between the way the private sector operates and the way the public sector must operate—we are not going to get the sort of scheme that is going to be responsive to the changing times as superannuation evolves in this country. Philosophically, the sooner the scheme comes into the private sector, the better.

We are now in a Wallis environment where we also have to start to think about how the industry is evolving and how financial services are evolving for the consumer. More and more, we are seeing how those products are converging. I guess our view also comes from that basis. Over time, to isolate superannuation from the rest of its financial services that the consumer more and more will see as a package of things that it buys I think philosophically is a mistake as well. Again, that drives me into a private sector solution.

For the grounds of simplicity, flexibility and the ability to link with other financial services and products, which more and more the consumer will do, I see that the option to bring it into the private sector is really the only choice. In doing so, we have a good

opportunity to gain some efficiencies by the fact that we already have a whole range of schemes out there. Whether you want to merge this into existing schemes or just use the front end of an existing scheme, there are a whole of range of options out there. I think there are some good solutions there.

In the early discussions that we have had amongst the private sector with the ISC presence there has been a lot of convergence of views about the model that such a scheme should take. There are actually schemes out there that exist now that with some review and alteration and change to terms of reference could make quite a good home from the consumer's point of view and be done quite quickly too as opposed to starting from scratch yet again another scheme in this sector. We think that not only should it come into the private sector but if you do that, it should definitely be in conjunction, in whatever fashion that might take, with one of the existing schemes that are there as opposed to starting from scratch anew.

I think the other reason why you should be getting it into the hands of the private sector is the point that Paul Bean made—you really need everyone's involvement and participation in this and you need the insurers. You need the professional indemnity insurers prepared to be in there as well. I think everyone having a sense of involvement and ownership is the key to making these things work successfully.

Having said all that, everyone in the industry feels like they are paying for this now. We are paying for this now. We are certainly not paying twice. We have always said that when this comes into the private sector, it is on the basis that we pay once and pay once only. I guess that leaves you with two choices. The first choice is you take the money that is currently being allocated to the scheme and the levy that is being raised for it and the government makes a contribution to the body. There are lots of examples where government grants money to private sector bodies to do various activities in all sorts of sectors. In fact, some of the existing private sector schemes already have government representatives sitting on the boards and panels. That is possible in the future.

So you do that—the government collects the money and writes a cheque at the beginning of the year, which seems to me to be the easiest way—or alternatively the SIS levy is reduced accordingly and it is left to the industry and all the stakeholders involved to start to argue about who is going to pay what, in which case my forecast is that we will be here well past the year 2000 arguing about who is going to pay for what. So our preference would be for a simple adjustment, not an adjustment of the SIS levy but effectively for the government to continue to transfer over that portion of the SIS levy which is already going into the scheme. That avoids the possibility of all of us having what would be a very nasty fight over money, and we know how these things go: they can be very difficult, and I think it would be very difficult.

Ms SMITH—Just going back to the advantages and disadvantages of the alternative, I see one of the advantages being that it does provide, in terms of the threshold of certainty, a way forward. As I indicated before though, I differ from Paul Bean in that it cannot just assume a voluntary arrangement. The nature of super is such that I do not think you can

assume that. The way forward, as I see it, is that there is legislative backing through the SIS legislation probably requiring membership of an approved scheme—hopefully just one scheme or a limited number of schemes—the contractual arrangements then being with the funds and, through the trust deeds, to live by the decisions of that approved scheme. I see that providing relative certainty as opposed to the other options but it is not just a voluntary thing, and I talked about the governance issues before.

In terms of the modus operandi, the point I would make is that we can learn from a lot of the different skills that are around. I think we are striving for alternative dispute mechanisms, so we can draw on those and we would want a sort of hybrid of those arrangements and a range of tools for maximum flexibility. I do not think though, in terms of looking for scope, that it is a matter that it is as convenient as just slotting it into one of the schemes that are currently operating because I do not think they meet the standards, or the options, of what we need to get to. It is a matter of sorting through, particularly from the trustee's perspective, the expertise that is needed and the standards that are needed from that perspective and then, doing that from the superannuation area, and then looking at what marriages can happen—not the other way around.

CHAIR—One of the difficulties with this particular model is that you must ensure that the decision is binding on the trustee. Can the lawyers give us some idea of how, if this model were adopted, we could make it binding on the trustee?

Mr ROGERS—It seems to me that the legislative underpinning of which Philippa spoke needs to be very carefully considered because it is a legislative underpinning to try and bind contractually all the various stakeholders involved. Some of them are easier than others. If you have a requirement that in every trust deed there shall be implied the obligation to participate in a particular dispute resolution scheme, you would be effectively and contractually binding the beneficiary who, by reason of joining the scheme, would become bound by the rules of the scheme. You would be binding the trustee who is administering the scheme because it also is contractually participating in the trust deed. Where you need some finesse is in binding people other than the immediate parties, such as reinsurers, professional advisers and so on.

It seems to me that it ought to be possible to make a determined condition of participating in the sales, say, of reinsurance contracts that the reinsurer also becomes bound to this contractual arrangement. At the end of the day, what you want to achieve, in my view, is a scheme under which there will be an obligation to participate in a contractual arrangement incorporated in the code of conduct, so that the obligation to participate is legislated but the obligation to comply with the result of the dispute resolution process is contractual.

CHAIR—Are the conditions of that binding on the trustees and other parties?

Mr FOX—I wanted to add that the model just described is, by and large, that proposed under CLERP—insofar as we are talking about making it a condition of someone providing a financial service that their licence includes a condition that they be party to an external

complaints scheme that has been approved by the relevant regulator, and part of those approvals will go into all the terms and conditions we have touched on here.

The one issue that would remain is this question of interaction with trustee duties. But there is a model that is part of the government proposal now. And as I mentioned before, it has the advantage that it is building from state and territory laws as the Corporations Law scheme evolves. It could easily take advantage of industry schemes if that is the method that we chose. We have a platform we can start building from there, and it is consistent with the view of the broader converging environment that Wallis has painted for us. I want to make sure that it is squarely before the committee as part of its considerations.

CHAIR—Given the special status of trustees, could there be a problem in interposing trustees into that sort of arrangement?

Mr FOX—The issue will have to be dealt with as part of the CLERP process insofar as the proposal is that it deal with all financial instruments and that would include a superannuation interest; so as part of the package that comes through, I think it is already an issue to be tackled.

CHAIR—Senator Conroy?

Senator CONROY—I have a question for Mr Rogers. You mentioned that you thought that all beneficiaries would be party to the contract. I think it has already been alluded to that infants, for instance, could not be bound in that way. But most beneficiaries that I have ever dealt with in a death case are not members of the funds. I think it is broader than just infants. Certainly, in the case of almost every death benefit, they are not members so they will not have been signed into the fund.

Mr ROGERS—You are perfectly right. But they get their benefit through a subscriber, so it seems to me that, by reason of the actual participant in the scheme subscribing to the rules, the people who take under them, if you understand what I mean, would also be bound by the rules of the scheme. It would be one of the conditions of entitlement to participate in the benefit that you—

Senator CONROY—I was formerly a superannuation officer for a fund. I was involved in situations involving a death where you had not only children arguing with trustees about where it should go, but former wives, current lovers—we had situations of mistresses, lovers, children, children of first wives. Would you envisage that all of those people would be bound as well, just by the one signature of the original member?

Mr ROGERS—Yes, because the only reason why they ever get an opportunity of claiming is because Joe Bloggs was a beneficiary; so it is one of the conditions of Joe Bloggs's subscription in the scheme that any benefit which flows has to be dealt with in accordance with the scheme.

CHAIR—In terms of the constitution, is there a problem with having such an industry body?

Mr MACLEAN—I will firstly take the point that Senator Conroy raised about persons who are not members of the fund being bound by this industry body. I disagree with Mr Rogers about the consequence of the fact that the person who died had been a member. My view would be that that would not mean that the persons who were parties to the dispute but who were not members of the fund would be bound.

Industry bodies generally have a dilemma. If the trustee is bound as a result of a federal statute to comply with the determination of whatever industry body it is, then that will open up the judicial power arguments. If the trustee is not bound, then the trustee cannot act on it because to act on it would be a breach of trust.

Mr LARKIN—The trustee would not necessarily be bound under statute to comply with the determinations of the industry body; they would only be bound to be a member of the industry disputes scheme. The industry disputes scheme would have its own rules about enforcing its determinations under the contract between the trustee and the scheme. Those rules would govern the enforcement of the determination. It may be that only the trustee is bound but not the complainant—the complainant may not surrender any rights of appeal, for example.

Mr WILKINSON—If that is the case, how do you enforce a decision against that trustee? Is it by things in the legislation or is it by part of the agreement that you enter into? It is by the agreement. If one of the members does not pay up when the body says, 'Pay up,' is it then just left to the member to take the fund to court, which they could have done in the first place? What is the process of getting the complainant to get his just decision implemented?

Mr ROGERS—It is not the same thing as going to court originally because the whole dispute and entitlement has been resolved and it is really only a question of, in effect, registering the award or determination or whatever you like to call it. So it is almost on the verge of being self-executing. Senator, in an attempt to be helpful, I say to Mr Maclean and Senator Conroy that the way I envisage the position of the beneficiaries is this: you can make any grant conditional. The grant of the benefit to Bloggs, who is the subscriber, or to anybody claiming under him, is conditional upon subscribing to the circumstances of the dispute resolution process. You never get to the starting gate as an infant beneficiary whether you are in court or in the dispute resolution process except by reason of the fact that there was a subscriber. In a sense the river cannot rise any higher than its head, and the head is the original beneficiary. I would like to think that one could, at the end of the day, persuade Mr Maclean that there is a respectable argument for that proposition.

Mr MACLEAN—I am not persuaded. There is another point against your argument, Mr Rogers: what do you say happens to the legal rights of the non-member dependants who wish to make a claim? Do they lose their rights to go to the state court? How does it work?

Mr ROGERS—It is no different from an arbitration agreement. You are not ousting the jurisdiction of the court, you are substituting for the court remedy another form of dispute resolution procedure the same way as you do in arbitration.

Mr BEAN—I think this is getting off the track. The private schemes do not bind the consumers and we are talking about people at the end of the day who would not be bound in a private scheme. The only people who would be bound in these schemes are the insurers and the trustees, not the beneficiaries. If the beneficiaries did not like the issue they could then take the matter to court. That is what happens now and that is what would happen under the proposed scheme that everybody has been talking about.

Mr ROGERS—Not everyone.

Mr BEAN—Sorry, except for Mr Rogers. But basically that is the way we envisage private schemes working, or, as Lynn has been calling them, private sector schemes. No matter what it is, it would work that way. I do not think we should really be labouring this point.

Mr ROSE—I think I still have some qualms along the lines of David Maclean's problems to the extent that there may be a need for some legislation underpinning it and requiring alteration of rights and liabilities to accord with the decision of the tribunal or whatever. I still think there is a lurking problem of judicial power there. I really think one would need to think about it very carefully and in detail, but that is certainly my reaction at this stage.

Mr FAIRLEY—I want to express concerned about the members not being bound because in the event that a determination is made and the trustee being bound, the members still have their rights to go and pursue them through the courts. If they have those rights, most trustees would not pay out because they know that, until the limitation of actions makes that action no longer possible, they have got this potential problem hanging over their head that a member can go into a different jurisdiction and pursue their rights. I think we are really skirting around that issue and not resolving it, and I am not sure it is soluble. I think David Maclean is correct in relation to this issue of no privity of contract between the people who are not the participants in the scheme. The participants in the scheme have got, at best, a contingent entitlement and they only get a vested entitlement at the time at which the trigger goes off, and if they are still alive they get a vested entitlement. If they are not alive when the trigger goes off and the benefit is payable, the benefit is payable in accordance with whom the trustee determines is payable to, and there may be beneficiaries who were not even alive or in existence at the time at which the member entered into the arrangements.

Mr MIKULA—To respond specifically, it may be that, given the peculiarities of death benefits where you have a range of claimants, there may need to be separate arrangements made, but certainly where the dispute is just between the member and the fund the ordinary method in which these ADR schemes operate can still be used. I think it is worth making the point that in the other schemes, given membership and ownership by industry, there have

been no challenges of these kinds to them. I would expect something similar to happen if a superannuation scheme was adopted.

Mr LILLICRAP—At the risk of being dull, I am prepared to assume that in due course the lawyers will find a way to make some sort of private body work, and I just want to make some brief comments on what sort of private body trustees might be looking for. From my point of view, they will be looking for a separate body to any of those that exist now. I think Philippa Smith has talked about the need for some sort of legislative compulsion. That in itself would make this a different type of arrangement than others and I think the trustee problems probably make superannuation a different type of problem; you have to be much more careful with the legal structure. So I think both of those argue for a separate body.

I agree with Philippa that we need the support of legislation. The comment was made about how it should be funded. I suppose that as a last resort the user-pays principle could be applied very broadly as the levy is now: funds with large membership like mine pay much more than funds with small membership, and that is a type of user-pays principle. One of the things I believe should be avoided is a case-by-case, user-pays principle because that has the consequence that each time the fund is facing a decision about what to do when somebody registers a complaint, if you build the hurdle of cost for it high enough, it simply does not bother to take any action on large numbers of complaints—the same thing that happens in the court system now where, if you are facing a very large cost, you simply give in, and people use that to their own advantage.

There is an element that people have not talked about yet and I know it has been on Philippa's mind: there is a need for assistance and advice to the people using this type of body. It is important that there be such a body providing advice and assistance but I also think it is important that that should be separated from the body that makes recommendations or decisions. If you are assisting consumers with their claims, you cannot help being partisan and, particularly in a voluntary body, a partisan decision-maker would be a disaster. So they are three points to consider.

Mr RAITT—I just want to address this issue of the binding decision. I think it is a paradox to compare the tribunal in a modified merit review function, on the one hand, with an industry scheme on the other in that, if you can solve the problem of the binding decision—and substituting that for the trustee—for the tribunal, it will also work for the industry scheme. My view is, in the paper I have submitted to the committee, that if you cannot solve that problem for the tribunal, you will not be able to solve it for the industry scheme either.

Mr WILLIAMS—My point is substantially to the same effect. If we are looking at a private scheme that would have industry backing, I think it is difficult under the constitution to enable there to be some enforceable element to that private scheme via federal legislation because you run into the problem that you are simply attempting to do what it has been found that the tribunal cannot do via a different means.

If it simply involves the imposition of a contract or the imposition of some other legislative means of ensuring enforcement, the odds are that a court would look through that and say that indeed this is exactly what has been done previously and found to be invalid via some other attempt, so I think it really comes down to the idea that it is not likely to be feasible, under the law as it currently stands, to have a legislative based power of enforcement for a non-judicial body. I think that is what the law is telling us.

The other point that comes from that is it is even clearer that we might run afoul of the constitution if the power of enforcement extends beyond simply the trustee and a member of a fund to third parties as well. If that were to extend, for example, to the spouse of someone who has died or to someone else, I think that would make it clearer that we may be getting into constitutional problems by trying to set up the power of enforcement.

The second issue, which someone has brought to my attention and I will just flag, is that you need to be extremely careful in setting up a scheme like this that you do not involve any acquisition of property on unjust terms. The constitution says in section 51 that the Commonwealth can legislate for the acquisition of property but it must be on just terms. If a scheme were to involve the taking of property from trustees or the beneficiaries of a scheme, issues would be raised there. It is likely that they could be avoided but I think that they must be taken into account and the scheme must be set up in a way so that does not raise an insoluble problem.

Mr LARKIN—We need to draw a distinction between coverage and enforcement. In the ISC's consideration of the industry scheme option, we think it is feasible for there to be legislative backing to require funds to be a member of an industry scheme; however, we consider there would be problems in legislating for the enforcement of those determinations.

The enforcement of the determinations would come through the governing rules of the scheme itself, that is, the contract that the fund entered into with the scheme. The fact that you cannot legislate for the enforcement of determinations should not be overemphasised as a constraint on the option because with sufficient industry ownership, peer pressure and accountability within the private sector those forces can operate to ensure a high level of compliance anyway, as they do at present in current industry based schemes.

CHAIR—We have not considered voluntary arbitration under contract law. Would somebody like to lead off on that option?

Mr ROGERS—The only way that you could ever consider arbitration is if you recast the whole procedure. The devil is in the detail there. It would only be an arbitration in name; in actual practice the procedures that you would have to follow would have to be completely different. Otherwise you would be defeating what to me is the primary purpose of the exercise: providing an informal, cheap and expeditious dispute resolution mechanism. If I may say so, Senator, what you are really flagging is voluntary procedure for dispute resolution. To call it arbitration is really merely to import into the voluntary dispute resolution mechanism an unwanted problem.

There is absolutely no reason that one can think of, subject to two problems that I will mention, why anybody in Australia should not voluntarily agree to submit a dispute for determination by somebody else. The first problem is the one that Senator Conroy identified, that there you would really have a problem of the unborn children and such like. Secondly, you could have in a very acute form the problem of trustees and their power to participate in that completely voluntary mechanism which is not underpinned by any sort of rule, regulation or legislative mechanism.

CHAIR—Time is running out and I now propose to move to the second item, reconstituting the tribunal as part of the Federal Court, and in addition discuss the industry code of practice under TPC. I call for speakers in terms of reconstitution of the Federal Court.

Mr ROSE—As I said this morning, this would only work if the powers to be given to the Federal Court are judicial powers. I am confident myself that, if the powers stopped with the power to decide that the trustee's decision complained of was not fair and reasonable, that would be an exercise of judicial power. But to go further and say that the Federal Court can do what is said in section 37 of the present act, if you have got to say that the Federal Court instead of the tribunal has all the powers, obligations and discretions that are conferred on the trustee by law or under the governing rules of the fund, it looks to me rather odd content for judicial power. I think the function of acting as if one were a trustee and making decisions in the administration of a trust—decisions among probably a number of available options each of which is fair and reasonable et cetera—is not really a judicial function.

I know that courts often have the power to approve proposals by trustees and administrators, but it is quite a different matter to say that the court itself can act as if it were the trustee or administrator. I would have some real doubts as to whether that would be a judicial function. Of course, this goes back to my general attitude towards the Wilkinson decision, since I think myself the Federal Court may well have been wrong—because of that component of the tribunal's powers. Be that as it may, there does seem to be considerable doubt and until we get a High Court decision it is really difficult to know which way to go.

Mr MACLEAN—Assuming that all you say is true, would you agree that the position would be different if all that happened was that a new act was passed or the complaints act was amended, so that the Federal Court was merely given jurisdiction to resolve general law disputes under superannuation trustees which arose in the superannuation world? That would seem to me to be okay and it would get around, or negate entirely, any possible concerns about the curiousness of a court standing in the shoes of a trustee, which seems to me to be quite unnecessary and inappropriate.

Mr ROSE—The problem with giving jurisdiction to the Federal Court is that it can only have it, insofar as we are concerned here, in matters arising under a federal law. A lot of these issues concerning trustees would be, would they not, arising under a state law of trust?

Mr MACLEAN—Something I was thinking of—for example, with the complaints tribunal concept of fairness and reasonableness—was that if the federal government wanted

to retain that they could set out a code, if you like, including, or not including that obligation; and then say to the Federal Court, 'You can be the body which determines disputes.' That seems right to me.

Mr ROSE—Yes, with that addition. The duties are contained in federal law, I agree.

Mr MACLEAN—And the next step would be that judicial registrars could be appointed to act as delegates of the Federal Court judges to resolve identified categories of disputes of that nature.

Mr MORGAN—My first comment is that I think we are dealing with a great variety of disputes and we should not lose sight of that. I think many of those disputes are quite minor and, if they were put into a state law system, would be resolved in a small claims tribunal of that type and that variety. There is no problem with those matters being dealt with in a very simple way.

I think there are also very complex disputes. There have been a number of comments about lawyers and I cannot resist responding to them; but I must admit they sound to me a little bit like saying that, in a disability claim involving the assessment of medical matters, you should not actually ask a medical man about it. A lot of issues relating to superannuation do involve legal issues, and I think that the legal methods and systems and lawyers can assist in that process.

I think a Federal Court arrangement, if that is the appropriate court to choose, would, in fact, provide a very good forum for the resolution of what, in many cases, are quite complex and difficult disputes—for example, when issues of truth are central to a dispute. I do not mean that in a disparaging way, but in the assessment of whether someone has an injury or in the assertions they may be making. If I could give an example—I was involved in a matter where a party was asserting that the de facto spouse would gamble the money away if she was given it and this would be detrimental to the children. How do these simplistic dispute resolution processes deal with that issue, if it is a proper matter for consideration in the decision making process?

I personally think there is a role for a properly constituted court, maybe with some simplified and less costly procedures and perhaps not having cost orders necessarily running with the outcome of the decision, to deal with those more complex disputes. Certainly, to that extent, I think the court approach has a real and proper role in this whole area.

CHAIR—How do we determine whether it is going to go to the court? Who is going to be the gatekeeper? That is your big problem.

Mr MORGAN—I do not disagree, but certainly, in other dispute resolution systems such as that in the general insurance area, that matter is being confronted and they do have a gatekeeper in that called the 'referee' who directs that matters involving allegations of fraud are dealt with differently. That seems to work quite successfully. I do not have a great

problem about there being some system to say that certain types of matter are inappropriate for a paper driven system and in those circumstances the court should be used.

There is a further problem about cost, and I acknowledge that the parties in these proceedings may not necessarily be able to afford representation and things of that nature and something may need to be done about that to ensure that they are properly able to have their rights determined.

But again could I keep coming back to this fundamental problem that the trusts that we are talking about do not have capital. It is the other members who pay the consequence of these outcomes or decisions. We have got to be very careful that their rights are adequately protected in this whole arrangement. Traditionally, courts have been the arbiter of that sort of decision making process.

Ms MURPHY—Senator, I am an non-lawyer. I guess I am a little concerned that the discussion keeps on coming back to what may be, on the face of it, the constitutionally most convenient option. I think every option that has been discussed has got some constitutional or other questions around it. I would be very concerned if we lost sight of the fact that the complaints tribunal was set up in the first place as an alternative to the court process, as a vehicle that could consider complaints more speedily, perhaps more efficiently and certainly at a far less cost to the consumer, than using the court system would entail. Even a simplified version reconstituting the tribunal as part of the Federal Court would entail significant costs for consumers and would certainly be more time consuming.

The success so far of the many industry based private dispute resolution schemes around the place has shown that it is possible to resolve complex issues using legal advice but not necessarily going through the full legal system. This is not to say that lawyers should not be involved, because the issues are complex and they are often complex issues of the law, but it does not necessarily have to entail going through the more formal, formidable legal process that many consumers simply would not be bothered to try and tackle.

Mr GIBBS—If you have a system where people have to make complaints to the Federal Court, no matter what process is then put in place to deal with them, you will largely solve the problem of superannuation complaints, because no-one will make them. The mere fact of having to make them to a body like the Federal Court will militate against people making them.

You might think trustees—and I represent trustees—would be happy about that. In fact, I believe the majority of them would be devastated that there is not a simple process for their members to be able to have issues resolved. Yes, it is the other members' money. Of course it is, it always is the other members' money, but it is also the other members' money which is going to pay for all the expensive legal proceedings as well. Also, the other members may end up paying in a less direct way through a lack of confidence in their fund or the system as a whole. I think the Federal Court alternative is the least preferable of the ones that I have heard.

Mr MORGAN—Can I just add a comment? You should note that in the LICS scheme and the general insurance scheme, there are actually monetary limits in relation to the matters they can deal with. In the general insurance scheme, it is indexed. I cannot remember the exact amount, but in rough terms it is about $120,000. If the decision relates to a monetary amount under that, the company is bound. If it is up to $250,000 or $270,000, either party can elect to be bound. In the LICS scheme—Paul Bean can probably explain it better, but he has just given me a note—the overall limit is $250,000 and, in medical matters, $125,000 or, if there is no lump sum involved, $4,000 per month. That is a crude but not ineffective way of delineating matters which should be in a court room and those which should not be in a court room.

Mr WILKINSON—I say it is a crude and not a very effective way. In fact, the tribunal has operated without those limits, and I do not think the limits would have made much sense, in the time that we have been dealing with these matters. Just because the limits were imposed by an industry that was a little nervous about complaint schemes, and those limits have been progressively raised upwards on the whole—

Mr BEAN—It was 250 from the start and remained at 250.

Mr MORGAN—The general insurance one is indexed by CPI, I think annually. It is the same limit it was where it started from, plus indexation.

Mr WILKINSON—I would find it very difficulty to say that it was a sensible line in distinguishing between similar types of cases with similar issues, similar sorts of arguments.

Mr BEAN—Those limits were not just arbitrarily decided upon. They were looked into as matters of what type of insurance cover people in upper income brackets had. The sum of $250,000 is a substantial amount of money. They are saying: 'That is what the complaint is about.' It could be an insurance cover of $1 million, but if it is $250,000 that is being complained about, then that can be awarded. So, they are looking at those kinds of issues. When they came to the conclusion about these amounts, if you take the $4,000 amount, it is twice the average monthly earning type situation. Once you start going over the limit, that is what industry says: 'You are now looking at people who can now afford to take the matter to court.' That is what John was talking about before—whether or not some alternative dispute resolution is basically for people who do not have the means to contest the matter. If you are looking at that kind of amount of money, you are looking at people who do have the means to contest the matter.

With all due respect, Neil, it is possibly one of the reasons that the SCT was seen to be operating as a court. There are no limitations on you, you are making decisions about substantial amounts of money, and therefore you are going to be challenged.

Ms LAWTON—I suggest that those with the money will go to court if they perceive that to be the better place to get a resolution. But if I can return to the issue of discussing the Federal Court option, I would agree with what Mr Gibbs had to say—it is completely

pointless to imagine that that would be a viable dispute resolution forum for the majority of working people in superannuation funds and their dependants, howsoever styled. It would be completely pointless to continue to canvass the Federal Court option without also canvassing how to ensure that people get adequate legal advice and representation. As a person who advises people on an almost daily basis about their financial problems, I can assure you that, with the status of Legal Aid and of other community organisations in this country, that is just not possible.

I would also suggest, without disrespect to Mr Wilkinson and the Superannuation Complaints Tribunal, that I do not consider in all circumstances the secretariats attaching to dispute resolution bodies are always the most appropriate places for advice. I say as someone that helps consumers use these bodies, whether it is the Banking Ombudsman or whatever, that they are not necessarily the best sources of advice either because issues of capture by the industry that controls those schemes or runs those schemes—however you want to term it—is a live issue at the moment.

Also, the issue of case managers actively driving cases through and the effects of concern for efficiency and so on, and trying not to employ QCs to do those sorts of basic jobs, means that important issues often escape attention at that case management stage. I would suggest that, particularly if we are looking at the Federal Court, we have to look at an appropriate advice and advocacy system that springs up with it. I would caution, in terms of any other scheme that we consider, that that is something we must pay attention to—how to ensure ordinary consumers can get access to independent and appropriate advice and advocacy where necessary.

CHAIR—Where do you think people should go for their advice?

Ms LAWTON—Pie in the sky. I do not see, at the moment, other than legal aid organisations, many other sources. Such as may have existed over the years are eroded away now. Superannuation is a relatively new product insofar as low income people are concerned, so those advice organisations have not existed in the past. There have not been specialist bodies. Mr Mikula may be able to comment on the appropriateness of legal aid.

Mr RAITT—Could I just refer to the submission that my partner John Morgan of Blake Dawson Waldron in Melbourne has submitted to you. He is a strong believer in the courts and has mentioned some good ideas to make them more accessible. The only point I want to quote is the very important constitutional point that he makes, that is, there is no rule in the constitution that to be a court it must be too slow and expensive to be helpful.

Mr LILLICRAP—In the discussion about the Federal Court there has been an implication that it is inaccessible and expensive, even if it is more likely to be better law. I do not think even that latter assumption is one that should be made. The particular fund that I work for has probably had more cases in front of the tribunal than any other fund, perhaps any other three funds. I have also spent a bit of time in court. I have to say—without intending any disrespect for the legal system—that it is rare to find anyone in a court case, whether it

be the barristers, the solicitors or the judge, who understands any of the issues in the courts I have been in.

That is not the case in the tribunal. We get overruled the one in three times that the average trustee does. It is irritating, but I cannot say I ever walk away from a tribunal decision feeling it was irrational and incomprehensible. That is my almost invariable reaction when I walk away from a court. Just think of Bishop. I do not think there seems to be a common view here that that case was resolved in a very satisfactory way.

Mr FAIRLEY—I do not want to think about Bishop, Mr Chairman! I do want to make the point that I think our discussions of the Federal Court option have bogged down on the basis of the rules of the Federal Court as they presently exist. I do not think that that would necessarily be the case in circumstances where you were able to get the Federal Court to establish a system of judicial registrars who then were able to be accompanied by a set of rules that were actually drafted so they were massively accessible by complainants. So you are really looking at quite a different body from the Federal Court processes that you might have in your mind today, with the usual discovery and interrogatory processes and so on. I cannot see any reason why there could not be a different set of rules applicable to those complaints that fitted within the criteria of the judicial registrars, whatever that criteria was.

CHAIR—I think we should also consider the industry code of practice under the TPC act. Are there any volunteers for that approach?

Ms MURPHY—Under the Trade Practices Act, the Minister for Customs and Consumer Affairs will, from 1 July, have the power to prescribe codes under the act. He will be able to prescribe two different codes. One is mandatory codes, under which arrangement all members of an industry will automatically be bound to that code.

The second option is to prescribe a voluntary code, under which approach all members of the industry who signed up to a code voluntarily will be bound by the provisions of that code.

One of the good features of a code of conduct is access for consumers to alternative dispute resolution provisions. It is not essential, but it is certainly regarded as a very good feature of a good industry code. Therefore, under the proposed arrangements where a code is prescribed under the Trade Practices Act, it would likely also provide for dispute resolution mechanisms, and members of the industry would—depending on the contractual arrangements in that industry—be bound to that dispute resolution mechanism.

I think Mr Larkin was correct in drawing the distinction between being bound to signing up to a code, or even signing up to a dispute resolution scheme, and the issue of how you were then bound to the decisions by the decisions of that scheme. I do not think we would be envisaging under the Trade Practices Act amendment that the Commonwealth would then be requiring participants to be bound by the decisions of the dispute resolution scheme. There is a constitutional issue there and we are seeking advice on that at the moment.

Having said that, it is probably likely that the minister will be using his prescription powers sparingly and would be primarily using them where there is a problem in an industry in the way the industry deals with consumers. There might be systemic market failure problems, there could be problems that have not been able to be resolved by self-regulation and therefore you may need to look at more government intervention and a more co-regulatory approach to resolve some of those problems.

I do not think that we had envisaged that the starting point for prescribing a code would be whether an industry based dispute resolution scheme was working or not, or whether it had adequate coverage or not. It is certainly not beyond the realms of possibility that that might eventually drive the development and prescription of a code. It was not envisaged as being the starting point for prescribing codes, but, as I said, it is probably still an open option.

Mr EDSTEIN—If a code was envisaged for superannuation, given that virtually all funds are controlled by trustees, how much further would the code go than the body of trust law we already have that regulates them and SIS itself? In effect, both of those to me are a code. What would it cover?

Ms MURPHY—I am probably looking for Mr Larkin's assistance here. It is quite possible to have a code that runs complementary to relevant pieces of legislation. Indeed, that is the case in the life insurance and general insurance sectors. Generally, a code tends to deal with a relationship between an industry and its consumers, rather than necessarily going to issues of prudential practice and prudential management. But Mr Larkin might wish to expand there.

Mr LARKIN—We have codes in place for the life insurance sector and the general insurance sector. They both primarily deal with market conduct issues like ensuring adequate records are kept and maintained by the company and various best practice internal management practices are adhered to. I cannot say that a code of practice for the superannuation industry is high on our agenda. We have sought to promote industry best practice through other mechanisms—for example, the publication of our good practice guide for trustees, which sets out the results of some of our review findings, again dealing with matters such as record keeping and adequate segregation of duties, good investment management practices and so on. It is not beyond the realm of possibility that we could contemplate it if it was going to facilitate a long-term solution to complaints handling.

Mr EDSTEIN—I would be very concerned if that were a compulsory code of practice for a trustee. We start to travel down the same course as we did for SIS when it was being put together back in 1993, where the government of the day ordained trust law as the appropriate process to regulate superannuation funds complemented by SIS. If you look at section 52, the covenants in that section by and large reflect the covenants that are imposed on a trustee generally. My concern is that, if we try to put something compulsorily on trustees, we might run the risk of a bill of rights concept, where we start to define things too narrowly and we throw out the flexibility of 200 years of trust law. When you look at the role of the fiduciary acting in the best interests of beneficiaries, it is an incredibly flexible

concept and generally works. That is what the government decided back in 1994, correctly in my view, when they adopted SIS in the trust law process as the way to go.

Mr LARKIN—I have no comment to make. I think the comments are well made.

Ms SMITH—In some of the discussions that we have had, I would see the starting base as being the SA's legislation. In the discussions that we have had—whichever option we choose—perhaps there should be some refinement in terms of an alignment of that SA's legislation and trustee responsibilities as giving some assurance about double jeopardy issues. The question of that alignment and the alternative of the SIS legislation referring to a code was brought up. The types of issues that were thought perhaps could be spelt out were things like provision of information or giving of reasons, but the starting base was the SIS legislation and the better alignment of that.

CHAIR—Does anyone have anything further on the code or, alternatively, on the reconstitution of the SCT under the Federal Court?

Mr EDSTEIN—When Philippa raised alignment this morning, I perhaps incorrectly assumed that the alignment you were talking about was between the duties of a trustee—which are by and large encapsulated not just in the general law but also in section 52 of SIS—with the duties that you have to satisfy to get through the current SCT process of being fair and reasonable or being not fair or not unreasonable. That, to me, has been a problem that has surfaced perhaps unwittingly since SIS and the SCT were put in place in that the general law does not require a trustee to be fair or reasonable. It is basically an administrative law test.

We have in part come to grief because of that. It is incredibly difficult advising a trustee who is trying to behave as a proper fiduciary and then have this overlay test of being fair and reasonable as well. This raises the very thorny issue of giving reasons or not giving reasons, because the courts basically say that a trustee who gives reasons will then have those reasons exposed for review. In the absence of giving reasons, particularly in relation to a discretionary decision, then the reasoning is not open for review. I think we are basically walking into a situation where we have to decide whether a trustee should be asked to give reasons.

I know that Neil Wilkinson has a strong view on this. My position to date has been that, until the law requires it of a trustee, they should not give reasons, as a general rule, because they are not acting in the best interests of their beneficiaries to do so. They are exposing themselves to legal sanction, which is not good for the body of their beneficiaries. It may be good for one beneficiary but not for everybody. That is my general proposition. If we move to require trustees to give reasons, it will expose their decisions to much greater investigation. That may well be a good thing, but I certainly would be very cautious about requiring trustees to give a full expose of their reasons as opposed to possibly statements about the material things they took into account and disregarded in coming to their discretionary

judgments. The giving of reasons is a very live issue and I think will probably play a part in whatever resolution process we come to.

Ms SMITH—I want to clarify the question about the fair and reasonable test. That was the other part that was raised in terms of alignment.

CHAIR—I am interested in this question as a trustee myself as to whether we should be giving reasons. Do you think that should be built into the law? Because at the moment there is this problem. Can we canvass that as an issue, because I think it is relevant to the final outcome of good law?

Mr MORGAN—Certainly the Law Council Superannuation Committee has been giving some consideration to that. We believe there is no necessity to give reasons for every decision because with most of them there is no issue. But where, for example, there was a complaint which was brought under section 101 and perhaps where a party actually asks for it, it may be different. I do not want the trustees to end up having to give judicial reasons. It is very hard to identify what short reasons really are.

There are two sides to this. The trustee should point to the matters or facts or documents which it has taken into account in making the decision so that the party receiving the decision knows essentially what factors go to it and what that party has to address if it dislikes the decision. I think it is quite useless for non-lawyer trustees to get into the business of trying to concoct or write reasons for their decision making. I think it would be costly and probably ineffective at the end of the day. But it is quite sensible for trustees to identify the facts and matters which they took into account.

There is another side to that, and it is part of the transparency of decision making: one thing that the trustees of super funds fundamentally lack is some method or sureness that they have before them the relevant information. They do not have the powers that Neil Wilkinson has to go out and issue notices requiring people to deliver up documents and tell them about various things. They have insurance companies which are unwilling to release medical reports, and there are other issues relating to that sort of area. I think there should be an examination of some method to allow trustees in the superannuation environment some power or right to at least request parties who may be relevant to a decision to provide to them what they say are the matters which should be taken into account. Similarly, the trustee should be bound to give those parties the material they have—medical reports and the like—which they are going to take into account. Because, without that fullness of information, I do not think you get a proper decision making process.

Those views have been reached after a great deal of thought about how this matter should be resolved. We have never agreed with the tribunal's views about giving reasons. It was a mismatch of trust law and the tribunal's view of life. If trustees, the decision makers, are going to be required to do something, then the law should tell them what it is they have to do, not have some indirect means of forcing that upon them.

Mr ROGERS—I agree with the second half of what John Morgan has said, but I think it is essential to focus on two other aspects. The first one is that the trustee has tremendous powers of adjudicating on competing claims or rights. In order to allow the trustee to hide the rationale for deciding one way or the another, it is quite inconsistent with the current day approach to problems. It is not at all justified by appeal to the notion that it is very difficult to give reasons. It is a common misconception which applies in arbitration that there is some mystery or difficulty in writing an award or giving reasons. Some of the difficulty arises from judges being supercritical about what constitutes reasons and what does not.

But there should not be any justification, in my view, for denying to people who are wanting to know why the trustee has decided one way or the other from being told precisely that. There is no mystery attached to the reasons, and there should not be any mystery. If it leads to review procedures, so be it. Why should the decision of a trustee be any more immune than any other decision making process?

CHAIR—If there are no further comments, I will adjourn for afternoon tea.

Proceedings suspended from 3.02 p.m. to 3.22 p.m.

CHAIR—We now look at our third option, which is the amendments to the superannuation complaints act to ensure its constitutional validity. This issue was canvassed fairly extensively prior to lunch but it is now on the table to see whether it is possible to maintain the status quo, with certain changes.

Mr WILLIAMS—I believe this system offers the best alternative if the desire is to maintain the status quo. This is the option which does the best job of actually attempting to maintain the system as it currently existed prior to the decision of the Federal Court—with, of course, some modifications. I think the aim here would be, first, to make some modifications to the act, the sorts of modifications that should have been made the first time the act was amended, in an attempt to insulate as far as possible the complaints tribunal from challenge in the High Court or in other courts. However, in doing that it is important to realise that that is a risk management process. I do not think any legal adviser could say that there is a way of insulating the body completely from legal challenge without perhaps taking away the very power that it needs to operate.

If you were to take that first option then I think there are three things you need to look to. Enforcement is obviously the major problem as it is currently seen by the Federal Court. What you would need to do there is to redraft the legislation to substantially alter the way decisions of the tribunal are enforced, and again I would refer to the fact that the enforcement mechanism relating to the Corporations and Securities Panel does seem to be an inadequate mechanism, although it does provide for enforcement via a court rather than via the tribunal itself. But that perhaps is the cost of doing it this way and it seems very difficult to get around that. In terms of looking into that proposal more deeply, it would be useful to look at the draft takeover provisions released two weeks ago by CLERP, the corporate law economic reform program based in Treasury, which sought advice from the Australian Government Solicitor and redrafted the enforcement proposals for the panel in light of what advice suggested could be achieved, and that may well provide a very useful model.

The second area is the criteria on which the tribunal makes decisions, that is, the fairness and reasonableness criteria. This is obviously a problem for the tribunal as it is currently constituted. Here I think you have got two options. One is to remove those criteria entirely and to replace them with explicitly policy based objectives. For an example of those, you would look to the Eggleston principles in the Corporations Law, which are a good example of non-legal criteria and obviously go to commercial rather than legal policy objectives. That would be the safest way of doing things. However, you could also leave in the fairness and reasonableness criteria but make it clear that those criteria were commercial rather than legal criteria. You could say that fairness and reasonableness in the context of these other policy objectives is the way that the body should look at it. That is a halfway solution, but it does go a long way to avoiding the problems identified by the Federal Court.

The third way that you could look at reconstituting the body would be to make it clear that this is a merits review type process. It does have the disadvantage of making the body more akin to the AAT, and that may be something that is wished to be avoided, but the High Court decisions going back to the old taxation boards of review in the 1930s and 1940s say

that if a tribunal is put in the position of making a decision as if it stood in the shoes of a decision maker then that is acceptable under the constitution.

They are the three things I think you would focus on if it was simply looking at legislative change. The other option I will talk about very briefly is the one I raised this morning regarding a state based body maybe picking up Commonwealth legislation for the territories. In my view, this is the option which best avoids any constitutional difficulties with an attempt to maintain the tribunal as it is. It is based upon a very long line of authority. However, even in that area there is always the option that the High Court may overturn that line of authority and may decide to subject the territories to this limitation as well. That is currently not the case, but it simply goes to the point that there is no absolute certainty in the area of constitutional law.

However, I would personally wonder how much consideration we should give the state based alternative and that is because I personally doubt whether it is a viable option at the moment, given time and given the political willingness to achieve legislation across all of the states and the Northern Territory. It may be that five or 10 years down the track this is the solution that is left, but it is hard to see that it is viable as things currently stand.

CHAIR—Mr Williams, could you attach some sort of probabilities to this risk management scenario that you have put to the committee?

Mr WILLIAMS—I would put it this way: I believe that there is a reasonable possibility of success in the High Court as the legislation currently stands. I think the Federal Court took a very strict and very narrow view of the High Court's Brandy decision as to enforcement. I think that with a brand new High Court there is a good or at least a reasonable possibility that the court might look at the issue differently. Indeed, one of the dissenting judges, Justice Sundberg, in the Federal Court did exactly that. I think if you then added in a reformulation of the legislation in a way that matched the Corporations and Securities Panel which a unanimous High Court upheld in 1991, I would not attach any percentage to it but I do not think you could possibly be asked to do any more. Indeed, if you cannot set up a body along those lines where the High Court has already said it is acceptable in 1991, I think you have really got to the point where the constitution is completely inadequate to allow you to set up almost any form of tribunal that would make anything akin to a binding decision.

Mr MACLEAN—I have got two questions for George. The first one is: does George see any problem along the lines of the Commonwealth effectively acquiring property without compensation on his model? The second question is: what kind of commercial policy considerations does George have in mind as the things to go in?

Mr WILLIAMS—As to the first issue, the acquisition of property point, that is always an issue but it is one I believe can be safely navigated. That is because the High Court has said in its decisions that the constitution is not breached if it is not merely an acquisition of property but is an adjustment of interests according to a Commonwealth policy objective.

Mr MACLEAN—If person A has the benefit of the death benefit, for example, as a result of the decision of the trustee and then the tribunal applies some other test and gives the death benefit to B, just on a very prima facie level B has acquired A's property.

Mr WILLIAMS—Yes, that is right. In terms of the mechanics, there has been a shifting of property from one person to another, but the High Court has said that that is acceptable for there to be such a shifting of property as long as it is about some overarching scheme of regulation. It is not merely about taking property and giving it to another person but is meeting some other policy objectives such as, for example, a compensation scheme or some other criteria.

Mr MACLEAN—What is the compensation scheme here? What is the compensation for A, who has lost his property?

Mr WILLIAMS—I think it is a mistake to focus too narrowly upon the individual interests involved in any one case, because I think the way this would be characterised is as a scheme more generally providing for the resolution of disputes and the adjustment of claims in the superannuation industry as according to the explicit policy formulations set out in the statute. I think if that was done, the High Court would look at the scheme and say, 'This isn't simply the Commonwealth taking away property or moving property from one person to another characterised as such. It is indeed something far broader than that; something that is achieving some other objective than the mere acquisition of property.' It comes down to a characterisation, but I have not seen that as a strong issue thus far and I am not sure I would see it as a strong issue in the longer term.

Mr MACLEAN—What are the policy objectives that you would rely upon?

Mr WILLIAMS—I have not formulated them myself. What I would do is look to what objectives the superannuation industry and the players within that industry, both the trustees and also beneficiaries and consumers, would see as the objectives of an industry in seeking to resolve disputes. For example, you can look to the Corporations Law. There objectives such as the provision of adequate information to players in the industry are one of the things that must be taken into account. You have also got the equality of opportunity principle there which relates to takeovers and suggests that there should be some equality in sharing of benefits. You could look to that sorts of criteria. I would not pretend to be an expert in that area, but I would suggest that maybe the industry could determine certain policy objectives beyond simply fair and reasonable objectives which were policy rather than legal criteria.

Mr RAITT—In the paper I submitted to the committee I agree with much of what Mr Williams has said. In addressing the issue of acquisition of property, I have taken the view that probably, the law as it stands, under section 101 of the SI(S) Act, requires trustees to make provision, or make arrangements I think is the word used, to consider inquiries and complaints. I have taken the view that a trustee decision is, by virtue of that law, subject to reconsideration. Whether that is the proper interpretation of the law as it stands is probably neither here nor there, because I think it could be made clear beyond any doubt that there is

an inherent power of review created by statute which would override any doubts that there was an absolute vesting and therefore divestment or acquisition of property. So I think that could be easily fixed in a rewrite if it is necessary.

As for policy objectives, I do not myself believe that we need to specify any in a rewrite of the act because, as things stand under trust law, there is, in all the 200 years accumulation of the law of trusts, no statement of policy or commercial objectives. The trustee just carries out his duties and discharges his trusts. So I do not see why any person or body placed in the shoes of the trustees to re-exercise discretions needs any greater guidance than to discharge the terms of his trust.

Mr EDSTEIN—I have a question for Mr Williams in terms of the proposal being put. On my reading of the Wilkinson case, all three judges were apparently agreed that the act only covered discretionary decisions of trustees as opposed to non-discretionary decisions of trustees. If you look at the history of the SCT today, a lot of their decision making has been in relation to non-discretionary decisions. My sense of Mr Justice Sundberg's decision is that, quite apart from the interpretation of the act, non-discretionary decisions would also likely involve judicial power and would have to be determined by a court. How does your proposal fit with that scenario in that we may end up with a tribunal that can only review discretionary decisions?

Mr WILLIAMS—I would not read that into Justice Sundberg's reasoning. I think it is ambiguous; I would certainly accept that. But I read Justice Sundberg's decision in this way: he says there is not an exercise of judicial power because an essential element is missing, and that essential element is the ability to enforce the tribunal's decision without some form of review by a court. I do not think that essential element is altered one way or the other according to whether a decision is discretionary or non-discretionary; though we are in a sense trying to read his mind here—maybe he would have said something different. Personally, I do not think that is likely, because I do not think the foundation is there to support a different result, because whether it is discretionary or not does not affect the ability to enforce.

Mr ROSE—I agree, generally, with what George Williams has said about acquisition of property. As regards the present legislation, I have indicated that I think there are real problems with the reasoning in Wilkinson, in the judgments of both Justice Heerey and Justice Sundberg. That is not to say that the High Court would not come to the same result—perhaps for different or more elaborate reasons. There are some problems, to my mind, with the legislation as it stands, but I would not necessarily go down the route that, I think, George Williams has suggested.

It seems to me that it would be on the strongest footing if the scheme were to be that the tribunal's decisions are substituted for those of the trustee, as the present legislation does, and if the legislation provided that the decisions of the tribunal should be made exactly as if it were a trustee making the decision for the first time. If, of course, it is decided that the actual trustee's decision was inappropriate, the tribunal would then make a decision as if it were the trustee.

The legislation would provide that, for all purposes, the decision of the tribunal should be treated as if it were the decision of a trustee. That provision is there already in section 41(3), but the important thing is that it should, I think, go on to say that all the provisions of state and territory laws concerning trusts should apply to that decision of the tribunal as if it were a trustee. Then disputes concerning the merits of the tribunal's decision as a substitute second level trustee, so to speak, would be open to proceedings in the state Supreme Courts and the territory courts, on the bases on which trustee's decisions are now open to challenge—not a full merits review. The tribunal itself would have acted on a full merits review basis of the original trustee's decision. But the tribunal's decision would be exposed to review in the state Supreme Courts and territory Supreme Courts or could be made reviewable, on that same basis, in the Federal Court because they would be matters arising under Commonwealth law, being the provisions of state law applied as Commonwealth law. So I think the Federal Court could be given all the jurisdiction there, to act in exactly the same way as a state or territory court would act under the trustee laws at present.

Mr ROGERS—Whilst I understand the proposition that Mr Rose has just put, I would suggest that it yields to the objection that it merely interposes another level or rung in the decision making process, which is, by definition, undesirable. I would suggest for consideration that we go back to the point which was made by George, that the nub of the difficulty lies in the enforcement of any decision of the tribunal. We have to remember two things. One is that it applies only, as Mr Wilkinson said, to 21 per cent of the cases. Why then are we going to subject the other 79 per cent to some elaborate procedure which is unnecessary? Why should we not just cater for the 21 per cent? The great difficulty is in identifying which is the 21 per cent.

Let us, in that context, look at what would happen if one were to say, 'Well, to hell with it, if that is what the constitution demands, we will give it all to a judicial tribunal.' What would the judicial tribunal do? The judicial tribunal would submit the dispute to all the alternative dispute resolution processes, like mediation, which would eliminate your 79 per cent. So whichever way you do it, it seems to me that you are going to eliminate those disputes that yield to mediation or conciliation, or whatever you like, and you isolate the hard core of 21 per cent, whichever route you take.

In that regard, you can take one of the two alternatives and say, 'All right, that 21 per cent will go to the Federal Court'—or whatever judicial tribunal you choose—or you can go back to the suggestion that I would prefer of the industry model. The reason for doing that is that, if there is any merit in the argument about contract, you do not have to have a two-stage process. You can do it all in the one hit: either it is going to be eliminated by conciliation or mediation or you can go straight on with the exercise which will yield its own enforceable decision process.

At the end of the day, it does not really matter very much which one you take as long as you ensure that you do not waste your resources on the 79 per cent that are going to be resolved by some conciliation mechanism. To make the procedure as elaborate as we are talking about at the moment is, I would suggest, counterproductive. We are in the process, if

I may say so, of trying to protect from challenge the 21 per cent while making a very complex set of provisions for the other 79 per cent.

Mr MORGAN—I will make just two comments because I think all the issues have been covered. Firstly, if the 21 per cent are not dealt with, it will not be 79 per cent who will concede: it will be something far less than that.

The other thing is that, while I understand what Dennis Rose is saying, if the tribunal is going to be a true trustee subject to state law review, who pays when it gets it wrong? That becomes a major problem. The fund pays—that is the obvious answer—but, as I keep coming back to this point, the funds do not have unlimited money. They have members' money. They do not have capital. We have got to get certainty into the outcome.

What I am really saying is that, at the end of the day, the trustee of the fund has to be able to be in a position where, if it follows the decision of the tribunal, it has an absolute defence to any other proceedings related to that matter, because otherwise why would the trustee comply with the decision? By that I mean to say he would be the one who would have to run up to the state courts to get directions as to which decision he ought to follow.

Mr RAITT—On the problem of enforcement, it seems to me that it should be possible by federal law to confine judicial review to the Federal Court whether it is on the same grounds of collateral attack that would exist under state law or whether it is more streamlined into just issues of law. We already have this review mechanism in the complaints tribunal legislation at the moment so that, if the member accepts the decision, he just sits back. If the trustee wishes to appeal because he thinks the tribunal has erred in law, he takes his appeal to the Federal Court and that ought to be the way in which the merit review decisions are subjected to judicial review.

In the ordinary course, you would think that a trust fund member who has succeeded in the tribunal but who is overturned in the Federal Court should not be at risk of his costs. There is a question of whether there is some sort of appeal cost mechanism, as in state courts, or whether that has to come out of the fund. To deal with the situation of the recalcitrant trustee who decides not to appeal but not to implement the decision of the tribunal, it seems to me the reasoning of Sundberg is that there has to be some judicial discretion still standing in the way of an order compelling the trustee to carry out the decision.

It seems to me that that could be provided for by putting a high burden on the trustee to demonstrate that, although he has not appealed within the statutory procedure, nevertheless, there is some overriding defect which ought to prevent the court awarding enforcement. It seems to me that the costs of that action ought to be the costs of the fund because, after all, the trustee faced with the decision has not done the proper thing and appealed but has refused to carry it out. I would have thought, with those burden of proof issues and costs issues, enforcement, strictly in accordance with the constitution, ought not be an insurmountable problem.

Mr MIKULA—The more this discussion has gone on, the more this option has seemed to me to raise a whole range of complexities, particularly legal ones, for ordinary consumers. When they have a decision which may either not be complied with by the trustee or may be subject to review, they are going to be rather dissatisfied with the result. It again emphasises the point we have raised previously for the need for proper legal advice and adequate support for consumers.

Mr BERRILL—One of the problems with Mr Rose's proposal is that, if the tribunal decision stands in place of the trustee's, by giving of reasons in that decision, it opens itself up to challenge greater than a challenge on a question of law that exists now to the Federal Court. The decision in Karger v. Paul says that the giving of reasons is not a full merits review, but it is more than a narrow based review that exists now.

If we are talking about appeals and costs indemnities, in any process where there is a right of appeal, first of all, the appeal is invariably exercised not by consumers but by trustees, insurers and companies. That is mainly a resource question. Secondly, if you are talking about expanded rights of appeal with cost indemnities, you are going to be talking about a system that costs a hell of a lot more than it does now. One of Philippa's requirements is that, whatever replacement scheme there is, it is cost neutral as opposed to what they pay now. It ain't going to be if we have those sorts of procedures in place.

Mr WILKINSON—In regard to the discussion of enforcement, we have already put before you a document. I think we slid over the issue of enforcement in relation to industry or private bodies on the basis that there is not a problem at the moment with those bodies which are dealing with a small group which voluntarily becomes part of the scheme. What we are dealing with is a much larger group, an enormous, very diverse group, where there is no industry body. ASFA represents certain people, IFSA represents certain people and IFF represents certain people. There is overlapping between all of these, and there are some that are not attached effectively anywhere. The enforcement under either scheme seems to me a risk area, notwithstanding the experience that Paul Bean referred to. We have never had a problem. No banks have ever said we will not do it. But by agreement you cannot oust the jurisdiction of the court. So those agreements are really gentlemen's agreements, and we are dealing in an area where I think most people are gentlemen or gentlewomen, but some of them are not and that is a real problem.

Mr BEAN—That is not true. I can argue the Aegon case in England involving the English insurance ombudsman where an insurance company tried to take a decision of his to the court and the court held that his decision was not reviewable by the court because of the contractual nature of the agreement. I gave you a copy of that, Neil, or I gave you a reference to it. It is clear in that case that the court is saying, 'No, this is a contractual matter between the insurer and the scheme and therefore it is enforceable,' and there is no appeal from his decision to the court. It is not ousting the jurisdiction of the court. It is a contractual matter.

Mr RAITT—I think the English constitutional position is slightly different from ours and our constitutional issues of separation of powers may add something to that.

Mr BEAN—Yes, the constitutional issue may be there. But the contractual matter is what the courts were talking about there and it is the same here.

CHAIR—As part of this grouping we wanted to look at the body established under state or territory law. Mr John Fox, you have done some work on this already. Would you like to address the committee?

Mr FOX—At this stage, in terms of what is involved, I think it has been adequately covered by Mr Williams in terms of the panel and of my prior comments insofar as there is a CLERP proposal that will include as a condition for participation in the system—if you like, a registration condition—that the financial participant be party to an approved scheme. Having regard to the comments being made about the advantages of potentially building the substitute for the SCT on state and territory law as a way of side-stepping the constitutional issues, I am flagging that as one route that may be able to take advantage of it. In terms of going through that route and being able to provide any further advice, that is something I would have to take and report back on.

CHAIR—If we relied on a state legislative base, could that be used for an industry scheme or for a government-type model such as the SCT?

Mr FOX—Certainly in terms of the industry scheme, I would see it as a possibility, looking at the Corporations Law as it stands. The method that is being looked to to impose a scheme now is by way of a regulation which will make it a licence condition for a licensed dealer to be party to an approved complaints scheme. So, certainly I would see that as a model to deal with the industry schemes.

As to creating a separate, formal equivalent to the SCT, that is not something that I have had to consider. I am not aware that the ASC has had to either, so I am not in a position to answer that.

Mr WILKINSON—It could conceivably be a way of dealing with it.

Mr FOX—It could be. I would defer to those who know the state constitutional law better than I to answer that though.

CHAIR—Are there any experts in state constitutional law here?

Mr WILLIAMS—Perhaps I can give a quick answer. The state constitutions are bereft of the limitations that we are faced with here in terms of federal constitutional law. The High Court has decided, as recently as just a couple of years ago, that the New South Wales constitution does not contain the separation of powers which we are faced with here—and that was the best and most likely example of a state constitution that did.

The only real impediment I can see to the states being able to legislate for either of the sorts of schemes which are raised are that they may come into conflict with federal legislation, and in that case the constitution says that the state legislation gives way in the face of the federal legislation. So you would need to craft it carefully so that federal and state cooperation ensures that there are no overlaps that would lead to an inconsistency but, subject to that one technical requirement, I cannot see why the states would not have the power to do this in cooperation with the Commonwealth.

CHAIR—In terms of time frame, how long do participants believe it will take the various state parliaments to pass such legislation?

Ms RALPH—Right after they get through with tax reform.

Mr MORGAN—It depends how much money they promise to the states.

Mr GIBBS—Whilst we have heard this recently, I think that is an important consideration. So am I am right in saying that it would require separate legislation by each state to apply this in the superannuation area? Yes? I respectfully suggest there is our answer.

Ms LAWTON—The template credit legislation in each state took nearly 10 years to achieve with varying degrees of well-worn effort over that time between state governments.

Mr FOX—I well understand the issues involved in getting the states to pass legislation but I think we do need to bear in mind that, if we are talking about taking advantage of CLERP, we are building from an existing legislative framework. We are really talking about a few lines of text if we are talking about a licence condition. I am not going to underestimate the various issues that need to be worked through, but I think we need to keep that in proportion.

CHAIR—Thank you very much. Perhaps we might turn to the status of matters previously decided by the SCT. Mr Larkin, would you like to comment?

Mr LARKIN—Just from an ISC perspective, we have done some internal consideration of this issue. Our view is that compliance with an invalid SCT determination will not provide a defence for a trustee in an action for breach of duty. So, in other words, if a trustee has otherwise breached their fiduciary duty and implemented an SCT determination, the full Federal Court ruling will not provide the trustee with a defence. The upshot is that whether or not the trustees find themselves in trouble as a result of having implemented invalid determinations ultimately depends on how they have exercised their fiduciary duties. If they have complied with their governing rules and fully complied with their fiduciary obligations, they seem to be at a pretty low risk of being exposed to legal action but it depends on a case-by-case basis.

CHAIR—Is that the consensus around the room amongst the lawyers? Mr Rose?

Mr ROSE—Can I ask Mr Larkin: has any consideration been given to Commonwealth legislation validating the decisions if in fact they are invalid?

Mr LARKIN—Not formally and specifically. No.

Mr ROSE—There are precedents for doing that. Back in the early 1970s, the High Court held that a lot of divorce decrees that had been granted by Masters of state Supreme Courts were invalid and the Commonwealth passed legislation saying that those purported decrees should have the same force and effect as if they had been made by the judges of the courts. The same could be done here. The divorce legislation was upheld in the case of the Queen v. Humby, in 130 Commonwealth Law Reports, as an exercise of the divorce and matrimonial clauses power. Here it would be the corporations power, the old age pensions power and the territories power.

CHAIR—Do you think we on the committee should recommend that the government should legislate to validate such decisions?

Mr ROSE—I am just speaking rather off the cuff without any detailed consideration of the implications. The government may see some problems in it.

Mr FAIRLEY—I think that trustee decisions are at risk as a result of this full Federal Court decision, particularly decisions that were taken by the trustee and were subsequently altered by the tribunal, because it seems to me that, when the trustee made its initial determination, it created rights in the beneficiaries.

The only basis upon which those rights could have been altered was if the trustee could have had its decisions successfully challenged on the basis of improper purpose or excess power or so on, or if the tribunal came to a determination that those rights ought to have been changed, which it subsequently did. If in a number of cases—and I think there are 40, 50 or 60 such cases—the tribunal actually made a determination to change the original trustee decision and if the trustee paid out on those, it paid out pursuant to a decision that is now a nullity.

On that basis, it seems to me that the original determination of the trustee stands and that beneficiary has a vested entitlement to that benefit, subject obviously to the decision of the High Court. In the event that that were to support the decision of the full Federal Court, then there is a disclosure by trustees in respect of that benefit. They may well seek restitution in respect of the benefits that have been paid to the persons pursuant to the order of the tribunal and may or may not be successful, depending on whether those beneficiaries have changed their position. But I certainly support Dennis's recommendation that we at least ask the ISC to look at the opportunity of validating those decisions to prevent those 50 or so decisions becoming the subject of subsequent litigation.

Mr LILLICRAP—I agree with that completely in principle, but as a practical matter we have nine of those 50 or 60 cases. If we had to pay out all of the original decisions in

addition to the changed decisions, it would cost us $49,000. If the same applies right across the board it is infinitely cheaper, I would suspect, for the funds to pay out twice than for somebody to go through the process of changing the legislation.

Mr RAITT—It seems to me that, because of the non-judicial nature of the original trustee decision, when you wipe aside the invalid tribunal decision you are left with a decision that has not been conclusively proved or adjudicated by a court to be a valid one. The first thing that a trustee would have to do to recover any money would be to prove the validity of his original decision. That would no doubt be contested by the beneficiary who has got the money and there would be quite a large fight. But it seems to me that it is not conclusive that the original trustee decision was valid and necessarily binding. That would have to be determined. It just goes to prove the point that there would be quite some costly litigation to determine that and legislation would be a good idea, rather than have trustees having to pay out again.

Mr MORGAN—Certainly the matter should be looked at by the government. If it is a fairly simple amendment or a piece of legislation to provide that protection, it should be done. More importantly, if it is decided that that ought be done, someone should announce that it is going to be done on behalf of the government, so that at least everyone is aware of what is proposed. There are people looking at the issue and someone may start some litigation one of these days to test the water, and it will immediately become expensive for the funds.

Mr MACLEAN—If a trustee had a decision overturned by the tribunal and acted upon the tribunal's invalid determination, as a matter of equity the trustee would probably be obliged to try to get the money back from the person who benefited from the tribunal's decision, upon the basis that the money has been paid out under a gigantic mistake. So legislation, if it can be done, would be a very good idea.

CHAIR—Maybe we should write, preparatory to the completion of the report, to the minister putting forward this recommendation that the government investigate this possibility along the lines that Mr Rose suggested.

Mr LARKIN—One further issue here is the High Court appeal. To the extent that that came in down the track and revalidated the decisions then perhaps this legislation would have been superfluous, and the fact of the High Court appeal may well be forestalling litigation out in the industry.

CHAIR—Would it be possible to have an amendment to the bill currently before the Senate to pick up this validation?

Mr FAIRLEY—I think it would be a pretty ambitious litigant that would commence proceedings before the High Court came to its determination. I do not think anything is going to happen until the High Court has ultimately determined on the issues. I do not think there is the element of urgency about this issue that there is about some others.

Mr BERRILL—There is one other matter that needs to be mentioned. Another class of matters relevant here is death benefit claims where decisions have been made on 101 and are under appeal to the SCT at the moment—they are sitting there—whether the parties who were originally the beneficiaries of the original determination, the trustees, are entitled to the benefit now rather than waiting.

Mr FAIRLEY—I think the same issues apply there: you simply have to wait. Unless you can get an agreement from all the parties that they are prepared to accept that determination and not take it further, there is an obligation to wait until the High Court determines the validity of the Federal Court's decision.

CHAIR—I would now like to sum up. In summing up I would like to thank everybody who has participated today, who has come to these proceedings with a very open mind. I think this has been a very constructive day. We have had some of the best minds in Australia focusing on this matter. I believe that as a result of these deliberations a course can be planned for the future. There are obviously some short-term solutions that we decided upon this morning, and we give those to you, Mr Larkin, to take to your government. This afternoon's session has been very productive in terms of threshing out the issues. I thank you for your forbearance, because not everybody has detailed interest in all the matters raised today. I think it has been a very productive afternoon. I would like to thank everybody. A report will be prepared by the Senate and I commend its reading to you. I declare the meeting concluded.

Forum concluded at 4.07 p.m.