



Superannuation
Complaints
Tribunal

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The Secretary
Parliamentary Joint Committee on Corporations
and Financial Services
Suite SG.64
Parliament House
CANBERRA ACT 2600

Dear Sir

Inquiry into the structure and operation of the superannuation industry

Further to your letter of 3 July, please find attached a submission from the Superannuation Complaints Tribunal. A hard copy along with documents referred to in the submission will be forwarded by post.

The Tribunal is, of course, willing to answer any questions which the Committee members may have.

The Tribunal makes no application to have the submission treated as confidential.

Yours sincerely

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Superannuation Complaints Tribunal
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Parliamentary Joint Committee Inquiry on Superannuation

This submission seeks to provide an overview of the structure and functions carried out by the Superannuation Complaints Tribunal (SCT).

The *Superannuation (Resolution of Complaints) Act 1993* ('the Complaints Act') was established to give members of regulated superannuation funds access to an independent alternative to court dispute resolution body to question the fairness and reasonableness of decisions made by trustees and their insurers. The SCT provides a service at no direct cost to the consumer. It is, however, paid for from the annual levy applied to the industry and therefore ultimately the cost is born by the superannuation consumer. It is an unusual tribunal in Commonwealth terms because it is not funded by the taxpayer from consolidated revenue. It should be stressed that the Tribunal offers an alternative to a member bringing a court action. Members are not required to come to the Tribunal and may still issue court proceedings. The Tribunal does not have jurisdiction over some State Government funds (Victoria, South Australia, Tasmania which together consist of a small part of the market by value) and is not concerned with self-managed superannuation funds (which consist of about 23% of the market by value of investment). The decisions of the former mentioned funds are subject to appeal either to the Ombudsman or to state administrative appeals tribunals and the latter are subject to oversight by the ATO.

The need for such a body was justified by –

- the cost, complexity and limited remedies available through the courts (which for some purposes still regard superannuation as equating to a gift rather than a compulsory obligation to which the employee contributes). Courts have tended not to examine issues of unfairness/unreasonableness in assessing trustee decisions but rather whether the trustee has followed the correct procedural steps in reaching its determination.
- the belief that the resources available to an individual member were a lot less than those available to a trustee or insurer and that the latter two bodies could more likely afford (senior) counsel to defend cases by members in court, whereas loss in the court could cripple an individual who must not only pay his/her own costs but if he/she loses the costs of the winning party.

The fact that superannuation, unlike other financial market products, (e.g. banking, life insurance unconnected to superannuation, financial planning), is compulsory resulted in there being a statutorily-based superannuation dispute resolution scheme rather than an industry-promoted external dispute resolution scheme such as developed in the case of the banking, financial services and insurance industries.

The Tribunal services are free to consumers, i.e. there is no filing fee or other cost associated with a consumer approaching the scheme with a complaint. This is appropriate given that the Tribunal is funded through the levy and not directly from consolidated revenue. Not any of the external alternative dispute resolution schemes operating in Australia (or in any comparable jurisdiction, e.g. Canada, the United Kingdom, South Africa, the Republic of Ireland) impose any fee for service. The Complaints Act restricts

third party representation for both Complainants and Trustees. In the case of the former the person has a right to representation (not restricted to legal representation) if he/she suffers from a disability as defined in the *Disability Discrimination Act* 1992, or in the case of complainants, trustees or any other parties in circumstances where the Tribunal considers "it necessary in all the circumstances" (s23(4) of the Complaints Act). While this provision is not welcomed by the legal profession it, along with other provisions (e.g. s16 which requires the Tribunal to assist complainants who wish to lodge complaints) provides a clear indication that:

- (i) the Tribunal is to act as informally as possible in a manner which permits easy access by complainants, and,
- (ii) trustees are to participate in the supervision of complaints made to the Tribunal, i.e. this function should not be outsourced to administrators or fund solicitors.

The latter indication ought contribute to trustees better appreciating the approach of the Tribunal to the resolution of cases, which, in turn, ought result in fewer appeals. The Tribunal believes that this approach is appropriate.

Since its establishment in 1993 the Tribunal has successfully withstood a challenge to its jurisdiction and standing in the High Court of Australia, which held that in determining cases the Tribunal was exercising an administrative function and not a judicial function. Accordingly, it was held that the Tribunal was not exercising the judicial power of the Commonwealth and need not be reconstituted as a court.

The Tribunal receives approximately 2,000 written complaints per year, of which half are found to be within its jurisdiction. The high number rejected relates to a quirk in the legislation which requires trustees to notify members of the existence of the Tribunal when assessing the member's claim, but before the trustee's internal appeal procedures have been exercised. Section 101 of the *Superannuation Industry (Supervision) Act* 1993 requires a member to have exhausted the trustee's internal appeal mechanism before approaching the Tribunal. The reason the quirk exists relates to a requirement that a complaint must be lodged in a certain type of appeal within a two-year period of the Trustee's initial decision to reject a claim. The reason a two-year restriction exists is to encourage appeals to the Tribunal to be undertaken and determined within a shorter time than is otherwise permitted to a court (usually six years under the state statutes of limitation). The existence of a requirement that there be internal review before a case can be considered by the Tribunal is consistent with a similar requirement for banking and the other external dispute resolution schemes and has, over time, resulted in a better standard of self-assessment by trustees and insurers, which in turn has resulted in a higher standard of primary decision making. In as far as the Tribunal is concerned this has resulted, in the main, in only those cases raising more complex issues coming to it for resolution. This is clearly a more appropriate use of the Tribunal's resources than it is for it to be continually deciding the same issues.

The Tribunal consists of an office of a full-time chair and deputy, 34 FTE staff and 21 part time members. Since a number of ADR bodies have consistent jurisdiction over complaints (e.g. the Banking and Financial Ombudsman may determine complaints from all bank subsidiaries, the Financial Industries Complaints Scheme can determine complaints between trustees and life insurers) all schemes operate from one building, share one free incoming call line (to ensure reference to the scheme which most meets

complainants' needs) and integrate services as much as possible. It is, however, impossible to apply the same standard to case resolution or the same procedures as, in both those instances, the SCT is bound by the terms of its governing legislation and the other schemes their terms of reference. The staff of the SCT process incoming complaints, analyse them, requesting further information if necessary from the parties, consider and, if appropriate, undertake conciliation and/or prepare the cases for hearing by the Tribunal members.

There are time limits imposed on a member's access to the Tribunal which are shorter than those imposed on the same members approaching a court, e.g. in death benefit distribution cases, provided that the Trustee has correctly notified the potential claimants of the time limit, a 28-day limit applies, from the time of notification of the trustee's decision as to who is to benefit, within which the person must have lodged his/her claim with the Tribunal. Aspects of the time limits applicable in relation to total and permanent disability claims have been commented on earlier in this submission. The time limits are imposed in order to encourage members to have their claims/appeals processed as quickly as possible and not delay in the making of claims.

The Tribunal procedures are designed to be informal (in accordance with its statutory objective – see s11 of the Complaints Act) and, in determining matters, the Tribunal is not bound by the rules of evidence. A complaint can be commenced by letter or electronically.

The Tribunal has the power to compel the production of documents or information from the parties or from other people who may have information, which may assist in the resolution of a case. In all proceedings the Tribunal seeks to accord the parties 'natural justice'. While the term 'natural justice' is broad and covers many areas, in the context of the Tribunal this most often means:

- (a) Providing to each party all of the material produced by the other to the Tribunal and inviting a response to be given, and
- (b) If the Tribunal has a concern not addressed by the parties then raising that with them to permit the opportunity of submitting on it (i.e. not reaching decisions on a point or points which the parties have not had the opportunity of addressing).

Guidelines setting out the Tribunal's function are published and, where necessary, interpreters are used. A copy of the Tribunal's publication is herewith.

The test that the Tribunal is to apply in the resolution of cases is set out in s37(6) of the Complaints Act as: Is the decision of the trustee (or other decision maker) fair and reasonable in its operation to the Complainant in the circumstances? The application of the test requires a consideration of the effect of the decision on a particular complainant rather than concerning itself with the procedures adopted by the decision maker in reaching that decision - although it is fair to say that if the procedures are awry it may follow that the decision under review does not operate fairly or reasonably to the complainant. In exercising its functions under the Complaints Act, the Tribunal is bound by the terms and conditions of the trust deed (and any insurance policy), the law, and has all the powers and discretions of a trustee (or insurer), and may only place a complainant in a near as practicably possible to the position he or she would have been in, if the unfairness or unreasonableness which the Tribunal has found to exist no longer exists. The latter provision excludes the Tribunal from awarding damages or punishing a

trustee/insurer for its mistakes. These measures are all appropriate powers associated with the conduct of administrative review rather than of judicial review.

In implementing its determinations, the Tribunal may follow one of the following courses:

- set aside the decision under review and substitute its own decision,
- vary the decision under review,
- set aside the decision and remit the matter to be decided again in accordance with directions issued by the Tribunal, or,
- affirm the decision under review.

The Tribunal 'hears' cases on the papers but may, if it is necessary, conduct a more formal examination of witnesses. There have only been three such cases over the last six years. Otherwise, every member of a panel of up to three members has a copy of the entire file plus the relevant trust deed and insurance policy and has read them before a discussion takes place to consider the appeal. One or two members are assigned the writing of the Determination and Reasons, which are circulated to the other member(s) for comment before the final determination is issued to the parties. In contrast to what the courts have required of trustees (i.e. that there is no obligation to give reasons for their decisions) the Tribunal must give reasons for its determinations. The Tribunal is satisfied that those growing number of trustees which give reasons or explanations for decisions result in less appeals being generated and self-evidently there is a greater understanding by the member of the decisions. The reasons given by a trustee need not be lengthy but it helps if the issues are identified, the material relied upon to justify the decision is made apparent and the matters which the trustee accepts/rejects and briefly why are set out. Given the change in the underlying nature of superannuation, i.e. from being a gift from a benefactor to a compulsory employee contribution, the notion of a member not being given some reasons as to why a benefit should not be paid or is being distributed in a particular way is outdated.

A party dissatisfied with a determination may appeal to the Federal Court limited to point of law only. In the last financial year, 14 appeals against SCT decisions were lodged. The Tribunal believes that a formalised appeal mechanism is good for all parties and the Tribunal, as there are still many areas of superannuation law shrouded with uncertainty and the courts can give binding decisions which will clarify the law.

The Tribunal members, who hear and determine cases, consist of those with superannuation experience, superannuation lawyers, actuaries, qualified medical practitioners (the latter to assist in the assessment of total and permanent disability claims). Two members having consumer backgrounds are appointed. Appointment of members is undertaken by the Parliamentary Secretary to the Treasurer. Staff are ASIC employees and ASIC is required by s62(2) of the Complaints Act to provide the staff and backup services for the SCT (e.g. computers, human services, budgetary backup) for which the SCT reimburses ASIC, although there is no statutory provision for such reimbursement to be made.

It costs approximately \$4.5m per annum to fund the Tribunal (from a total of \$104.5m raised through the levy), cases determined during analysis and up to and including conciliation costing approximately \$1,500 per case rising to over \$6,000 per case for those proceeding to review.

The Tribunal has actively encouraged cases to be resolved internally by trustees and insurers or conciliated because –

- it is cheaper than cases being reviewed;
- the parties participate in the process orally and directly and retain control of the outcome, which is lost when a case proceeds to review where parties provide written submission following which the Tribunal panel will reach a determination.

This approach has been a factor in keeping the Tribunal costs to a minimum. The Tribunal has proceeded on this basis on the assumption that members would rather see greater returns on their retirement investment than seeing their contributions being consumed on an expanding dispute resolution scheme.

There are of course limitations on the Tribunal's jurisdiction, e.g. the Tribunal cannot consider a case which is before a court, or where some other statutory authority has dealt with it. The Tribunal has power to withdraw complaints considered vexatious, trivial, misconceived or lacking in substance. The exercise of such a power is always forewarned to a complainant, who is invited to address the reasons for withdrawal before a final decision is made.

All Tribunal decisions are available on the web and the parties, industry and the public can scrutinise them. The Tribunal is conscious that its determinations have a normative effect - one which industry follows, despite the Tribunal having no precedent value. Industry interest and constant reporting on Tribunal cases has helped establish expected norms in a number of areas where uncertainty otherwise attached. One example is in the area of death benefit distribution where regulation limits those who may have entitlement to the benefit to a spouse (including de facto spouse), children, financial dependants of the deceased, interdependants, the executor or administrator of the estate, or where not any of those mentioned are found to another individual (Division 6.2 of the *Superannuation Industry (Supervision) Act 1993 Regulations*). While limiting the class who may benefit the regulations leave open how, where there may be several qualifying members, competing claims are to be determined. Tribunal cases have assisted to clarify the position by reference to any non-binding nomination made by the deceased, the terms of his/her will, reference to changes in the deceased's circumstances after the making of a nomination (or will) and the application of the principle relating to the purpose of superannuation, i.e. who would have been most likely to have continued to participate in the ongoing income of the deceased had he/she not died prematurely (including consideration of anyone to whom the deceased may have had a legal or moral duty to support) and, in the case of deaths of those approaching retirement, who would have been likely to have participated with him/her in the superannuation benefit had he/she not died prematurely. The Tribunal has determined that the rules or expectations usually associated with inheritance distribution ought not apply when considering superannuation death benefit distribution, that the benefit should not be used to right real or perceived wrongs of the past (e.g. to satisfy debts (including outstanding maintenance orders)), nor that adult children have a right to expect distribution

to be made equally between siblings, particularly where infant children, who need education and support, are involved.

The two main areas of appeal which are likely to proceed to review by the Tribunal are those where the trustee is expected to exercise a discretion, i.e. in deciding if a member is totally and permanently disabled and therefore able to have access to his/her superannuation savings (and usually including an insurance component) before the ordinary vesting age, and death benefit distributions. To assist the public and the industry, the Tribunal has published booklets setting out the way in which the courts have approached these two topics (copies of the latest version attached A1 and A2 respectively).

In a buoyant investment market such as has been enjoyed in Australia in recent times complaints have tended to be low. A downturn in returns would no doubt see an increase in complaints.

Members of the Tribunal are required to notify the Chairman and he is to notify ASIC/APRA, as the case may be, of any potential offences (see s64 of the Complaints Act). It is then up to ASIC/APRA to decide if prosecutions should be issued or other follow-up action taken.

The Tribunal reports annually to the Parliament. A copy of the 2004/5 Annual Report, being the most recent report published, is herewith for the information of members. The 2005/6 report will be sent to the Parliamentary Secretary to the Treasurer shortly.

The Tribunal is happy to appear before the committee to answer any questions.

1 September 2006