Senate Select Committee on Superannuation and Financial Services

Main Inquiry
Reference (a) + (c)

Submission No. 26

Submittor: Mr Chris Connolly
Director
Financial Services Consumer Policy Centre
Unit 508, 410 Elizabeth Street
SURRY HILLS NSW 2010
☎ - (02) 9281 4452
🖹 - (02) 9281 4574

March 2000

Superannuation and Financial Services Inquiry

Submission to:

Senate Select Committee on Superannuation and Financial Services

Financial Services Consumer Policy Centre
Unit 508
410 Elizabeth Street
Surry Hills NSW 2010
t (02) 9281 4164
f (02) 9281 4574
director@fscpc.org.au
http://www.fscpc.org.au

With the assistance of Maurice Balckburn Cashman Solicitors.

1. Introduction

This submission covers term of reference (a) and (c) only.

We discuss deficiencies in the consumer protection framework for financial services in Australia, from a consumer perspective. We also share our experiences in dealing with the key regulators and oversight agencies since the Wallis reforms.

As the terms of reference were fairly general, we have provided brief descriptions, bullet points and lists in this submission. We are happy to elaborate on any of the issues raised if the Committee requires further information.

2. About the Centre

The Financial Services Consumer Policy Centre is a non-profit consumer research and advocacy organisation. Our aim is to conduct policy research and advocacy on national issues affecting low income and disadvantaged consumers of financial services.

The Centre has, in recent times, taken a lead role in advocacy on consumer issues in financial services, banking, superannuation, insurance, direct marketing, GST and electronic commerce.

3. Regulation

The current Government's preferred mode of providing consumer protection in financial services is through self-regulation. However, a layer of regulation remains in place, and the Centre has many concerns about the effectiveness of this regulation in its day to day practice.

3.1 Gaps

The Wallis reforms sought to establish consistent and comprehensive consumer protection coverage across all financial services. However, several large gaps still remain.

Key Gaps in Regulation
No regulation of bank fees and charges
No regulation of selling practices in superannuation
No regulation of some online financial intermediaries
No national regulation of fringe credit (outside UCCC jurisdiction)

3.1.1 Bank fees and charges

There is a basic premise flowing from the Wallis report and supported by Government that there should be no regulation in Australia of the level of bank fees and charges. This is in spite of community concern about the affordability of basic banking services in an industry which does not compete in the provision of retail banking (excluding home lending).

There are some exceptions to this basic premise:

a) The ACCC may occasionally receive undertakings during its merger approval process which may amount to a form of regulation of bank fees and charges. For example, in the Westpac Bank of Melbourne merger one undertaking allowed customers of existing BML products to retain the same fee structure for three years, as it was recognised that the product was more affordable than Westpac's similar products.

b) The Treasurer is on record stating that the Government monitors fees and charges and would oppose any unfair or anti-competitive fees and charges.

c) During the two year GST implementation period the ACCC will monitor bank fees and charges to ascertain whether or not GST price exploitation is taking place.

These examples of intervention show that the ACCC, at least, recognises that there is a link between the lack of competition in retail banking products and the level of fees and charges. However, it is restrained from carrying out general monitoring or intervening without a "trigger" event, such as a merger or the GST.

There is no possible justification for this position. If the level of fees and charges is a concern, it should be monitored and addressed on an ongoing basis. Consumers of anti-competitive bank products should not have to wait for a merger before having their position considered.

The Treasurer's stated position on bank fees and charges is also unacceptable. While the Government claims that fees and charges are monitored, there has in fact been no procedure for monitoring fees and charges in place apart from during merger proposals. This will change during the GST implementation period, but monitoring will only be carried out for GST related purposes.

The claim that the Government would oppose anti-competitive or unfair fees and charges is not backed up in practice. There is no definition or even general description of unfair fees and charges. There has been no intervention despite a recognition by the ACCC that the major banks do not compete on fees and charges in retail products (excluding home lending). The Government and the ACCC have never intervened in a single case where a fee or charge has been introduced or existing charges have risen. It is also unclear how the Government can oppose unfair or anti-competitive fees and charges when they do not in fact monitor fees and charges in the first place.

There is no other avenue for monitoring or challenging bank fees and charges. The Australian Banking Industry Ombudsman and the Australian Securities and Investments Commission both have a limited role in regulating the disclosure of fees and charges, but neither plays any role regarding the level of fees and charges.

3.1.2 Selling Practices in Superannuation

The selling of superannuation products in the marketplace takes place to a limited extent now, and will escalate with the introduction of Choice of Fund. There has been no regulation of selling practices to date, despite the development of draft legislation (the Life Insurance Conduct and Disclosure Bill and the Superannuation Choice of Fund (Consumer Protection) Bill. The Centre expects that this issue will now be dealt with within the CLERP framework, and we accept that outcome.

However, for consumers subject to superannuation selling practices today there is little protection.

3.1.3 Online Financial Intermediaries

Regulation of online financial intermediaries is patchy in Australia. The provision of financial advice, ranging from stock market tips in chat rooms to mortgage broking online, is a source of growing consumer concern.

The Centre has some examples of specific concerns in this area which we would be happy to provide if it is considered within the Inquiry terms of reference.

3.2 Overlaps

There are also some confusing overlaps in regulation. These cause difficulties for consumers and advocacy organisations seeking policy

direction or advice on matters where two or more regulators appear to have jurisdiction.

Key Overlaps in Regulation
Credit matters are covered by State agencies (UCCC), ACCC and ASIC, subject to various memoranda
Electronic commerce matters are covered by NOIE, ACCC and ASIC
Direct marketing matters are covered by ACCC, CAD, ASIC, ACA and a self regulatory code

The Centre is happy to provide further information on any of these areas of overlap.

3.3 General Comments

- There is a general perception amongst consumer representatives and case workers that the split between ASIC and the ACCC has been responsible for engendering a great deal of confusion. This is most pronounced in credit issues where a separation from general financial services has occurred.

- Consumer service agencies such as the Consumer Credit Legal Centre, CARE Incorporated and the Financial and Consumer Rights Council report to us that clients without legal representation tend to find direct communication with regulators difficult.

- Consumers have complained about the difficulty they face in obtaining relevant information. Likewise those consumers find it difficult to obtain intervention. There have been some problems with the provision of consumer contact points (for example, finding the basic contact details of the numerous credit union complaints bodies in Australia required one consumer worker nearly two weeks, as the majority of contact details were listed incorrectly on the regulator web sites).

- The formality of some complaints processes, slow follow up and a dependence on third party help make any consumer recourse difficult. However, this process is infinitely exacerbated for consumers who do not have a good command of the English language, those with low incomes and people without legal or other representation.

3.4 The ACCC

The ACCC remains the major consumer protection regulator in Australia, although its role in financial services has been diminished following the transfer of some of its powers to ASIC as part of the Wallis reforms.

The Centre has had extensive contact with the ACCC on numerous matters, ranging from small one off complaints to major ongoing consultations. We believe there is scope for improvement in some key areas of ACCC activity.

The ACCC retains an important role in three key areas in financial services:

- the consideration of mergers between financial service providers (eg banks);
- the authorisation of some codes of conduct and complaints schemes; and
- the application of the prohibition on price exploitation in the New Tax System (including financial services).

3.4.1 Mergers

In its consideration of mergers between banks, the ACCC has yet to show that it has mechanisms in place to take consumer protection issues into account. In those cases where it finds that the merger is prima facie anti-competitive, the ACCC seeks undertakings from the parties involved on matters which often fall into the consumer protection category. For example, in their eventual approval of the merger between Westpac and the Bank of Melbourne the ACCC received undertakings relating to bank fees and charges.

However, the undertakings are determined in private negotiations between the parties and the ACCC, and there is no opportunity for public comment or input from consumer organisations. This is a major deficiency and provides a stark contrast with international practice, where banks wishing to merge make public undertaking/offers which are then the subject of rigorous debate by all stakeholders.

We have received advice, however, from the ACCC that this issue will be addressed from now on in the mergers approval process, beginning with the proposed Commonwealth Bank – Colonial merger.

3.4.2 Authorisations

In its authorisation of some codes of conduct and complaints schemes the ACCC is bound by legislation to consider certain

issues according to a fairly strict process. The Centre's experience of this process is that it is highly unsatisfactory from the consumer's perspective.

The Centre has suggested to the ACCC on a number of occasions that they write a new guideline explaining the authorisation process for consumers. The current guideline is written for business. We have also made a number of other suggestions which could improve the authorisation process and ensure that consumers have adequate input into authorisations.

Our main suggestions are that the ACCC should ensure that any claims made by the industry concerned relating to their level of consumer consultation should be cross checked with consumer groups, and that any claims made by industry relating to 'coverage'[1] should be subject to independent verification.

3.4.3 GST and Financial Services

The implementation of the GST raises numerous difficult consumer protection issues in financial services, especially in relation to insurance premiums and bank fees and charges. The Centre was part of a group of consumer advocates who asked to discuss GST and financial services (specifically price exploitation issues) with the ACCC on July 29 1999. We asked again on 30 August 1999, 23 November 1999, 14 December 1999 and 25 January 2000. We are yet to receive confirmation of a meeting date.

The consumer movement has been involved in wider consultations on price exploitation with the GST, although these too have been extremely unsatisfactory. For example, a major meeting was held in Canberra on 24 November 1999 to discuss changes to the price exploitation guidelines, and to give consumers and business an update on education and enforcement activities. However, the meeting was held in a hotel with no video or teleconference facilities. The ACCC refused to pay travel costs for any consumer advocates to attend, despite inviting representatives from both Sydney and Melbourne.

This was an important meeting, and no consumer representatives were able to attend. This did not stop the ACCC from issuing a press release about the meeting the next day headed "Industry, Consumer GST Guidelines Input 'Positive'".

[1] Codes of conduct are subject to a coverage test. The ACCC appears to accept claims of levels of coverage by, for example, the industry association seeking authorisation for its own Code.

Protests about that meeting led to an eventual meeting between the ACCC and consumer representatives on December 14, 1999. The ACCC announced the establishment of a Consumer Advisory Group on GST issues, and consultation should now improve. However, there has still been no consultation on GST and financial services.

Similarly, the ACCC has a general Consumer Consultative Committee. But they do not pay airfare costs or sitting fees for participants on that body.

In the Centre's experience, the ACCC are extremely slow to respond to correspondence and complaints about consumer protection issues in financial services. The Centre has a current formal complaint lodged with the ACCC regarding their failure to comply with their service charter in dealing with complaints in a timely fashion.

3.5 ASIC

Like the ACCC, ASIC's current role is a result of the Wallis Report recommendations. In the eighteen month since its latest manifestation, we believe that ASIC has been quite successful in integrating its consumer protection responsibilities with the rest of the consumer movement. This is largely due to the work done by its Office of Consumer Protection and its Consumer Advisory Panel.

ASIC also has clear consultation procedures for its policy development process, and no policy is issued without extensive opportunity for community input.

The consumer movement now hopes to work with ASIC to develop specific communications strategies for consumers from NESB and other disadvantaged communities.

4. Self Regulation

4.1 General Concerns

The FSCPC is concerned at the rush toward 'self regulation', otherwise understood as regulation by market forces. While we recognise that this system has a degree of merit, especially its emphasis on alternative dispute resolution, we are concerned that self regulation imposes a limitation on regulatory investigation. Thereby, we are worried that the most disadvantaged consumers will also be most vulnerable to any market failure.

The FSCPC endorses the following recommendations put forward by CARE Incorporated:

1. The division of regulatory responsibilities be reviewed and areas of possible overlap be simplified through clear protocols.

2. Regulators who have direct communications with consumers ensure their referral processes are easy to understand, user friendly and effective; and

3. That government commit an appropriate level of resources to specialist regulatory agencies like the ASIC Office of Consumer Protection, to enable regulators to develop responses in anticipation of market activity and to respond swiftly to new consumer protection issues.

4. The Commonwealth Government make a commitment to inform itself of and respond to financial services issues affecting vulnerable consumers.

5. Resources be provided to consumers and consumer advocates to facilitate proper consultation and research of consumer issues OR government funds the preparation and provision of comment/research to inform policy affecting vulnerable consumers commensurate with the actual cost of providing such input.

4.2 Gaps in self regulatory coverage

There are still gaps in the provision of self regulatory codes of conduct and alternative dispute resolution schemes in financial services:

Key Gaps in Self Regulation
Finance companies
Mortgage brokers (although a code is under development)
Online financial services (although a patchwork of existing laws and self regulation applies)
Credit unions and building societies which do not belong to existing schemes

4.3 Practical problems in self regulation

Even where self regulation should work well in theory, there are often practical difficulties in making self regulation work effectively on a day to day basis. We have further information on this issue

(prepared for the Self regulation Task Force), but they can be summarised here:

- Code and ADR Scheme Reviews are not carried out as stipulated by the Codes
- Reviews are not carried out independently
- Review recommendations are not implemented or there are long delays before review recommendations are implemented
- Consumer representative positions are left vacant for long periods
- There is no accountable selection process for consumer representatives

Issues surrounding the selection of appropriate consumer representatives are discussed in more detail in the discussion paper included at Appendix A.

5. Superannuation

The Centre has a special interest in consumer issues in superannuation. We describe the key areas of current consumer concern below.

5.1 Superannuation Choice of Fund

While superannuation choice of fund is still a legislative mystery to most people, the FSCPC and the consumer movement are concerned that the slow pace of legislation is confusing what is already a highly complex financial matter.

The FSCPC is concerned that superannuation choice of fund already exists by default. Indeed, a number of financial institutions have already begun marketing their superannuation products under the assumption that superannuation choice of fund is a given. Consumers are further exposed to superannuation choice via state legislation.

The FSCPC recognises that the provision of choice of fund is an important step in furthering consumer sovereignty, however, we prefer to see choice of fund introduced in a staged manner which takes into account matters of education, disclosure and consumer protection.

5.2 Conduct Issues & Consumer Protection

In order to avoid the problems experienced in other countries, a clear set of principles and objectives need to be established. As such, adequate education and full disclosure of fees and charges represent a significant part of consumer protection. The FSCPC believes that the following items as identified by this committee in a previous report to be the most critical for consumer protection:

- Commission driven selling
- Relationships between employers and providers; and
- Dispute resolution.

We endorse the comments made by the Australian Institute of Superannuation Trustees (AIST) on commission selling:

> Commissions are okay for optional personal contributions but, in terms of somebody's superannuation guarantee payments, if you want to be sure of avoiding the UK problem, you simply outlaw the payment of commissions in those circumstances...you will inevitably have the sales people there; there is nothing more certain in your mind. When somebody else makes money out of somebody's changing funds, people will be convinced to change funds when they should not – inevitably in my view.

AIST pointed out that the experience of the United Kingdom represents a stark reminder that there needs to be adequate protection mechanisms in place so that individuals are not sold products that are not in their interests to buy:

> Caveat emptor is not a concept which should apply when we are dealing with what might be an individuals' own savings and... will be likely to form their major source of income in retirement.
>
> A bad decision early in life might, as people are living longer and longer, result in thirty or more years of financial misery later on, and the impact on the whole community by way of people being increasingly reliant of government pensions and assistance in retirement is obvious.

The FSCPC is concerned about the potential for employees to be locked into fund choices by their employer. This scenario has the potential to materialise where an employer is offered certain inducements to offer their employees a choice of specific funds. This will become most pronounced as financial institutions and brokers start developing 'bundled' superannuation packages designed to appeal to various industries and sectors.

The Centre advocates that where an employer has a financial relationship with a financial institution that may be a in a position to provide superannuation services, then full disclosure of financial relationships between the employer and a financial provider be made to relevant employees who are offered choice of fund.

The FSCPC endorse the Australian Consumers' Associations' in calling that as a minimum, consumer protection must encapsulate the following:

- Ensure employees and consumers receive appropriate advice that takes into account their financial needs, and that they are not subject to 'twisting' or 'churning;

- Prohibit misleading and deceptive conduct on the part of sales agents and advisors;

- Ensure that all relevant features of the products, in particular fees and charges, are disclosed to consumers;

- Ensure that complaints and disputes can be readily addressed; and

- Provide protection against employers and sellers making deals with the purpose of persuading their employees to take up a certain offer.

5.3 Corporate Law Economic Reform Program (CLERP 6)

The Corporate Law Economic Reform Program (CLERP 6) discussion paper also offers a range of seemingly comprehensive policy reform measures designed to reinforce consumer protection standards. The discussion paper pays particular interest to the areas of 'cooling off periods' and 'cold calling/pressure selling'. The proposed changes seek to maintain the existing 'cooling off' provisions for life insurance, superannuation and retirement savings accounts.

The proposed CLERP bill will also seek to prohibit the practice of 'cold calling/pressure selling'. This is to ensure that before being committed to a transaction, retail clients have sufficient opportunity to assess the merits of financial products and ensure that products meet their needs. This has a great deal of significance to those consumers who make vital and sometimes high risk commitments. The discussion paper further endorses the following consumer protection measures:

- The Corporations Law prohibition on securities hawking;

- The availability of cooling off periods to consumers; and
- The imposition of limited restrictions on unsolicited life insurance contact in relation to investment linked life insurance.

However, the CLERP discussion paper also proposes an alternative approach which would bring 'superannuation and life insurance with an investment component within the securities hawking provisions as contained in Part 7.12 of the Corporations Law'.

"This approach would mean that cooling off periods would no longer apply in relation to superannuation and life insurance with an investment component. Instead, the same measures aimed at prohibiting cold calling would apply to similar financial products".

The Centre suggests that CLERP need not be limited by existing legislation and that it adopts a stance which includes a prohibition on 'hawking/cold calling' as well as including a 'cooling off period'.

We think that the inclusion of a 'cooling off period' will enhance consumer protection. This is particularly critical in superannuation where the notion of *caveat emptor* should not be made to apply. This is particularly in view of the fact that for most people, superannuation will be one of the biggest investments they are likely to make. The compulsory nature of superannuation should also guarantee that consumer protection is a major component of CLERP. The ramifications of making the wrong decision in this area have the potential to severely disadvantage a consumer in their long term financial security.

The CLERP paper also proposes the following key points in relation to Misconduct and Enforcement:

- A general prohibition on misleading and deceptive conduct will apply to dealings in financial products and the provision of financial services.
- Misconduct provisions in the Corporations Law and other applicable legislation will be harmonised to provide a single regime in relation to financial products.
- Breaches of the market misconduct provisions will be brought within the civil penalty regime.
- ASIC enforcement powers will be harmonised and consideration will be given to including a general fraud offence in the Corporations Law.

CLERP will seek to focus on providing a 'functionally based' regulation of the various misconduct provisions applying to a range of financial products including: superannuation and life insurance, securities and derivatives. As such, it will be essential to ensure

consistent treatment of misconduct in relation to all financial products.

Accordingly, the CLERP reforms to the financial industry will bring together various financial products under a single regulatory framework. This will be designed to work in tandem, to the extent possible, with a single misconduct regime which will harmonise provisions of the Corporations Law and other legislation having a similar application.

5.4 Superannuation Consumer Resource Centre

The consumer movement has sought support for the development of an independent Superannuation Consumer Resource Centre for many years. The service would provide advice and, where necessary, legal assistance to consumers of superannuation products.

The laws and practices governing the provision of superannuation are complex, and consumers are often confused and frustrated at the point of entering into superannuation, and later when making inquiries, claims or complaints. The compulsory nature of superannuation, and its development as the cornerstone of Australian retirement incomes policy, mean that it has become an important product for business, government and consumers.

Unlike other financial services products, there is no independent, specialist organisation to provide legal and advisory services to consumers. Community Legal Centres and Legal Aid offices receive around 40,000 inquiries from consumers seeking assistance on financial services issues each year. A significant proportion of these inquiries relate to superannuation.

The introduction of superannuation choice of fund will lead to additional pressure for consumer advice and assistance.

The Community Organisation model for providing advice and assistance has been highly successful. Organisations such as the Consumer Credit Legal Centres, Welfare Rights Centres and Women's Legal Resource Centres provide invaluable assistance to the community, and fill a vacuum left by business and government. It is now time to consider establishing a similar specialist service for superannuation.

The advice and information required by consumers includes:

- financial and legal information and advice at the point of purchase or entry, to explain the appropriateness of different products;

- financial and legal information, advice and assistance throughout the term of the product, relating to potential insurance claims, fees and charges, the costs and benefits of switching products, and the exercise of consumer choice;

- financial and legal advice on the termination of employment and/or the withdrawal of superannuation monies; and

- assistance in resolving disputes.

The independence of advice would be compromised if the service was provided by institutions which sell superannuation or insurance. A similar concern is apparent with the independence of advice given by financial planners. This service is also outside the role of the Superannuation Complaints Tribunal (or any industry complaints body). Those bodies exist to determine rights between parties, and cannot stand as advocates for consumers.

Community organisations and/or Legal Aid Commissions (in those states where Legal Aid Commissions are willing to perform that role) provide the best hope of establishing true independence. The criteria for final selection of a Centre to provide the service should include:

- true independence
- links with consumer and community organisations
- experience in consumer advice
- experience in consumer casework

A non-profit, independent advice and assistance service in superannuation will boost consumer confidence in superannuation, and help promote best industry practice. The service can be run efficiently and at reasonable cost.

Government and industry recognise the importance of empowering consumers in this field. It is now up to government, industry and consumers to work together to develop and support this service.

The FSCPC believe that the development of an independent, community based advice and legal service, specialising in superannuation, should be pursued as part of the overall development of the choice of fund regime.

5.5 Lost and Multiple Accounts

Lost and multiple accounts cause a significant administrative headache to industry, and an obvious financial loss to consumers.

Recent improvements in the ability to combine multiple accounts have lessened the problem slightly, but there are still more than 16.8 million superannuation accounts in existence or 2 accounts for every working Australian.

It will be important in a Choice of Fund environment to ensure that simple procedures for combining small amounts held in multiple funds are provided, perhaps with the assistance of the industry associations or the proposed legal/advice service.

Lost accounts represent around $4 billion in assets – more than 1.08% of Australia's overall superannuation assets.[2] While the Australian Taxation Office (ATO), industry associations and the funds themselves conduct a range of campaigns to contact lost account holders, there has been little co-ordination of these efforts. Accordingly, the ATO currently holds over 2.5 million lost or dormant accounts the average value of which is about $1600.

The FSCPC believes that it may be useful to develop, as part of the Choice regime or otherwise, an annual "round-up" of lost accounts. This could be a co-ordinated effort between government agencies, industry and community groups, on a regular date each year. It could develop into a high profile event (with a name like "lost money week") which, over time, helped track down the holders of lost accounts, and generally raised awareness of lost accounts.

5.6 Life Insurance

The Centre has prepared a discussion paper on life insurance issues in superannuation choice of fund. That paper appears at Appendix B.

6. Oversight

6.1 Absence of a national Consumer Affairs Minister

The consumer movement as a whole is concerned at the absence of a national consumer affairs Minister. The FSCPC believes that the absence of a Minister and the downgrading of the department to a mere subsidiary of the Treasury damages consumer interests.

[2] Australian Tax Office.

We believe that the downgrading of consumer affairs has been responsible for inhibiting policy development which affects overall public policy. An example of this bad public policy is the lack of consumer protection and opportunities for consumer input in the new tax system. We believe that the presence of a vigilant Minister and department would have insured that consumer concerns are taken on board. Instead, it is generally accepted that consumers and their representative organisations have been dealt out of the policy making process.

The downgrading of the Minister was accompanied by the de-funding of the Consumers' Federation of Australia which at the time was the peak consumer organisation in Australia. The de-funding of the CFA has effectively marginalised the consumer movement from general policy input. As such, there no longer exists a clear, effective and systematic process by which consumer agencies are able to influence government policy development. We believe that this has a very adverse affect on public policy. This is particularly problematic in financial services where so much of our policy perspectives are informed by grass roots case work experience.

It should also be noted that a substantial conflict of interest arises where the Minister with responsibility for consumer affairs is also the Minister responsible for promoting the development of Australia as a regional financial centre. We are happy to discuss this particular issue further with the Committee.

6.2 Weakness of the national Consumer Affairs Agency

The national consumer affairs agency is now a Division of Treasury. We are concerned that this limits opportunities for the CAD to prepare critical analysis of Treasury proposals in the financial services area.

The CAD also appears to have abandoned its role, as set out in its service charter, in conducting an open and accountable process for the selection of consumer representatives to ADR schemes and Code Committees. The Centre attaches a separate discussion paper about this issue (Appendix A).

7. Term C

The Centre supports the establishment of legislation and / or regulations which require employers to make SGC contributions quarterly.

The Centre makes the following additional suggestions for improvements to the superannuation guarantee collection mechanism:

1. Scrutinise the extent to which the Australian Taxation Office (ATO) prosecutes employers for the recovery of any Superannuation Guarantee shortfall, i.e. actually issues court proceedings for debt recovery.

2. Amend the *Superannuation Guarantee (Administration) Act* 1992 (SGAA) to allow the employee of an employer who has incurred a Superannuation Guarantee shortfall to bring civil court proceedings for the recovery of the shortfall.

3. To allocate sufficient resources to the ATO and/or the Australian Government Solicitor for the adequate administration and recovery of the Superannuation Guarantee shortfall under the SGAA.

4. In the alternative, the ATO to contract out for the recovery of the Superannuation Guarantee shortfall by civil court proceedings.

5. Amend the SGAA to require Superannuation Guarantee contributions to be paid more regularly than annually, i.e. monthly or quarterly.

6. Remove privacy restrictions on access to information for an employee inquiring as to progress of recovery action with respect to the Superannuation Guarantee shortfall.

7. The ATO alter its Superannuation Guarantee shortfall recovery procedures to respond to all Notifications, given that the SGAA charges the ATO with the responsibility for collection of the shortfall.

We attach three case studies to support our submission on Part C (Appendix C).

8. Further Information

The Centre has a vast supply of case studies and further details on many of the above issues. We would be happy to assist the Inquiry with further information, oral evidence or a private meeting if the Committee wishes to explore any of these issues in more detail.

Attachments:

Appendix A Discussion paper on Consumer Representation

Appendix B: Discussion paper on life insurance issues in superannuation choice of fund

Appendix C Case studies on Superannuation Guarantee

Appendix A

August 1999

Appointment of Consumer Representatives

Issues Paper

This paper outlines current issues in the selection and appointment of consumer representatives by the Minister responsible for Consumer Affairs. It discusses the important role which consumer representatives play on a range of industry dispute resolution schemes. The paper sets out problems in the current appointment process and suggestions for reform.

This paper was prepared by Chris Connolly in response to an invitation to attend a round table meeting with government and industry representatives to discuss this issue. The paper has benefited from substantial input from John Barber, Chris Field and Jenny Lawton, and additional comments from members of the Financial Services Network, consumer organisations and community organisations.

1 Background

Consumer representatives play an important role in three areas: on Boards or Committees which have oversight of industry dispute resolution schemes; on panels which make decisions on consumer complaints; and on general advisory Boards or Councils which have input on government policy, regulatory matters, industry issues and codes of conduct.[1]

Appointments to these bodies are currently made using a wide variety of methods. Some are direct industry appointments. Some are direct Ministerial appointments. Many are a mixture of consumer, industry and Ministerial processes.

The various methods of appointing consumer representatives have been discussed in recent fora, including:

- The ACCC review of the proposed ADMA Code under Section 90 of the TPA[2]
- The ASIC development of a policy on approval of ADR schemes
- The Working Group developing the Financial Industry Complaints Scheme (FICS)[3]

There are also a number of Government documents which discuss the role and importance of consumer representatives, and appropriate methods for appointment:

- Fair Trading Codes of Conduct – Why Have Them, How to Prepare Them (1996)
- Benchmarks for Industry Based Customer Dispute Resolution Schemes (1997)
- Consumer Affairs Customer Service Charter (1997)
- Codes of Conduct Policy Framework (1998)
- Prescribed Codes of Conduct (1999)

In all these fora and documents the important role of consumer representatives is acknowledged.

In recent times, concerns have arisen over the integrity and effectiveness of the appointment of consumer representatives, especially in relation to ADR scheme boards and panels. While the consumer movement has many other important issues to deal with, this particular issue has reached the stage where organisations and advocates have decided to come together to seek an urgent resolution.[4]

Consumer Affairs Division has agreed to host a round-table forum with government, industry and consumers to discuss this issue. This development is welcomed by consumer

[1] Examples of the last category include the Commonwealth Consumer Affairs Advisory Council, the Consumers' Advisory Panel of ASIC and the Telstra Consumer Consultative Committee.
[2] The Australian Direct Marketing Association Industry Code of Conduct.
[3] The mooted replacement for the Life Insurance Complaints Scheme.
[4] A phone link up of interested consumer advocates was held on 28 June 1999.

organisations as a first step. The CAD's role is set out in their customer service charter: "We liaise with government, consumer and community groups, and industry bodies to find consumer representatives for boards, committees and review bodies". There is obviously a question about whether they now fulfil this role in practice.

The four consumer representatives who will be attending the round table[5] will appear on behalf of a wide range of consumer and community organisations who have an interest in this issue. They have been asked to raise the following issues and proposals at that meeting.

2 Current Situation

Consumer Affairs Division advise that the current process for appointing consumer representatives for those schemes who receive appointments or nominees from the Minister is based on a 'pool' system. Some individuals who have previously applied for consumer representative positions have been placed in the pool.

No other details are available about the current scheme, although CAD have agreed to provide a short written document outlining the current system prior to, or at the round table forum.

3 Issues Requiring Immediate Action

Issues and proposals have been divided into those which require immediate action, and those which could be subject to a more detailed review later in the year.

The issues of greatest concern relate to ensuring that the process of appointment is transparent and accountable. The consumer movement seeks immediate action on the following issues to restore confidence in the appointment process, and integrity to industry ADR schemes.

3.1 Lack of information about the current method of appointing consumer representatives

This may be addressed shortly, as CAD have advised that they are preparing a short description of the current process. In any case, a description of the process should be available in writing and on the web site, and circulated to consumer and community organisations.

[5] John Barber (Ageing Agendas), Chris Connolly (FSCPC), Chris Field (Consumer Law Centre) and Jenny Lawton (Carlton & Fitzroy Financial Counseling Service).

Recommendation 1

A description of the appointment process should be available in writing and on the CAD web site, and circulated to consumer and community organisations immediately.

3.2 Definition of Consumer Representative

There should be no need to define consumer representatives. Unfortunately, it appears that a definition may be necessary in order to deliver quality appointments, in the face of inappropriate appointments. There are some existing definitions:

The 1996 guide to Fair Trading Codes states that:

> "Consumer representatives... should be capable of reflecting the viewpoints and concerns of consumers and be people in whom consumers and consumer groups can have confidence."

The Benchmarks state:

> "representatives of consumer interests on the overseeing entity are:
> (a) capable of reflecting the viewpoints and concerns of consumers; and
> (b) persons in whom consumers and consumer organisations have confidence."

The LICS terms of reference state: "The consumer member must be well informed, impartial and objective. He or she must be capable of advising the Chair on consumer related issues." The IEC terms of reference state that consumer representatives: "shall bring to a panel expertise in consumer affairs".

The common theme here appears to be that a consumer representative should bring positive benefits to the position, including understanding of consumer issues and viewpoints, and the confidence of the consumer movement.

In perhaps the most important development regarding the definition of consumer representatives, the ACCC has been asked to consider the matter in formal Section 90 proceedings relating to the proposed Australian Direct Marketing Association Code of Conduct. ADMA are seeking to have their Code and (now) an ADR scheme authorised under Section 90 of the TPA. In doing so, they have become subject to a "public benefit" test under the Act.[6]

The Code submitted by ADMA defines a consumer representative as a "person with special competence in consumer or industry matters". Consumer and privacy organisations appearing

[6] Under Section 90 the ACCC must weigh the likely public benefit of the Code against its likely anti-competitive effect.

at a pre-determination hearing before the ACCC in November 1998 argued that this definition was unacceptable.

In June 1999 the ACCC issued a draft determination. This document is "informal" at this stage, although it is intended to be released formally in the near future. At paragraph 8.87 the ACCC state:

> "The Commission is concerned with the definition of 'consumer representatives' contained in clause 3.4.2 of Appendix 1 of the Code, which requires such representatives to be 'persons with special competence in consumer or industry matters'. The interests of consumers are unlikely to be served by a person who has competence in industry matters only. The Commission is of the view that this definition should be changed to require competence in 'consumer and industry matters'."[7]

This decision, when formally released, will lend weight to arguments for a definition of consumer representative which requires expertise in consumer matters. The decision will have significant legal weight, as all industry ADR schemes are potentially subject to Section 90 of the TPA.

In all the circumstances, it seems reasonable to adopt the definition of consumer representatives in the Benchmarks, with the added understanding that consumer representatives with purely industry expertise would be rejected by the ACCC if the scheme was challenged under the Act. What appears to be lacking is a commitment to the Benchmarks at this stage.

Recommendation 2

That CAD, industry ADR schemes and the Minister's Office accept and commit to the Benchmarks' definition of consumer representative, ie:

> ***"representatives of consumer interests on the overseeing entity are:***
> ***(a) capable of reflecting the viewpoints and concerns of consumers; and***
> ***(b) persons in whom consumers and consumer organisations have confidence."***

That this definition appears prominently in documents relating to the selection process and vacancies, and appears on the CAD web site; and

That the definition is considered as part of the test of independence undertaken during reviews of ADR schemes.

[7] In subsequent submissions to the ACCC, consumer and privacy advocates have questioned whether competence in "industry matters" needs to be an essential requirement, rather than a desirable requirement.

3.3 Lack of notice regarding impending appointments

Consumer and community organisations cannot be expected to have knowledge of each appointment and vacancy. Indeed, many organisations have registered their interest in appointments with CAD in the belief that they will receive information about appointments. There is a space on CAD's publications/mailing list form for this purpose.

Also, previous applicants for representative positions who had joined the 'pool' were under the impression that they might also receive notice of relevant vacancies. However, no consumer organisations or individuals have received notice regarding recent appointments or the numerous current vacancies. It is inappropriate to make decisions based on prior applications for unrelated positions.

Recommendation 3

In lieu of national advertising, notice of vacancies should be supplied to consumer and community organisations, members of the "pool" and other individuals who may register an interest with CAD.

3.4 Lack of consumer consultation regarding appointments

It appears that current appointments are being made without any consultative process. We note that the Consumer Affairs Customer Service Charter states:

> "in relation to consumer representation we will:
> - use open and transparent processes to find consumer representatives;
> - provide advice and support to those representatives; and
> - regularly publicise information about consumer representation in Consumer Wise"

Obviously, no open and transparent process was utilised for recent appointments. Partly, this is an issue to be resolved in the bigger picture review discussed below. However, the consumer movement will not be satisfied with any temporary solution (or the current system) which does not include some element of community consultation and openness.

The Benchmarks state:

> "Suitable consumer representatives can be ascertained by a number of methods, including the relevant consumer organisation providing a nominee, advertising for representatives, or the relevant consumer affairs agency or Minister responsible for consumer affairs nominating a representative."

This statement is not particularly helpful. It is to be hoped that a reasonable interim solution can be reached which at the very least provides opportunities for consumer organisations to participate in the nomination of candidates.

Without wishing to restrict the opportunity for consumer, industry and government representatives to work towards a satisfactory interim solution, this paper has set out at Appendix A three possible options for consideration. Each involves an element of community consultation.

Recommendation 4

That consumer, industry and government representatives work together to develop an appointments process which includes an appropriate level of consultation.

3.5 Merit based appointments[8]

The definition of a consumer representative (as discussed above) supports arguments for an improved merit based appointments process. The following principles are indicative of the types of issues that need to be addressed, to ensure that a merit based approach is taken for all appointments. They could be observed in the recruitment and selection process of consumer representatives when nominated by the Minister, in consultation with the appropriate stakeholders.

- Recruitment and selection practices are aimed at quality selection to achieve organisational objectives in consultation with stakeholders.
- Information on job requirements, and the basis on which selection is made is developed in conjunction with stakeholders.
- Information on job requirements, and the basis on which selection is made, is accessible, defines necessary abilities and skills, and is able to be assessed in a practical way.
- Recruitment and selection processes are transparent and free of patronage, favouritism or unjustified discrimination.
- Principles of equity and procedural fairness apply in making and reviewing decisions and actions affecting appointments.
- Recruitment and selection decisions are documented and are based on merit and the relative assessment of applicants.
- Recruitment and selection policies and practices are consistent with best practice and reflect the public interest nature of the positions.
- Reports of decisions are available to aggrieved persons (with due consideration of applicable privacy requirements).
- Appropriate resourcing is provided to support a fair and efficient process.

There may also be some use in setting out the essential criteria for consumer representative positions,[9] to help ensure that appropriate 'merits' are considered. Effective consumer representatives must possess the following attributes:

[8] This section prepared with the assistance of Anne Napier

[9] These sections adapted from earlier work by Fiona Guthrie and Greg Kirk.

- Expertise in consumer issues
- An understanding of different consumer experience
- Ability to consult with consumers
- Willingness to report to the consumer movement
- Independence from industry and government
- Relevant personal skills

Recommendation 5

That consumer, industry and government representatives work towards the development of a clear process for the advertising, recruitment and merit based selection of consumer representatives and the reporting of such decisions.

3.6 Standards and support for consumer representatives

It is generally acknowledged that the standard of consumer representation varies a great deal, depending on the individual. Some people have noted that there used to be a greater amount of training and support for representatives when CFA had a full time secretariat. Certainly there are a large number of documents available from that period.

The most recent guidance is contained in the 1996 "Training Handbook – A Guide for Consumer Representatives" published by the Australian Consumers' Council (now CCAAC). This document is also sometimes referred to as the "Consumer Representatives Handbook". It seems a little out of date now, although still useful in parts.

However, to gain real improvements in the quality of consumer representation, the following steps have been suggested:

- Updating and re-issuing guidelines for consumer representatives;

- Obtaining regular feedback and reports from representatives to consumer organisations and community groups;

- Holding an annual national meeting of consumer representatives (currently only undertaken by FSN for financial services representatives, although CAD sometimes hold a forum for all representatives); and

- Training and support for representatives (not currently undertaken because of resource constraints, although it is on the agenda of ASIC's Consumer Advisory Panel and possibly CCAAC).

Recommendation 6

That CAD, in consultation with industry and consumer representatives, implement steps to improve the quality of training and support for consumer representation.

4 Review of Overall Process

These short term improvements will be of great benefit, but must be subject to review. The larger issue of how appropriate consumer representatives can be found and appointed, in an environment where there are limited resources available for consumer organisations, advertising, training and support, is a high priority.

There are several competing models for the appointment of consumer representatives, and a lack of consensus on which model is appropriate (let alone achievable). These issues need to be resolved at the earliest opportunity, however it does not appear possible to reach a consensus prior to the round table.

The competing models range from the Minister having complete control over appointments, to ADR Boards having control, to consumers having more control, and all points in between.

On the question of how this process might be taken forward, there is support for dealing with the short term issues (above) now, including a renewed commitment to apply the Benchmarks, definitions and standards outlined above, and then calling for a wider review.

Some initial steps which might prove useful include to:

- Undertake a survey of existing consumer representatives
- Allocate resources to work on standards for consumer representation
- Establish processes for registering interest in positions

Queries about the content of this issues paper can be directed, in the first instance, to:

Chris Connolly
Director
Financial Services Consumer Policy Centre
Unit 508
410 Elizabeth Street
Surry Hills NSW 2010
t. (02) 9281 4452
f. (02) 9281 4574
director@fscpc.org.au

Appendix A

Options for Consultation Regarding the Appointment of Consumer Representatives

Note: these options are listed here to help prompt discussion of possible solutions. They are indicative only, and do not constitute a formal consumer position. Also, these are only suggestions for an interim solution on the issue of consultation.

1) CCAAC

Appointments could be made in consultation with a sub-committee of the Commonwealth Consumer Affairs Advisory Council (CCAAC). The sub-committee would assist the Minister by providing input on the appropriateness of appointments. The sub-committee may be assisted by one or two additional community representatives (eg. a representative from ACOSS). It is envisaged that the industry members of CCAAC would not participate in this process or would play a very limited role.

2) New Committee

A new appointments advisory committee could be established, including appropriate representatives of the consumer movement. This committee would be consulted in relation to all appointments. The committee might occasionally "co-opt" specialists for consideration of specific appointments, if they did not feel they had appropriate expertise or knowledge of that consumer issue or sector.

3) Consultation Lists

Specific lists of appropriate organisations could be developed for each scheme or type of scheme. For example, before making appointments relating to an industry scheme dealing with financial advice (eg. FICS, FSCRS) the Minister would consult with a pre-registered list of community and consumer organisations. The list would be different for different sectors.

In each of the above options, consideration needs to be given to the exact structure of consultation. This may include consideration of a shortlist of nominations.

Appendix B

Financial Services Consumer Policy Centre Options Paper on the Provision of Life Insurance Under the Proposed Superannuation Choice of Fund Regime

By Khaldoun Hajaj

Background

The concept of choice of superannuation fund for employees has been at the centre of policy debate within legislative, consumer and industry circles for the past four years.

The philosophy underpinning the introduction of the choice regime is an economically driven prescript reasoning that developed markets such as Australia's financial services market are at their most efficient when left to compete for business. Hence it was using this 'supply side' logic that the Financial Systems Inquiry (1996) proposed:

> Employees should be provided with choice of fund , subject to any constraints necessary to address concerns about administrative costs and fund liquidity. Where superannuation benefits vest in a member, that member should have the right to transfer the amounts to any complying fund. Where a member chooses to exercise that right, payments should be transferred to the chosen fund as soon as practicable, subject to controls necessary to maintain orderly management for the benefit of fund members.
>
> Transfer costs, including those incurred as a result of regulatory requirements, should be transparent and reasonable.

Under current arrangements, workers covered under Federal and most State Awards have very limited access to choice of fund. Hence, there exists virtual mandated industry monopolies whereby an entire given industry with workforces numbering in the hundreds of thousands have their prescribed superannuation guarantee automatically lodged into a complying fund. Those workers' superannuation guarantee is invested in a prescribed superannuation fund regardless of returns on their investment and fees and charges.

Since the introduction of mandated superannuation in 1992, this system has been highly efficient as it provided workers with universal access to superannuation which for so long had been an exclusive entitlement for privileged workers. The new arrangements have been highly effective as the majority of the 'industry funds' have been performing adequately with low overheads, adequate investment returns and accordingly a low fee structure and competitive crediting rates.

A highly positive feature of the current 'no choice' system is its ability to deliver Life Insurance benefits (Death, Total and Permanent Disability [TPD] & Total and Temporary Disability [TTD]) to a majority of workers at a 'minimal' cost. This has been possible

due to the economies of scale which are engendered through group insurance. That is, mass insurance of industry funds allows group insurers to guarantee an individuals' coverage without the provision of a risk assessment. This is possible when an entire industry is group insured – which enables higher risk members access to attractive insurance terms through some cross subsidy from lower risk members without risk of anti-selection. The exclusion of the individual assessment process further enhances the advantages of group insurance to members as it allows for considerable administrative savings in the areas of communication with members, providing policy documents, claims and disputes and processing of payments. Those cost savings translate into considerably lower premiums for workers and funds.

However, contrary to popular perception, most life insurance policies are not the same. While there is no individual assessment of fund members (except those on very high benefits) when group insurance is provided, there is however a very thorough assessment of certain industries as a whole. In industries deemed to be 'high risk' such as mining, nursing, abattoirs..., those funds may find it difficult to insure their workers. Likewise when an insurer does agree to taking an industry on, they are forced to structure their premiums at levels which are prohibitive for funds and individuals. This is especially pertinent for workers in an 'industry fund' as the cost of their insurance premiums are deducted from their superannuation guarantee. That being the case, it is important that the point of departure for the ensuing discussion be that *workers do not have an equal access to life insurance benefits.*

Why Choice?

With the current superannuation arrangements seemingly working well, we must ask: Why the move to superannuation choice of fund?

In answer, it is only due to the relatively small amounts of money which have been building up in members accounts as a result of compulsory superannuation contributions that fund members have been satisfied with current arrangements. However, those amounts are exponentially increasing and will keep doing so in perpetuity. Consequently, it is self evident that as members accounts grow, so will the active interest which they will exercise in their investments. Indeed, there is already evidence suggesting that for a majority of Australians, more money is vested in their superannuation accounts than they have ever saved. As such, Australian consumers are demanding that they be given a say in where they invest their money. This is especially the case for those consumers suffering as a result of poor returns on their investment. The right of consumers to invest their money in the most appropriate way is not currently being granted to the vast majority of Australians.

Consumers support having a choice in which fund their money is invested as it enhances competition which can potentially reduce costs, increase returns on their investment and ultimately enhance their retirement incomes. The provision of superannuation choice of fund is a logical extension in the drive to enhance consumer sovereignty.

Current Superannuation-Life Insurance Arrangements

The link between life insurance and superannuation at a basic level is merely a historical one. Besides the economies of scale described above, there is no intrinsic potential economic advantages which may be derived through such mode of operation. Indeed, the concept of superannuation was conceived of more as a benevolent activity designed to cater for those workers who lack 'independent means'. Life insurance developed along similar lines. Life insurance developed as a result of employers' sense of moral obligation to provide for the families of loyal staff who may die or suffer a permanent injury rendering them unemployable. Insurance benefits were typically set at a level equivalent to an employee's prospective retirement benefit or as a multiple of salary.

Historically insurance has always been provided and paid for by the employer. This is still the case for many workers belonging to corporate superannuation funds, however, this is not the case for workers belonging to industry funds (fastest growing sector in superannuation) as they have to pay for the provision of life insurance benefits out of their superannuation guarantee contributions. Further, the continued shift from defined benefit funds to accumulation funds, also entails the removal of employer premium subsidies and shifted the cost on to the employee.

Insurance became a practical mechanism for enhancing the benefits referred to above due to its minimal cost. As the industry developed, benefits began to be tailored in accordance of need, and hence married men tended to get different benefits than those of single men and women. Disability benefits were also set at the same levels as death benefits despite the different needs of the claimants.

One of the major problems in the current superannuation arrangements is the arbitrary nature of it. According to government statistics, there are three times as many superannuation and insurance accounts as there are members in funds. This arrangement is counter productive to consumers as they are all ad-hoc and not tailored to an individual's needs. This particular manifestation is derived by the greater employee mobility in today's workforce. It is very common for an employee to go through life having numerous jobs. This leads to workers also having numerous retirement accounts. And while member benefits can be transferred to other funds upon changing employment so that there is a continuous accumulation of funds, the same cannot be said of risk benefits which tend to vary significantly between funds.

Where to from here?

As pointed out above, one of the strengths of the current system is its ability to mass insure industries. In changing the current arrangements, it will be possible that insurers will no longer be able to offer generous automatic acceptance terms as there will be no

assurance that a majority of members will remain in a certain plan and hence cross subsidise those members who would otherwise be deemed too risky or costly to insure. Further, the introduction of choice of fund may increasingly require health declarations from members. This adds to an insurer's administrative costs. Choice will also tighten provision of continuation options, under which insurance is provided to members for a certain time after they leave their employer.

Some parts of industry fear that undermining the current system could cause the insurance industry to revert to the HIV era, 'where members who most need insurance cover are not able to access it because of their health'. However, this problem already exists as many workers already in high risk industries find it difficult to gain meaningful insurance.

Accordingly some members of industry have suggested that this problem can be resolved by adjusting the premium rate structure to cover the risk, 'price can accommodate any risk'. This argument is flawed as it ignores the initial attraction of superannuation and life insurance. That is, that closed shop coverage guaranteeing economies of scale which in turn facilitate the cross-subsidies which in-turn underwrite high risk workers.

While agreeing that there is a potential to undermine current arrangements, parts of industry point out that choice reforms could be of benefit where existing arrangements are not sufficient to cover the needs of all workers. Accordingly, some employees may be able to gain improved insurance and lower costs through increased choice, depending on their circumstances, some may be able to access better life insurance in circumstances:

- Where there is restricted insurance coverage;
- Where existing costs are too high due to recent high level of claims by the fund; and
- Where the member changes fund frequently and coverage is not fully transferable.

Which is why some parts of industry warn against making the provision of life insurance mandatory. Given the inconsistent provision of life insurance across industry, and its seeming lack of value for younger and older workers, they argue that the public benefit of mandating life insurance as an increased 'social safety net' is questionable. They assert that mandating insurance within default funds will lead to consumers getting very poor value in their insurance arrangements. They concluded by arguing that "onsumers would be much better served by having insurance dealt with within the choice education campaign and as a minimum default funds could have optional insurance. So that those who really need insurance are able to get it tailored to their needs and appropriate to their circumstances".

By default, this model merely seeks to recreate the existing system. And while the existing life insurance arrangements work efficiently under the current superannuation arrangements, they only do so as a result of the economies of scale so described above. Those scales create a pool of premiums large enough to underwrite workers deemed to be too high a risk otherwise. As a result of this, all workers in a given large fund are generally able to access life insurance and TPD benefits at an accessible premium.

Access to tailored insurance solutions as suggested by parts of industry are a positive aspect of superannuation, however, to a large extent this scheme already exists whereby workers are able to purchase extra units of cover if they feel it necessary. Moreover, those workers are able to tailor-make their life insurance (by purchasing extra cover) at 'group insurance' rates. This existing arrangement is considerably more economical than tailoring a policy at retail prices. Indeed, the purchase of individual retail life insurance policies, seemingly defeats the purpose of the superannuation – life insurance relationship.

Furthermore, a number of compelling arguments regarding the value of life insurance to certain age groups were put forward. Particular questions were posed about its worth for younger and older workers. It was argued that workers in the 17-25 age group do not get value out of their insurance as they tend not to have any dependants and likewise, questions were asked regarding the value of life insurance for older workers who may have already built up considerable funds for retirement. While this is true in many cases, we feel that it is important for those workers to remain in the life insurance pool as their withdrawal will have the affect of raising premiums for those people who do feel the need to have it.

Further, for young workers to opt out of the system will simply require them to make up for it in terms of higher premiums when they feel they are ready for life insurance. Likewise, it is also the case that for many young workers, TPD and death benefits are the largest benefit they have. Indeed, the post-traditionalist social milieu in which we exist have rendered social assessments of who requires insurance and who does not as quite obsolete.

Older workers opting out is also problematic, though the cost of their opting out will not be recouped for another generation and hence burdening the next generation of workers with excessive premiums for insurance which the community has come to view as an essential feature of the superannuation system. Further, older workers also benefit from life insurance as it can insures against those workers not meeting their expected retirement income benefit in the case of injury.

The consumer movement recognises that the provision of inter-genarational cross-subsidies posits a market distortion which interferes with the free operation of the market. However, the consumer movement is not exclusively concerned with the sovereignty of individual consumers, rather, we view the provision of a socially just system of cross-subsidies as an extremely important aspect of superannuation and life insurance as it guarantees the inclusion of a maximum number of Australian workers. The opting out of sections of the workforce at times of personal convenience merely undermines the long-term well-being of a successful system. Surely, the entire philosophy of insurance is one which is underpinned by an extensive system of cross-subsidies. This applies in health insurance, motor vehicle insurance, general insurance and so on.

The Financial Services Consumer Policy Centre is cognisant of the inconsistent nature of the benefits and sees this as an unfortunate aspect of the system. Be that as it may, we also recognise that the lack of definitional standards are an intrinsic feature of group insurance as superannuation funds can only purchase policies in accordance with their group risk assessment. This is why we call for mandated minimum premiums and not a minimal benefit.

The FSCPC disagree with some industry assessments deeming that TPD insurance is already largely covered via workers compensation insurance. We take the view that workers compensation insurance is designed as insurance against income loss. Life insurance on the other hand is designed to insure a workers retirement benefit which is not considered an income. As such, we do not see any links between life insurance and workers compensation insurance.

The FSCPC takes the view that a key strength of the proposed choice of fund regime will be the portability of individual accounts. This will have a direct positive affect on life insurance as workers will be able to take up other jobs (especially part-time) without having to duplicate a service which they already have. We envisage that this will enhance the attractiveness of life insurance as workers would be able to gain insurance coverage in a number of jobs without having to pay extra premiums.

Period before choice is made

Fears have been raised regarding the 56 day period before a worker makes a choice, and the implication of this same worker either dying or suffering a permanent disability. Questions such as 'who will be responsible for insuring this worker if she/he dies prior to making an active choice'? 'What if no premiums have been paid'? and 'what if most of the workers in a certain work place have all made active choices which differed from the award default fund'? The FSCPC recognises the pertinence of those questions and suggests the following:

- Cover should exist from the date the person commences work. This can be done either through an obligation being placed on employers to immediately pay insurance premiums or to continue the current system of automatic acceptance.

If an employee dies before selecting superannuation fund , then:

A. The employer is still liable to pay their superannuation guarantee into the prescribed fund, and thereby also covering the life insurance premium;

B. It is assumed that there is automatic acceptance, so the person would have been accepted by the insurer in any event;

C. If the insurance premiums are deducted from the superannuation guarantee, then no issue of writing complex small cheques exist (as has been suggested);

D. If the employer pays separately, then presumably they will have some regular arrangement with the insurer of the fund to do this;

E. It may be necessary to have some legal arrangement to cover this situation, for example, providing that the employer holds premiums on trust for the employees for the first eight weeks of employment.

Many of the fears amongst insurers are premised on their being a flight of workers in and out of various funds and hence impairing the precarious balance which currently exists. While acknowledging the long term potential for such a manifestation; we are confident that critical-mass of inter-fund movement is not likely to occur for a number of years to come. Taking into account the limited financial education of a majority of the Australian workforce, we envisage that there will be very limited initial inter-fund movement, thereby guaranteeing a critical mass by which economies of scale are achieved.

Some issues could arise where superannuation funds and insurers may have to meet a benefit claim for an injured or deceased worker who happens to die prior to making an active choice. They may be totally unknown to the fund or insurer. Yet, the fund and insurer may still have to meet any insurance claim. The FSCPC takes the view that being granted default fund status will be a much sought after position. This will automatically guarantee the entry of thousands of new members every year into the default fund. With that, we regard the benefits gained from being selected as a default fund as far outweighing any potential risks.

Consequently, the Financial Services Consumer Policy Centre proposes:

- Automatic acceptance for all new employees (need to further address issues concerning workers who have had previous TPD claims);
- Compulsory cover by way of an amount of premium per week (rather than a fixed level of cover with the premium calculated as a result); and
- The inclusion of both death and TPD (issues concerning members switching to default funds to take advantage of insurance open to further negotiation).

Conclusion

The Financial Services Consumer Policy Centre recognises that life insurance has the potential to cause some confusion amongst funds and insurers. However, we think that those problems are minor and transitional. In due course, the industry will absorb the changes and resume its normative position.

The following is a summary of consumer propositions which we hope would be taken into account in the development of the final choice of fund regime:

- Death and disability insurance is an important feature of employment superannuation and is very popular amongst members;

- At the very least, a default fund should have death and TPD insurance as a minimum standard. The most practical way to achieve this is to have a minimum requirement that a fund apply a minimum weekly dollar amount of an account balance to death and disability TPD insurance;

- TPD insurance in particular is important because it provides a hedge against the effect of premature retirement from the workforce on a workers' ability to accumulate an adequate retirement income;

- Under most employment superannuation plans, somewhere between $2 and $4 per week is allocated for insurance premiums. Accordingly, we call for this benchmark to be carried over into the new system;

- TPD cover is more cost-effective and more akin to providing a retirement income than is a salary continuance or a total and temporary disablement benefit. Thereby, the minimum requirement should be for the purchase of TPD cover, not salary continuance or TTD cover;

- It is not practical to attempt to fix a minimum amount of insurance cover because what could be purchased will vary from industry to industry and fund to fund;

- Funds should be encouraged to provide higher levels of death and disability cover but the minimum premium rate would be simply a minimum standard;

- The insurance cover should commence from the date a new employee commences work; and

- The prescribed insurance arrangements may not be suitable to all funds, but it would be unrealistic to expect that all superannuation funds would be suitable for all arrangements. In that case, those funds (retail) could make alternative arrangements such as setting up a sub-fund or a sub-class of membership which can operate as a default fund.

The provision of superannuation choice of fund while empowering consumers to take control of their retirement benefits, also has the potential to confuse a great many people. This is precisely why we feel that consumer protection must be maximised. We view the provision of mandated life insurance for default funds as an essential component of this consumer protection.

11/2/2000

Appendix C

CASE STUDY NO. 1

Q was employed as a hairdresser by a small Melbourne business for two years until 1998. Throughout her employment, she was an employee for the purposes of the *Superannuation Guarantee (Administration) Act* 1992 and her employer was liable to pay the Superannuation Guarantee contributions into a superannuation fund on her behalf.

No Superannuation Guarantee contributions were ever paid and the business closed in 1998, although the employer had established a new hairdressing business.

Q first contacted the Australian Taxation Office (ATO) by telephone in November, 1998, in relation to the non-payment of the Superannuation Guarantee contributions.

The initial response of the ATO was to indicate that they were unlikely to pursue the employer given the small amount outstanding (approximately $4,800.00 in respect of Q) and the small number of affected employees.

The tenor of the discussions was that Q was probably wasting her time but that at her insistence, the Notification form was lodged.

Q received a standard letter in January, 1999, advising her that privacy requirements prevented disclosure to her of any information as to progress of the ATO's collection efforts. No further information was received until March, 2000, when, in response to queries from Q, the ATO initially advised that as the employer was no longer trading, recovery was unlikely. However, by letter of the same date (22nd of March, 2000), the ATO advised of possible future action, again without giving any indication of what action they had or would take to pursue the employer.

CASE STUDY NO. 2

G was employed as a truck driver by a Melbourne-based company for eight years.

In 1996, he suffered a knee injury at work, as a result of which he has had a total knee replacement.

G was absent from employment for two years as a result of his injury, but has returned to work for the last eighteen months.

G's employer has never paid Superannuation Guarantee contributions, although G was unaware of their obligation to do so until after he returned to work following his accident.
G contacted the ATO's 1800 number in early 2000. After being on hold for 29 minutes, G was informed that if a Notification was filed, the data would be recorded but there was no guarantee that it would be acted upon. G was advised that it would effectively be up to the computer to decide whether action would be taken and that, given there were only a small number of employees affected, further action was unlikely.

G was also informed that if the Notification was lodged, the ATO would not notify him of progress of any recovery action because of privacy laws.

G lodged the Notification and has not heard anything since.

CASE STUDY NO. 3

K was employed as a process worker with a Melbourne-based company for 35 years.

From his employment, he was a member of his employer's corporate superannuation fund until 1997, when all employees were transferred to membership of an industry fund.

The business was sold in 1997 and the new employer made no contributions into the industry fund after August of 1998.

K ceased work in September, 1999, when the company went into liquidation.

The Superannuation Guarantee shortfall with respect to K is approximately $3,000.00, which remains unpaid. In addition, the industry fund included a total and permanent disability insurance benefit of $16,000.00, which benefit lapsed when the new employer ceased making contributions. K has been diagnosed with inoperable cancer and would have been eligible to claim the disability insurance benefit had the employer paid contributions up to the date K ceased work.

K first contacted the ATO with respect to the non-payment of Superannuation Guarantee contributions by the employer in 1998 and lodged a Notification form. The other 30 employees of the company whose Superannuation Guarantee contributions had also not been paid lodged similar Notification forms. K was informed that the ATO would not necessarily pursue the employer for payment of the Superannuation Guarantee shortfall and that K was not entitled to be informed of progress of any action.

No Superannuation Guarantee contributions have been recovered to date, although the liquidator has indicated that some of the Superannuation Guarantee shortfall may be distributed in the liquidation. However, K has been given no guarantees that the $16,000.00 disability insurance benefit will be available to be claimed.

SUGGESTIONS FOR IMPROVEMENTS to the SUPERANNUATION GUARANTEE COLLECTION MECHANISM

1. Scrutinise the extent to which the Australian Taxation Office (ATO) prosecutes employers for the recovery of any Superannuation Guarantee shortfall, i.e. actually issues court proceedings for debt recovery.

2. Amend the *Superannuation Guarantee (Administration) Act* 1992 to allow the employee of an employer who has incurred a Superannuation Guarantee shortfall to bring civil court proceedings for the recovery of the shortfall.

3. To allocate sufficient resources to the ATO and/or the Australian Government Solicitor for the adequate administration and recovery of the Superannuation Guarantee shortfall under the *Superannuation Guarantee (Administration) Act* 1992.

4. In the alternative, to direct the ATO to contract out for the recovery of the Superannuation Guarantee shortfall.

5. Require Superannuation Guarantee contributions to be paid more regularly than annually, i.e. monthly or quarterly.