Senate Select Committee on Superannuation and Financial Services

Main Inquiry
Reference (a)

Submission No. 81

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Our Reference: 00-4938
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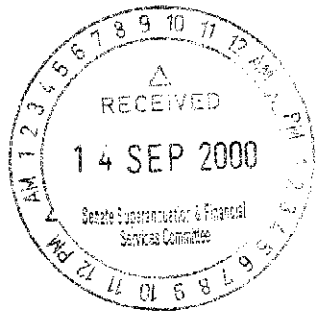
13 September 2000



The Secretary
Senate Select Committee on Superannuation
Parliament House
CANBERRA ACT 2600

Dear Ms Morton

Thank you for your letter of 26 June last. I can answer the queries as follows :

1. Legal advice re Tribunal's privacy provisions

   I am attaching ('A') a copy of the advice with respect to the privacy issue. The advice is in handwriting. I sought the advice from the Tribunal's Solicitor by way of comment on my own assessment of the effect of the provisions of the *Superannuation (Resolution of Complaints) Act* 1993 (the Complaints Act). The advice was part of advice on a number of points in respect to a proposed letter. It was given on 4 April of this year.

   Given the Tribunal's funding is linked to the level of superannuation levy, it becomes more relevant for well-performing industry members to be aware of those who may be over- using the available resources.

   I apologise to the Committee if I put the advice given as being more certain than in fact it transpires to be.

   Given the nature of the advice, I would be grateful if the Committee would give consideration to treating it as being confidential legal advice i.e over the whole of document 'A'. DOCUMENT 'A' CONFIDENTIAL — NOT AUTHORISED FOR PUBLICATION

2. Since meeting with the Committee, I have met with the ASIC representatives and it has been agreed that a more detailed report will be provided to the Tribunal on complaints forwarded by for investigation to the ASIC.

   I am not in favour of the Tribunal undertaking a reporting role in relation to offences. The function of dispute resolution should be able to operate free of constraints which attach to a policing role. The current system separating dispute resolution from offence investigation is, in my view, the preferred model.

3. Guidelines for Matrimonial Causes Disputes

Publishing Guidelines would appear to be a useful tool particularly for Complainants for whom the Tribunal is specifically required to give assistance (section 16 of the SCT Act).

Some thought will need to be given to the Guidelines. Given the legislation does not become effective until January 2001, the Tribunal will address the Guidelines in the latter half of next year when, hopefully, the backlog of cases has been controlled.

4. Conciliation

Attached please find the Report on Conciliation's for the quarter ending 30 June 2000 ('B') (this information is taken from the Tribunal's Quarterly Report Bulletin which Committee Members may already have seen). The figures for July and August 2000 show a decrease reflecting the move from culling the extensive backlog for cases able to be conciliated to dealing with more contemporaneous cases. There is, however, an overall improvement in the uptake rate from industry members for conciliation and there is every reason to believe that this will be maintained.

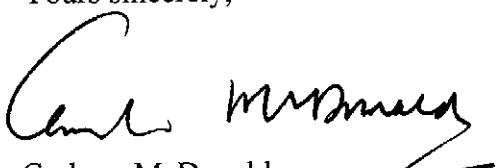
5. Other

With some insignificant exceptions (usually where further information (e.g. updated medical report) is awaited or parties have required an adjournment for further settlement discussions) the last of the 1996 – 1998 cases are listed for review by the end of September. Decisions in those cases should be concluded by the end of December or January 2001. It is hoped to maintain the present rate of case disposal, which is putting considerable pressure on Part-Time Members, so that the 1999 cases requiring review have all been listed by end of April next year. The burden on Part-Time Members ought be reduced to a more manageable level if legislation currently in the Parliament lifting the maximum ceiling of 10 Members is passed.

The Tribunal is attempting to adopt an educative role so that Trustees/Insurers are better placed to reach accurate decisions which will ultimately hopefully lead to a reduction in the number of complaints to the Tribunal. As foreshadowed in my submission, seminars have been held in Sydney and Melbourne for this purpose and I am attaching the Paper prepared by the Tribunal's Solicitor on the legal issues on Total and Permanent Disablement. This has been well received to the extent that ASFA have decided to publish it on their Website for the benefit of their Members.

The Tribunal thanks the Committee for its ongoing interest.

Yours sincerely,



Graham McDonald
Chairperson
encls

B

CONCILIATION

The Tribunal conciliated 48 cases during the quarter, compared to 28 cases for the previous quarter.

The number of cases conciliated during the quarter is the highest number ever dealt with at the Tribunal and represents an increase of 71% over the previous quarter, and 118% over the June 1999 quarter.

Conciliation Conference Outcomes by Nature of Complaint During the Quarter

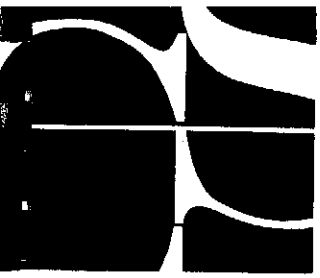
Nature of Complaint	No. of Cases	Settled	Unresolved	Pending
Account Balance	2		2	
Administration	4	3		1
Disability - Medical Evidence	10	2	2	6
Disability - Other	1	1		
Death Benefits - Distribution	31	19	4	8
Total	**48**	**25**	**8**	**15**

Of the 33 cases concluded in the quarter, 25 were settled and 8 were unresolved. This represents a settlement rate of 76%, compared to 70% in the previous quarter. This high settlement rate should be noted by Trustees and Insurers as being a very positive step in the process of case management.

The largest category continues to comprise death benefit distributions with 31 cases accounting for 65% of all cases dealt with. Nineteen cases were resolved and 8 cases are pending.

Disability cases comprised the next highest category with 11 cases heard during the quarter. Three cases were resolved, 2 cases unresolved and 6 cases are pending.

The activity and outcomes are heartening and in accord with the expectations from revised management practices introduced in December 1999 and the promotion of the conciliation process by the Chairperson and Deputy Chairperson.



Superannuation Complaints Tribunal

Legal Issues in TPD

Forum Discussion Paper

Sydney: 10 July 2000
11 July 2000

Melbourne: 13 July 2000

DISCLAIMER:
The information contained herein does not constitute legal advice but represents the Tribunal's understanding of the cases in relation to the topics discussed. This may change over time. Trustees, Insurers and other persons are advised to make their own assessments in relation to the materials provided.

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Legal Issues in TPD

1. Role of Tribunal

It is important to appreciate that the Tribunal's role is quite different to the role of a court because this difference affects the way in which the Tribunal operates in terms of its decision-making. The Tribunal is an administrative body exercising *de novo* review powers—***Seafarers' Retirement Fund P/L v Oppenhuis***, [1999] FCA 1683 [paras 18–22] per Merkel J; ***Lykogiannis v Retail Employees Superannuation Pty Ltd*** [2000] FCA 327 (23 March 2000), [para 48] per Mansfield J;—therefore, it must not act 'judicially'. In practical terms, this means that, in some respects, the Tribunal has greater powers than a court; although, in other respects, its powers are narrower. For example:

- The Tribunal alone may consider the substantive merits of the particular complaint before it using the 'fair and reasonable' norm built into the SRC Act. The court cannot review the Tribunal's determination as to the merits (or facts) of the complaint; nor can it substitute its own view of what is 'fair and reasonable' for that of the Tribunal. The court is limited to reviewing the Tribunal's determinations in the context of errors of law—either as to the legalities within the complaint itself; or as to the manner in which the Tribunal has exercised its powers—***Jeffcoat v Queensland Coal & Oil Shale Mining Industry (Superannuation) Ltd*** [2000] FCA 655 (19 May 2000) per Kiefel J, [paras 18–20]; ***National Mutual Life Association of Australasia Ltd v Campbell*** [2000] FCA 852 (23 June 2000), [paras 8, 33] per Black CJ, Emmett & Hely JJ [Full Court].
- The Tribunal may also consider the legalities of the particular complaint before it; however, it cannot conclusively pronounce upon those legalities—***Precision Data Holdings v Wills*** (1991) 173 CLR 167 [HCA—joint judgment Full Bench]. Such legal questions, as aforesaid, will always be open to review by the courts.
- The Tribunal is not bound by precedent; although, in the interests of certainty, it will strive for consistency in its decision-making—thereby following the practice of the AAT as articulated by Brennan J in ***Re Drake v MIEA (No 2)*** (1979) 2 ALD 634. Importantly, however, the Tribunal must always take care not to inflexibly apply a policy, or to act under dictation because to do so would leave it open to appeal or judicial review. Consequently, each complaint must be, and is, considered according to its own particular circumstances.

In terms of the following discussion, this means that the Tribunal will always be the final arbiter of what is the 'fair and reasonable' outcome in relation to a particular complaint, unless it has committed an error of law somewhere in its deliberations or procedures. Consequently, it is no part of the Tribunal's brief to slavishly apply factors identified by the courts as relevant, or to automatically dismiss factors identified by the courts as irrelevant, particularly where those factors have been raised in entirely different contexts—such as workers' compensation—where the concept of TPD operates according to an entirely different paradigm—ie. whether or not the

disability is work-related, rather than whether or not the person will ever again be able to work. To do so would, in itself, amount to an improper exercise of its power and constitute an error of law. The Tribunal will, however, carefully consider what the courts have to say in relation to the application of various factors and will, of course, apply any unambiguous directions of the court which are specifically in point.

2. Outline of Discussion

In relation to TPD complaints, it is open to the Tribunal to take into account a wide range of factors when it is called upon to decide whether or not the trustee/insurer decision has operated fairly and reasonably in the circumstances in relation to the complainant and other parties. The aim of this discussion is (1) to refer briefly to some of the general observations made by the courts in relation to decision-making by trustees; and (2) to look at some of the factors adverted to by the courts which the Tribunal may take into account during the course of its deliberative process. It will be useful look at these factors in the context of some of the more common TPD definitions which are to be found in trust deeds and in contracts of insurance—see Attachment A:

3 General Observations by the Courts

Has the Trustee Acted Fairly and Reasonably?

According to caselaw, the trustee must act 'fairly and reasonably' or 'fairly and adequately'.

3.1 Extent of Trustee's Obligations:

- According to Young J in ***Maciejewski v. Telstra Super Pty Ltd*** [1998] NSWSC 376 (17 August 1998) S/Ct NSW—citing, with approval, Robert Walker in ***Scott v. National Trust*** [1998] 2 All ER 705, 719—when trustees make decisions in the exercise of their fiduciary functions, 'certain points are clear beyond argument':

  > Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite oftern) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. It is however for advisors to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts. [*Scott* at 717].

- According to the cases of ***Karger v Paul*** [1984] VR 161 per McGarvie J; ***Rapa v. Patience*** (unreported—4 April 1985) S/Ct NSW; ***Vidovic v. Email Superannuation Ltd*** (unreported—3 March 1995) S/Ct NSW; ***Tonkin v Western Mining Corporation Ltd*** (unreported—19 Jun 1997) S/Ct WA; ***Chammas v Harwood Nominees P/L [No 1]*** (BC9301704—unreported, 14 April 1993), 10,

S/Ct NSW; and *Flegeltaub v Telstra Super P/L* [1998] VSC 144 / [2000] VSC 107: a trustee's discretion must be exercised in good faith; it must be exercised on the basis of a real and genuine consideration; it must be exercised in accordance with the purposes for which it was conferred; and, where the trustee gives reasons, they must be sound. It must be 'honest and reasonable'—***Minehan v AGL Employees Superannuation P/L*** [1998] ACTSC 114 per Gallop ACJ. His Honour also stated, *obiter*, that while there is no legal obligation upon a trustee to adopt a 'fair procedure', the procedure actually adopted 'might have a place in consideration whether a power was executed in good faith.'—[para 57].

- Persons using their power under a trust deed must not deny the beneficiary rights by their incompetence or inaction—Young J in ***Maciejewski*** citing ***Dundee General Hospitals Board of Management v. Walker*** [1952] 1 All ER 896, 905;

- Bringing an action in a court 'costs thousands of dollars', therefore, 'those who are given the job of acting fairly under superannuation schemes must be scrupulously professional, careful and assisting. If they are not, then [the] Court will need to step in.'— Young J in ***Maciejewski.***

- 'A person's superannuation is an extremely important right', consequently the trustee must behave 'fairly and properly and treat the beneficiaries as human beings', 'not just as a file'. This is so even if the employer is large, has many employees and an in-house trustee company with a trustee board comprised of 'busy people'—Young J in ***Maciejewski.***

- In terms of TPD, this means that the Trustee must ask itself the 'right question' and must exercise its discretion 'upon a real and genuine consideration of all the evidence.'—***Minehan*** [paras 59, 63].

3.2 Meaning of 'Fair' and 'Reasonable' in SRC Act:

- According to Nicholson J in ***Pope v Lawler,*** the meaning of the words 'fair and reasonable' is a question of fact. 'Fair' is relevantly defined as 'just, unbiased, equitable, impartial'. 'Reasonable' is defined as 'within the limits of reason; not greatly less or more than might be thought likely or appropriate.' (The New Shorter Oxford English Dictionary). Approved in a number of subsequent FCA cases—eg: ***National Mutual Life Association of Australia Ltd v Jevtovic*** [1997] 359 FCA (8 May 1997); ***Briffa v Hay*** [1997] 544 FCA (20 June 1997); ***Collins v AMP Superannuation Ltd*** [1997] 643 FCA (18 July 1997).

- In ***National Mutual Life Association of Australasia Ltd v Campbell*** [1999] FCA 1717 (10 December 1999) [paras 13–15], Heerey J (first instance). Heerey J rejected the appellants's argument that the Tribunal could only upset the Trustee's decision is it was so unreasonable that no reasonable decision-maker could have come to it—"something overwhelming"—*Wednesbury* unreasonableness. Heerey J approved the definition of Nicholson J in *Pope* and commented that, if the appellant's contention was correct, the Tribunal would be exercising judicial

power, which was the not the case according to the Full Bench of the High Court of Australia in ***A-G(Cth) v Breckler*** (1999) 163 ALR 576.

- In ***Campbell*** [2000] (Full FCA) [para 36], there was some further discussion as to the meaning of 'unfair' and 'unreasonable'. The Court stated *obiter* that attempts to achieve a precise definition 'are likely to run into difficulty.' However, the Court was of the view that Parliament had 'quite deliberately used words of broad content' rather than a narrow view—such as the *Wednesbury* test of unreasonableness—'beyond the bounds of reason'. In short, the Court preferred an 'ordinary usage' test so that 'unreasonable' meant 'just "unreasonable"'.

3.3 Trustee/Insurer & Procedural Fairness:

- Trustees are required to be fair in the sense that they have to try to weigh up competing factors. However, according to Robert Walker in ***Scott*** (cited with approval by Young J in ***Maciejewski***), '...they are not a court or an administrative tribunal. They are not under any general duty to give a hearing to both sides.' Nevertheless, if 'it seems at least arguable' that no reasonable body of trustees would make a decision without giving the beneficiary the opportunity to be heard, even although the beneficiary has no legal or equitable rights, s/he may have a legitimate expectation (depending upon the particular circumstances). If that is so, then the concept of legitimate expectation 'may have some part to play in trust law as well as in judicial review cases ...' [***Scott*** at 718]

- In ***Chammas***, Hodgson J found that the trustee did not act fairly because it failed to afford the plaintiff the opportunity to respond to an adverse medical report. The cases of ***Edwards v. Hunter Valley Co-op Dairy Co Ltd*** (1992) 7 ANZIC 61-113; (15 April 1992 2496/88);—Supreme Court of NSW and ***Rapa*** applied.

- In ***Honey v McLennan*** (unreported—BC9705863, 30 October 1997, S/Ct WA) Scott J held that the Trustee was 'obliged' to provide the plaintiff with a copy of the medical report upon which it relied to refuse payment of a TPD benefit [p.16]. His Honour further held that the Trustee's action in withholding the report amounted to a 'fraud' so as to exclude the operation of the *Statute of Limitations* upon which the Trustee sought to rely to bar the plaintiff's action [pp. 11–16].

- In ***Flegeltaub*** [2000], Byrne J said that it was 'clear' that a trustee is not bound by the rules of natural justice—citing ***Karger v Paul*** and ***Pope v Lawler***. However, 'the circumstances of the case may demand, as a matter of fairness, that, on a particular matter, the position of the applicant be sought so that a proper decision can be made'—citing ***Maciejewski*** and ***Karger v Paul***. This, he said, may arise because there is an 'apparently adverse matter of fact' which needs to be explained by the applicant; or, it may involve a disclosure of adverse material to the applicant or his/her representative—citing ***Maciejewski*** and ***Minehan***. It may also require, as in the present case, that the trustee to invite the applicant to bring forward material upon a particular matter and disclosure to the applicant of the potential difficulty in the way of his/her application—[para 18]. Failure of the trustee to address these matters may lead to the conclusion that there is a lack of genuine

consideration and a lack of good faith in the decision-making process—citing ***Karger v Paul.***

Note also that Byrne J criticised the fact that the Trustee failed to advise the applicant of the 'precise nature' of the obstacle which her application was facing. This meant, he said, that she was 'unable to make any meaningful response'. It also meant that the trustee decision was not made with the benefit of her input on the question of her refusal to take medication and her reasons for this—[para 38].

- Insurers: In ***Beverley v Tyndall Life Insurance Co Ltd*** [1999] WASCA 198 (Full Court—Malcolm CJ, Ipp and Anderson JJ), Malcolm CJ said:

> [I]n my opinion, the insurer was bound to disclose the contents of the medical opinions it had obtained and, in particular, those which had been given by doctors to whom copies of the opinions obtained by the appellant had been provided. ... [A]ny duty of the respondent to disclose to the insured any medical reports obtained by it in connection with its consideration of the appellant's claim cannot be based on any mutual duty of disclosure as such. The duty must be an aspect of the mutual obligations of good faith. This requires the implication of a term in the contract of insurance to the effect that the mutual obligation of good fairh required that the appellant be given an opportunity to respond to any adverse medical reports obtained by the respondent in the context of the consideration by the respondent of the appellant's claim under the policy, which was itself supported by medical reports. Recognition that the duty of good faith required the respondent as insurer to act fairly and reasonably in the consideration of the appellant's claim would seem to require both disclosure of the medical reports obtained by the insurer and an opportunity being given to the appellant to answer them as suggested by Hodgson J in *Chammas* [citation omitted] and by Bryson J in *Wyllie* [citation omitted].[paras 6 & 12]

Ipp J essentially agreed [para 95]. Anderson J did not express an opinion, but commented that he did not think that the rules of natural justice per se have a role to play and that the obligations of the parties are governed by the *Insurance Contract Act* 1984 (Cth) and by the rules relating to the construction of such contracts. Accord ***Szuster v HEST Australia Ltd*** (6 March 2000, D/Ct of SA).

3.4 Trustee has a Duty to Exercise its Discretion:

- In ***Minehan***, the Supreme Court of the ACT held that the trustee abrogated its duty in so far as it had not exercised its discretion 'upon a real and genuine consideration of all the evidence' because it merely accepted the opinion of the insurance company that the member was not TPD. A like decision was reached by the Industrial Court of New South Wales in the case of ***Fernance v. Wreckair & Co Pty Ltd*** (21 September 1992)—Industrial Court of NSW. The Court found that the trustee had abdicated its duty and functions and failed to exercise its discretion upon real and genuine considerations. See also ***Beverley v Tyndall.***

Sometimes, the trust deed will provide that benefits are payable only if the insurer has determined that the member falls within the relevant definition of TPD. In such cases, the trustee can be under no liability to the member unless the insurer has made such a decision. If the member does not challenge the validity or effectiveness of the insurer's decision, a claim against the trustee must fail—***De Britt v. Frew*** (1992) 7 ANZIC 77, 716. Any attempt to then join the insurer may

be subject to a limitation defence (6 years)—***Kovacevic v. Tycan Aust Pty Ltd*** (unreported 25 June 1991)—Supreme Court of NSW re insurers.

3.5 'Subjective' Discretion of Trustees:

- In ***Minehan***, the Court noted that it was 'common' for trust deeds to leave 'significant decisions' to be determined according to the subjective discretion (as cf. according to the objective facts) of the trustee. Such decisions were amenable to only very limited review by the courts; especially where, as in ***Minehan***, the trust deed also stated that the trustee's discretion was to be absolute and uncontrolled. The Court was highly critical of such arrangements and stressed that 'the expectation' was 'that the exercise of the power will be honest and reasonable.' See also the cases of ***De Britt***, ***Edwards***, ***Dillon*** and ***Vidovic***.

- In ***Flegeltaub*** [2000], Byrne J stated that it may have been concerns and considerations such as those raised in the above cases 'which led to the passing of the *Superannution (Resolution of Complaints) Act* 1993 (Cth) and the establishment ... of the Superannuation Complaints Tribunal which may review decisions of trustees on the ground that they are unfair or unreasonable.' [para 17].

3.6 'Subjective' Discretion of Insurers:

- In ***Edwards v the Hunter Valley Co Op Dairy Co Ltd*** (1992) 7 ANZ Insurance Cases [61-113], p 10. According to McLelland J, where, under a contract, rights or liabilities depend upon the subjective state of mind of a party, eg the party's approval, opinion or satisfaction, of or about something, it can be a difficult question whether the party is subject to an implied obligation in reaching that state of mind, or failing reach it, as the case may be, to be bound by objective standards of reasonableness. However, he goes on to say that 'in the field of insurance, it is well established that where under a contract of insurance an element of the insurer's liability is expressed in terms of the satisfaction or opinion of the insurer, the insurer is obliged to act reasonably in considering and determining that matter—eg: ***Moore v Woolsey*** (1854) 119 ER 93.

- According to the Full Court in ***Beverley v Tyndall***, s.13 *Insurance Contracts Act* 1984 (Cth) requires that the insurer act with the utmost good faith in the assessment and determination of the applicant's TPD claim. Section 13 provides that:

> *A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.*

The Court went on to say that one reason why an insurer must act with the utmost good faith in such a situation is because 'in the assessment of a claim under a policy the insurer is in a very real sense acting as a judge in the insurer's own cause. In these circumstances the duty of good faith must extend to a duty to act fairly and reasonably in the assessment and determination of the question whether

the insured has made out a claim under the policy which the insurer is bound to indemnify.

3.7 Nature of Trustee Discretion & TPD:

- In ***Flegeltaub*** [2000], Byrne J approved, in principle, the argument that the determination of the trustee to allow or disallow a TPD claim was not a 'true' exercise of discretion—citing ***Dundee*** [p.903];and ***Rapa*** [p.14]. According to his Honour, as a matter of logic, it could not be said that the forming of such an opinion, the trustee was 'at large'; nor could it be said that the trustee was exercising an 'absolute and uncontrolled discretion' within the meaning of cl. 1.4.1 of the deed. He said:

> The trustee is not entitled to make the decision perversely, arbitrarily, capriciously, wantonly, irresponsibly, mischievously or on some basis which is irrelevant to the sensible expectation of the settlor. The duty of the trustee is, plainly, to make a decision on the correct question or questions and to do so in good faith and upon a real and genuine consideration of the material. The function of the trustee in the present case, in accordance with the terms of the trust deed, is to apply the facts as it finds them to a given standard: the specified incapacity for work. If the trustee's state of mind is such that the application of these facts to the standard produces the result that it has formed the opinion that the applicant for benefits satisfies that part of the definition, the trustee must pay the benefit. [footnotes omitted] [para 55]

His Honour then contrasted this sort of discretion with that involved in the investing of the trust fund; or from the decision of a trustee under a non-superannuation trust to pay the fund to a beneficiary; or to a selected member of a class of potential beneficiaries—[para 55].

3.8 Nature of Medical Evidence:

- The medical evidence upon which trustees rely must be of a nature to enable the trustee to determine whether or not the person is TPD. In the case of ***Maciejewski***, the material considered by the trustee had been gathered for workers' compensation purposes. As such, the material was directed towards whether or not the plaintiff had suffered the kind of accident which qualified her for compensation. It did not (except incidentally) go towards whether or not the plaintiff was fit for work in the future (ie. one of the elements of establishing whether or not the plaintiff was TPD within the relevant definition). Consequently, the court found that the nature of the medical evidence considered by the trustee was inadequate (and may even have been misleading to some degree) to enable the trustee to fairly and adequately determine the TPD question. See also ***Gomes v. Austchem Nominees Pty Ltd*** (1993) 7 ANZIC 61-159.

- The medical reports upon which the trustee relies must lie within the area of expertise of the medical practitioner who provides them—Young J in ***Maciejewski***.

- The trustee must not act upon medical reports which are expressed to be preliminary or subject to the outcome of further tests or treatment— ***Vidovic***. Consequently, the trustee should allow sufficient time for the member's medical

condition to stabilise. If there is evidence that the member's condition is likely to improve in the future, the trustee can consider this in deciding whether or not the member's disablement is permanent— ***Wiley v. Board of Trustees, State Public Sector Superannuation Scheme*** (3 April 1997 2327/96, BC9701020)—Supreme Court of Qld.

3.9 Trustee's Obligations to Obtain Information / Fresh Evidence:

- In ***Maciejewski***, the plaintiff was invited by the Trustee to put forward further information. The plaintiff did not do so and the Trustee went ahead and made its determination. The Trustee's solicitor argued that it was no part of the Trustee's job to actually go out and find material, it just had to assess the material on what it had before it. This argument was rejected by Young J, who said:

> I can see no bases for that submission. Very often if a trustee and its officers have acted fairly and conscientiously they will have ensured that sufficient material is before them, so that they can make a decision. However, it is just a complete "cop out" to act on material which ... is inadequate, and then say that the plaintiff has not supplied sufficient material. If the plaintiff has not supplied sufficient material then, if that is necessary to make a proper decision, it has to be obtained somehow or other. One cannot merely dismiss the plaintiff's claim out of hand.

- Conversely, in the case of ***Tonkin v. Western Mining Corp Ltd*** (BC981346, unreported—20 April 1998)—S/Ct of WA (Full Court—Malcolm CJ, Pidgeon and Franklyn JJ) the Court said:

> There is no obligation on the trustee, on an application for the TPD benefit supported by evidence inadequate to give rise to the necessary opinion, to seek out, on its own initiative, evidence for its consideration and so strain to obtain evidence relevant to the formation of the necessary opinion, thereby attempting to bring within the definition a member not otherwise within its terms. [p.24]

Accord ***Bannister v The National Mutual Life Association of Australia Ltd and the State Fire Commission*** (unreported—BC9000033, 9 October 1990, S/Ct Tas) per Zeeman J [p.17]; and ***Flegeltaub*** [2000] wherein Byrne J stated, in passing and without finding it necessary to express a final view on the matter, that there was 'no general obligation' upon the trustee to search out evidence; although, an 'honest and fair examination' was required and this may involve seeking further evidence or information.—[para 41].

- Note, also, that if the plaintiff, 'from time to time', requests the trustee to consider further relevant medical evidence, the trustee is 'bound' to do so because of the fiduciary nature of the trustee's obligations—***Tonkin*** (Full Court) [p. 25] (discussed further below at 3.11)

3.10 Consideration of Medical Evidence:

- ***Bednarczyk v. Natcorp Investments Ltd*** (23 July 1997 970363, BC9703308) —Supreme Court of WA (Full Court); was a worker's compensation case

concerning the refusal of a Review Officer to consider certain medical evidence because the claim was made some twenty years after the accident and the Officer therefore considered the evidence to be 'unreliable'. The Full Court of the Supreme Court of WA held that the Officer erred (1) in finding unidentified prejudice in the mere fact that there was delay in making the claim when that hypothesis was unsupported by evidence and not subject to cross-examination; and (2) by refusing to consider the medical evidence.

- If the trustees obtain detailed medical reports which express a different view from those obtained by the member which are not so detailed, the trustees have a duty to advise the member to obtain a correspondingly detailed report for comparative reasons—***Chammas***.

- In ***Campbell*** [2000] [paras 9, 34], the Full Court intimated that the Tribunal could not find an insurer decision to be unfair or unreasonable because the Tribunal 'merely preferred one body of evidence over another.' In this case, the Court found that the Tribunal had not 'merely preferred' one medical report over another, but had turned its mind to the nature of the illness (post-traumatic stress disorder), and the weight accorded to the respective independent and treating doctor's medical reports by the insurer.

3.11 Reconsideration of Medical Evidence:

- In ***Tonkin*** (Full Court), it was held that a trustee is 'bound' to reconsider a TPD claim where the member submits new or further evidence in support of his/her claim unless a relevant limitation period applies either under the relevant deed or pursuant to statutory limitation. This decision appears to mean that trustees may well be open to TPD claims *ad infinitum*.

  Note, however, that the TPD time limitation provisions contained in sub-ss.14(6A)–(6D) of the SRC Act (and their equivalents) limit the Tribunal's jurisdiction to deal with TPD complaints as set out therein.

3.12 The Relevance of Previous Injuries:

- In the case of ***Ruiz v Canberra Rex Hotel P/L*** 5 ACTR 1, 28 November 1974 (a worker's compensation case), the plaintiff had previously suffered a back injury which prevented him from sitting for prolonged periods. The plaintiff was, however, still capable of undertaking heavy manual work in his current job. After his second accident, the plaintiff was no longer able to engage in heavy work. It was argued that had it not been for the previous accident, the plaintiff would not now be TPD; ie. the first accident had reduced his range of possible employment so that he was unable to engage in light duties (such as clerical work) which required prolonged sitting. This argument was rejected by Woodward J, who said that the obligation to compensate could not be avoided by showing that the plaintiff might have engaged in lighter duties had it not been for a previous injury. The case of ***Paterson v. Paterson*** (1953) 89 CLR 212 was applied; and, the cases

of ***Astill v. Orange Blue Metal Pty Ltd*** [1969] WCR (NSW) 39; ***Beaton v. Yips*** [1966] WCR (NSW) 78; ***Bratovich v. Rheem (Aust) Pty Ltd*** 2 SASR 33; ***Dolso v. Pedy Concrete Pty Ltd*** [1971] WCR (NSW) 51; and ***Hill v. Brewer ford Motors Pty Ltd*** [1969] WCR (NSW) considered.

3.13 'Retirement' and TPD:

- In ***Giannoulis v Email Superannuation P/L (as Trustee of 'Email Retirement Fund')*** (unreported—BC9002453, 11 May 1990, NSW C/A, Full Court—Kirby P, Meagher and Handley JAA). In this case, the plaintiff suffered a 'bad accident' at work in 1984. He was dismissed in early 1985 on the grounds that he was 'unable to satisfactorily fulfil his duties'. The plaintiff was paid superannuation under r.7—ie. for leaving in circumstances *other* than retirement on the 'Normal Retirement Date', death, or retirement due to TPD. The plaintiff claimed that he had retired due to TPD. The term 'retirement' was not defined in the Deed. The Trial Judge rejected this claim at first instance on the grounds that 'retirement' necessarily involved a 'voluntary' act; therefore, as the plaintiff had not voluntarily left service he held that the plaintiff had not so retired. On appeal, Meagher JA (with whom Kirby P and Handley JA agreed) discussed the meaning of 'retirement' in normal parlance—'Sir Robert Menzies did retire from the office of Prime Minister, Mr Whitlam did not.' However, in the context of the Deed, his Honour decided that there was nothing voluntary about the concept of retirement—eg: no one 'decided' to grow old and retire on the 'Normal Retirement Date'—it just happened. Consequently, he held that 'retirement' in the context of the Deed simply meant to 'cease employment' and so could incorporate the notion of 'retiring' because of TPD. The appeal was allowed.

3.14 Reasons:

- The proposition that trustees are not obliged to give reasons for their decisions as stated in ***Karger v Paul*** and ***Re Londonderry's Settlement*** [1965] Ch 918 has been consistently approved and followed by the courts—eg: ***Flegeltaub*** (both at first instance and on appeal). However, if a trustee does not give reasons for its decision, the courts may take the view that perhaps it had no good reasons—***Maciejewski*** per Young J. If trustees do provide reasons for their decision, this amounts to a waiver of their immunity and their reasons may be looked at by the courts. As to what amounts to the giving of reasons, see ***Meat Industry Employees Superannuation Fund P/L v Petrucelli*** (unreported—28 February 1992, S/Ct of Vic) per Nathan J.

  The Tribunal's approach to the giving or withholding of reasons accords with the above.

3.15 TPD is not an 'abstract' concept:

- In ***Dillon v. Burns Philp Finance Ltd*** (unreported 20 July 1988)—Supreme Court of NSW, the Supreme Court of New South Wales, per Bryson J, held that the

definition of TPD was 'not an abstract concept but is related to the social and other circumstances in which the work is to be performed.' It was also stressed that the particular definition must be applied; any factors which lay outside the definition were 'irrelevant'. For example, in ***Dillon***, the definition of TPD required only that the plaintiff was unable to perform the particular duties he was performing at the time of his resignation. Consequently, it was irrelevant that there was a possibility that the plaintiff could have been offered work in another area of the company; or that the plaintiff, after resigning, worked successfully for another employer.

- Each aspect of the TPD definition must be considered by the decision-maker; no limitation may be ignored—***Edwards***. The trustee must also consider the right question— ***Neskovski v. Rogers*** (12 May 1995 5466/90)—Supreme Court of NSW; eg: does the member suffer from 'TPD' or from 'disablement'.

4 Specific Factors and Issues in TPD Definitions

4.1 "unlikely ever to work again / ever to engage in ...":

TPD definitions routinely require the decision-maker to assess whether or not the member will ever again be able to work for reward, or engage in any gainful occupation. In line with the approach of the courts (noted below), the Tribunal applies the civil standard—'on the balance of probabilities'—in such cases (eg: D99–2000/025—wherein submissions by the trustee and insurer that the test was 'absolute certainty' was rejected by the Tribunal).

- In ***Herbohn v NZI Life Ltd*** (unreported—BC9802534, 12 June 1998 S/Ct Qld), Lee J applied the 'common sense' test referred to by the High Court in ***March v E & MH Stramare P/L*** (1990–91) 171 CLR 506—ie. that the outcome should be decided 'as a matter of ordinary common sense and experience' [para 6] as to what 'was likely to happen' [para 28]—ie. upon 'the 'balance of probabilities'.

- In ***White v. Board of Trustees, State Public Sector Superannuation Scheme*** [1997] 2 Qd R 659, White J held that the trustee must apply the ordinary meaning of the word 'unlikely'; ie. there is 'no real chance' or it is 'improbable' that the member will work again. He said, citing ***Robertson v French*** (1803) 102 ER 779, 781:

> It is a fundamental canon of interpretation that words in a Deed should be construed in their plain, ordinary and popular sense unless by usage or context some other approach is called for.

White J went on to consider the meanings given to 'unlikely' in the Oxford English Dictionary—ie.—'not likely to occur or come to pass; improbable in respect of an occurrence; improbably.' Conversely, he said that the meaning given to 'likely' and 'likelihood' refer to probable or probability. His Honour went on the consider the effect of the word 'ever' upon the definition. He thought that:

> ... 'ever' ... allows the Board to look well into the future but does not, in my view affect the degree of unlikelihood to which regard must be had

His Honour concluded that 'unlikely' did *not* mean a remote possibility that the member would ever work again.

- In ***Wiley v The Board of Trustees, State Public Sector Superannuation Scheme*** (unreported—BC9701020, 3 April 1997, S/Ct Qld) White J cited the test in ***Chan v MIEA*** (1989) 169 CLR 379, 389 (HCA) per Mason J as meaning 'no real chance' and 'improbable'.

- In ***Ivkovic v Australian Casualty & Life Ltd*** [1994] 10 SR (WA) 325, 351, (Commercial Tribunal of NSW), the words '... is unlikely ever to be able to follow his usual occupation and any other occupation for which he could be reasonably considered qualified by education, training or experience' was held to constitute a much lower test than if the person had to show that he was 'incapable' of following his usual occupation, etc.

- In ***Riley v. National Mutual Life Association of Australia*** (1986) 4 ANZIC 60-684 Cosgrove J said that the definition 'disablement which, in the opinion of the trustee/insurer, renders it unlikely that the member will ever be able to work again in a job for which the member is reasonably qualified by education, training or experience' meant: 'is the incapacity of the plaintiff such as to render it unlikely that he will ever again become a regular member of the work force (ie. available for work and able to work) in any suitable occupation.' Approved in ***Bannister*** [p.4].

- In ***Tonkin*** (first instance), it was argued that the TPD definition in the insurance policy—which contained the words 'unlikely to ever engage in or work for reward in any occupation or work for which he [the member] is reasonably qualified by education, training or experience'—was more generous to the plaintiff than the definition in the supplemental trust deed—'unlikely ever to resume work in or attend to any gainful profession or occupation.'

  Trust Deed: ... means having been absent from employment with the company through an illness or injury for a period of six consecutive months and in the opinion of the company after consideration of the medical evidence having become incapacitated to such an extent as to be unlikely ever to resume work in or attend to any gainful profession or occupation.

  Policy: ... means having been absent from employment with a company through injury or illness for six consecutive months and in the opinion of the Association after consideration of medical evidence having become incapacitated to such an extent as to render the life assured unlikely ever to engage in or work for reward in any occupation or work for which he is reasonably qualified by education, training or experience.

Scott J rejected this argument and took the opposite view (*obiter*), ie. that the insurer definition was the more restrictive. He said:

> In my opinion, there could be cases where a person who was unlikely ever to engage in, or work for reward in any occupation for which he is reasonably qualified by education or experience may, nonetheless, still not be incapacitated to such an extent as to be unlikely ever to resume work in or attend to any gainful profession or occupation.

- In ***Ante Chokolich v The Local Government Superannuation Board*** (unreported—BC9001052, 2 November 1990, S/Ct WA) it was held that '[t]he word "unlikely" should not be read to be "never". Insofar as the ability at any future time to engage in regular remunerative occupation is concerned clearly the legislature intended that the benefit would not be paid to any person who was likely to make a sufficient recovery to be able to return to regular remunerative occupation.'

- In order to establish his/her right to payment under such a definition, the onus is on the plaintiff to provide both medical evidence as to his/her incapacity and evidence as to his education, training or experience—***Tonkin*** per Scott J. See also ***Heitman v Guardian Assurance Co Ltd*** (unreported—BC9201339, 12 Feb 1992) S/Ct of WA [pp.8–9] per Franklyn J. However, according to the Full Court of the Federal Court in ***Tonkin*** (on appeal):

  > ... in a particular case, the evidence of total and permanent disablement may be such that it can properly give rise to the opinion that, whatever might be the assured's education, training or experience, he will be unlikely to ever engage in any occupation or work. In that case, clearly, evidence of education, training or experience is unnecessary. Likewise in respect of incapacity "to such an extent as to be unlikely ever to resume work in or attend to any gainful profession or occupation."

- In ***Flegeltaub*** [2000], Byrne J affirmed that the trustee was required to form an opinion as to the future—as to whether it was unlikely, in the sense of being 'improbable' (citing ***White***) that the applicant would ever engage in the specified work. The trustee argued that the applicant's incapacity was not permanent in the sense that two of the medicos were of the view that if she took 'psychotropic medication' she had a good prospect of improvement to the point that she might work again. The applicant argued that this was irrelevant. Apparently, all the doctors were agreed that she was presently unable to work and so long as she took no medication, the condition would continue indefinitely. The applicant was adamant that she would not take the medication because she was afraid of becoming drug-dependent; consequently, her counsel argued that as there was nothing before the trustee to suggest she would change her mind, she was, according to the literal meaning of the definition, TPD.

4.1.1 Refusal to accept medication/surgery to alleviate the incapacity:

- In ***Dragojlovic v The Director-General of Social Security*** (1984) 1 FCR 301, Smithers J stated that the question ought to be resolved on the basis that a person will be found to be permanently incapacitated where the incapacity is such that it can only be relieved by an 'objectively reasonable' treatment which the person genuinely is unable to undergo—eg: because of religious beliefs, fear, or some other genuine grounds which it would not be reasonable to expect the person to overcome. [p.305].

- In ***Flegeltaub*** [2000], Byrne J applied Smithers J's test in ***Dragojlovic*** in the context of the particular definition of TPD in the Deed. The Deed contained a proviso which stated that TPD did not include disablement which the Trustee considered to be attributable to deliberate action or inaction by any person for the

purpose of causing a benefit to be paid or continued; this was expressed to include 'an unreasonable refusal to submit to treatment.' Byrne J stated that the trustee must, on the material before it, form an opinion whether the member was unreasonably refusing medical treatment and that this refusal was done deliberately for the purpose of obtaining or continuing to receive benefits under the scheme. It was not enough that an entitlement to benefits arises as an incidental consequence of the unreasonable refusal. [para 25]. According to Byrne J, upon the evidence, it was not possible for the Trustee to rationally conclude that the applicant was unreasonably refusing medication deliberately for the reason of obtaining TPD benefits—[paras 44–5, 72].

4.2 "work for reward" / "gainful occupation":

TPD definitions usually require the decision-maker to assess whether or not the member will ever again be able to 'work for reward' or engage in 'gainful occupation'.

- In ***Re Hastings and Secretary, Department of Social Security***, (1987) 14 ALD 181 (AAT), it was held that 'gainful employment' meant employment that was 'productive of gain or profit.'

- However, employment need not be profitable or lucrative in order to qualify as 'gainful'. Thus, 'provision to a person of a small amount of money or payment in a non-monetary form, such as food, could suffice to render employment 'gainful'. There must, however, be a relationship of employment in existence between the person and the person or organisation providing the payment—***Re Isles v Decretary, Department of Social Security*** (1988) 15 ALD 522; ***Re JB Griffiths, Quinn & Co*** (1968) 5 KIR 128; ***Vandyk v Minister of Pensions and National Insurance*** [1955] 1 QB 29; ***Benjamin v Minister of Pensions and National Insurance*** [1960] 2 QB 519.

4.3 Occupation—Full-time or Part-time:

Capacity to engage in any 'work' or 'occupation', usually implies a capacity to engage in full-time work—***Re Mann v Director-General of Social Services*** (1982) 4 ALN N146 (note, however, that this was a social security case involving the construction of the *Social Security Act*). However, where the definition refers to the person's 'usual' occupation, arguably, whether or not the person was employed full-time or part-time prior to the disablement will be relevant in deciding whether or not that person is TPD—S Mackenzie, 'Disability Insurance' (Superannuation Conference 1999)

- In ***Chammas***, the definition stated, *inter alia*, that a person was TPD if s/he was 'incapacitated from further employment'. According to Hodgson J, 'the relevant employment is full-time employment'—[p13]. See also ***Szuster v HEST***.

- The question of when a 'casual' employee is regarded as a 'full-time' employee for TPD purposes was dealt with in ***HEST Australia Ltd v McInerney*** [1998]

SASC (11 August 1998) (Full Court of S/Ct SA—Doyle CJ, Prior and Olsson JJ). In this case, the deed provided that only 'full-time' employees were eligible for TPD benefits. The fund argued that an employee could only be full-time if the employer-employee relationship was such that the employee could demand at least 30 hours of work per week from the employer which, as a 'casual' was not open to the plaintiff. The Court, however, found that the definition of 'full-time' employee was ambiguous and could be construed so as to apply to the plaintiff. (Note: Because this decision turns on the particular provisions of the Deed, it is of limited value and should be regarded with caution.)

4.3.1 'Normal duties of occupation':

- In the case of ***Zollo v. National Australia Bank Ltd (No. 2)*** (21 March 1997 S6060, BC9700858)—Supreme Court of SA (Full Court), the plaintiff was required, under the policy of insurance, to show that he was unable to carry out the normal duties of his occupation. He was, in fact, still able to carry out managerial work which was a significant part of his normal duties. ***Edwards, Australian Casualty Co Ltd v. Federico***(1986) 160 CLR 513, ***Zollo v. National Australia Bank Ltd*** [1997] ACL Rep (Iss 2) 110 SA 1 applied; ***R v. Fairclough*** [1996] ACL Rep 130 SA 216 distinguished

4.4 "reasonably qualified" / "reasonably suited" ... :

When deciding whether or not a person will ever again be able to engage in paid work for which s/he is 'reasonably qualified' or 'reasonably suited' in terms of his/her education, training or experience, the courts have made the following comments:

- In ***Chammas***, Hodgson J held that 'the reasonable qualification' meant employment which is reasonably open to the member. That is, 'employment which the member is capable of undertaking, having regard to his education, experience and training, or at least employment which he could become capable of undertaking with further training which it would be reasonable for him to undertake.' His Honour also held that, on the words of the definition (ie. incapacity 'from' further employment, not 'for' employment) 'the actual availability of employment and the question of the likelihood of obtaining employment is relevant.'—[pp.12–13].

- The Court also looked at the words 'a job for which the member is reasonably qualified by education, training or experience' in ***Fernance***. The Court held that the time at which the criteria is to determined is 'at the time of the assessment, not after retraining ... [t]he definition does not admit ... qualifications by education, training or experience which the member may or may not be able to obtain in the future.' [***Fernance*** at 57]. If, however, retraining was carried out before the time when the decision as to whether the member is permanently disabled is required to be made, then the member's qualifications after the training could be taken into account.

[NB: According to Noel Davis' 'Total and Permanent Disablement Claims' paper [p.5] the 'safer course' is the view held in ***Fernance*** and ***White***.]

- In ***Cavill Power Products P/L v Royle*** [1992] 42 IR 229, (Full Court of the S/Ct of SA) the insured's training was as a diesel mechanic. After injuring his knee he was totally unable to work as a diesel mechanic and was unsuccessful at performing a clerical job which had been found for him within the company. According to Matheson J, the insured was 'not "reasonably qualified" for any other occupation. He was 'fit' enough for clerical work, but 'not relevantly qualified for it.' In view of the insured's age and disabilities, even though Matheson J thought that there might be 'some light duties' the insured could perform, he did not think that he should, for that reason, be excluded from receiving his TPD benefit.

- In ***Ante Chokolich***, the Court found that a labourer who spoke little English was TPD. His back injuries prevented him from continuing as a labourer. His experience and training were confined to labouring jobs and he was unsuitable for retraining elsewhere.

- In ***Wiley***, White J stated that the kind of job the applicant is likely in the future to work at is limited by the words 'is reasonably qualified by education training or experience.'—citing ***Dufty v City Mutual General Insurance Ltd*** (1977) Qd R 94, 96 per Kniepp J. According to his Honour, the 'test' is whether the applicant can be expected to utilise his education, training and experience in the future.

4.4.1 'usual occupation' / 'own occupation':

Sometimes TPD definitions contain the expression **'usual occupation' or 'own occupation'**—ie 'unlikely to ever be able to follow his usual occupation and any other occupation, etc.'—eg: ***Ivkovic***; see also ***Edwards***.

- In ***Ye Hu v Rees & MIEA*** [1997] 160 FCA (4 March 1997), Einfield J found that 'usual occupation' is concerned not with the mere possession of skills nor with the performance of tasks. Rather, the term is necessarily concerned with the application of skills to tasks in an employment environment. The correct approach to be taken required the ascertainment of an applicant's skills and how those skills were applied in the workplace for remuneration. *Ye Hu* was appealed to the Full Court of the Federal Court—***MIMA v Ye Hu*** 47 ALD 513 (Von Doussa, Moore and Sackville JJ). The Court upheld Einfeld J's conclusion and found that the decision-maker had erred by interpreting 'usual occupation' as requiring attention to be focussed exclusively on the tasks performed by the applicant during one particular period of employment. Properly construed, the definition required the decision-maker to take into account not merely those tasks, but the applicant's training, qualifications and work experience, although, they said, the significance of these matters will depend upon the circumstances of the individual case.

- ***Herbohn***, involved a TPD claim by a psychiatrist (Dr B) who was suffering from tinnitus. The claim was refused on the grounds that Dr B was still able to engage

in 'any other occupation for which he [was] fitted by knowledge and ability'—eg: in this case, share investments, farming and property transactions; teaching, research, administration and a courier. Lee J considered these alternatives. He dismissed share investing as 'no more than a distraction, and an attempt to generate interest and cannot be regarded as an occupation' Likewise, Lee J found that farming and property transactions were no more than 'recreational hobbies' in which Dr B, in any case, lacked experience or training. The courier job was unsuitable because Dr B was unreliable and an alcoholic; and his other attempts to achieve—studies, writing, editing, computing, etc—had all been unsuccessful. On balance, Lee J found that Dr B was TPD.

- In ***Morais v MILGEA*** (FCA unreported—17 February 1995 54/95)—migration case—Kiefel J said 'usual occupation' was clearly not just any undertaking, pursuit or activity which occupies one's time, but one which has been pursued in the context of employment. It did not cover 'work-related experience only'. Her Honour said:

> An essential feature of such an occupation is the receipt of income or other form of reward, something given or acquired in exchange for the provision of skills or services. A person's occupation would, I consider, ordinarily be understood to refer to that employment, trade or business in which that person is habitually engaged and by which that person earns a livelihood or receives some form of remuneration.

- In ***Alessi v National Mutual Life Association of Australasia Ltd*** (1982) 2 ANZ Insurance Cases 77, 723, the insured was a roofing carpenter. The TPD definition was couched in terms of a disability preventing him from 'engaging in his occupation or any similar occupation'. According to Wickham J, this clause did not apply 'to any ability to do any kind of work at anything' but related to the insured being prevented from carrying on any occupation generally related to that of a carpenter. In terms of training and abilities, Wickham J took this to mean those abilities which the insured could, 'with reasonable diligence acquire.'

- In ***Wyllie v National Mutual Life Association of Australasia Ltd*** (unreported—BC9703063, 18 April 1997, S/Ct NSW) the member was an accountant who suffered a stroke. The TPD definition required that the claimant show that he was 'unlikely ever to engage in ... any occupation or work ... etc.'. The Insurer rejected the claim. According to Hunter J, the insurer failed to determine the correct question. It considered that the expression 'reasonably qualified by education, training or experience' as capable of referring to an occupation or work for which Mr W was over-qualified. It did not consider the actual likelihood of Mr W gaining employment in any occupation or work of the kind that he was reasonably qualified to obtain. [p.15]

4.4.2 'suitable' employment:

- In ***Re Jorgensen and Comcare*** (AAT, A94/195, 9 August 1995), Senior Member Allen held that 'suitable employment' is a question of fact in each case, having regard not only to the physical condition of the applicant, but also to the nature and character of occupation prior to the accident and the work which is offered after the accident. According to the Senior Member, the work should be 'substantially

equivalent to the employment that it replaces. The mere payment of the same level of remuneration does not render the employment suitable.'—applying ***Taylor v Kent County Council*** (1969) 2 QB 560. In this case, the employer found the applicant alternative employment that required the applicant to work 21 hours per week instead of 18 hours. In the circumstances, the Senior Member held that a variation of 3 hours did not render the alternative employment unsuitable.

4.4.3 Inability to obtain or retain suitable employment:

- The Supreme Court of NSW held that the 'person does not need to show that[s/he] has been unable to obtain or retain suitable employment. All that is required is a substantial handicap in obtaining or keeping employment or from undertaking work on their own account in areas of employment which would otherwise be suitable.'— ***American Home Assurance Co v. Whitfield*** (18 August 1997 40591/96, BC9706873)—Supreme Court of NSW; Court of Appeal. Case of ***Tillmanns Butcheries Pty Ltd v. Australian Meat Industry Employees Union*** (1979) 27 ALR 367 applied.

4.5 Economic & Non-Medical Considerations:

Most importantly, the courts have consistently held that decision-makers should consider all the circumstances when determining whether or not a person is TPD. Assessment of medical evidence alone is not enough. The Tribunal also adopts this approach in relation to the determination of TPD complaints and takes account of work capability and work availability as well as medical reports.

- In ***Muinos v. Johnson and Johnson Retirement Benefits Ltd*** (BC9605916 unreported, 5 December 1996)—Supreme Court of NSW, McLelland CJ made it clear that it is not enough for the trustee to simply examine the medical evidence and accept the doctors' assessments (via the insurer) that although the member is unable to return to his/her own former occupation, s/he may in a purely medical sense, be able to return to some limited sort of paid work. The trustees must consider the member's particular circumstances and actual job prospects in the real world and make their determination upon that basis. McLelland CJ said:

  > In my opinion the committee's consideration of the matter culminating in its decision to decline the plaintiff's claim was vitiated by its concentration on the medical evidence to the apparent exclusion of any, or certainly any adequate, attention being paid to the question of whether the plaintiff's education, training or experience rendered him reasonably suitable for any occupation of the kind for which he was fit in a medical sense, or the reasonable availability of any such occupation for such a person as the plaintiff.'

- Likewise, in ***Chammas***, Hodgson J said:

  > the actual availability of employment and the question of the likelihood of obtaining employment is relevant ... the directors treated the matter essentially as a contest between doctors. There is no suggestion that they independently considered the question of whether the plaintiff's complaints, to the effect that he could not do the job, were or were not genuine.

- A person may be only 'partially' physically disabled, but because there is no available work that he is capable of undertaking, he may be deemed to be 'totally' incapacitated. In the case of ***Ruiz v. Canberra Rex Hotel Pty Ltd*** 5 ACTR 1 (28 November 1974)—Supreme Court of the ACT, the medical evidence suggested that the plaintiff was fit to undertake very limited light work (he could not sit for prolonged periods) such as a gatekeeper, caretaker or watchman. However, the plaintiff had been unable to find such work because prospective employers considered that he was a 'poor risk'. Thus, he was 'in reality, totally incapacitated'; essentially, although he had a 'theoretic capacity to obtain and keep a job', his 'actual capacity' to obtain and keep a job was nil.

- The state of the economy is a relevant consideration in reaching such a conclusion. According to Woodward J in ***Ruiz***, 'in a time of 'over-full' employment, employers will engage people whom they would not normally employ.' Conversely, 'in times of significant unemployment, those with disabilities will find the competition for work particularly hard to overcome.' In ***Ruiz***, Woodward J thought it was appropriate to use 'normal employment circumstances' as his criterion. He said: '... the appellant would always find it very difficult, and would normally find it impossible, to secure work.'

- Woodward J in ***Ruiz*** cited the dictum of Kitto J in ***Thompson v. Armstrong & Royse Pty Ltd*** (1950) 81 CLR 585—High Court of Australia as follows:

> ... incapacity for work is an economic and not a physical fact. The relevant economic fact ... is the inability, or the reduced ability, by reason of a physical deficiency, to sell work for wages. ... Thus compensation is awarded, not for loss of wages, nor for impairment of physical condition per se, but for the economic aspect of that impairment, namely a lost or diminished ability to obtain wages by working. [*Thompson* at 621]

- Kitto J in ***Thompson*** cited Lord Loreburn in ***Ball v. William Hunt & Sons Ltd*** [1912] AC 496:

> There is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonable accessible to him. [*Ball* at 499–500]

- Hodgson J in ***Chammas***:

> the actual availability of employment and the question of the likelihood or obtaining employment is relevant.

- The trustee must adopt a realistic approach in deciding what work the member is qualified (physically and otherwise) to perform—***Wiley***. The trustee does not have to show that there is a particular job available to the member; however, the actual availability of employment and the plaintiff's likelihood of obtaining employment may be relevant—***Muinos***.

- In ***Edwards***, McLelland J held that the majority of the committee did not consider the correct question in so far as they did not consider the limitation on 'any other occupation' arising from the words 'for which he ... is qualified by his ... knowledge or training'. In short, they appeared to have considered Mr E's capacity for engaging in an occupation by reference solely to his physical

condition and without regard to his qualification by knowledge or training. In this case Mr E had been employed as a labourer and as a truck driver and his formal education had terminated at the end of second form in high school. [page 12] Accord ***Szuster v HEST***.

4.6 "active employment" / "at work":

As a general rule, a member must be 'at work' or in 'active employment' at all material times in order to be eligible to take out TPD insurance cover. Usually, the material time is the time at which the member completed his/her application for membership, or on the date s/he commenced employment.

- In ***Lykogiannis v Retail Employees Superannuation P/L*** [2000] FCA 327 (23 March 2000), Mansfield J found that a four day period of orientation training constituted being 'at work' in 'active employment'—expressions which were defined in the insurance policy as follows:

  > **"At work"** means: being in active employment or on employer-approved unpaid leave of up to 12 consecutive months except leave which is caused by sickness or injury.
  >
  > **"Active employment"** means: being employed (including being on fully paid leave except leave which is caused by sickness or injury) by an employer to carry out identifiable duties and in our opinion being able to perform those duties on a full time basis. This can include members who are employed on a part time basis for an employer.

  Mansfield J's finding was at variance with the determination of the Tribunal; consequently, the matter was remitted to the Tribunal for re-determination.

- In ***Alagic v Callbar P/L*** [1999] NTSC 90 [para 20] (negligence case), Martin J indicated that 'seasonal' work—in this case seven to nine months of the year—amounted to 'active employment'.

- In ***Higgins v Nankivell*** (unreported—BC9200427, April 1992) (negligence case) a waitress who worked part-time (3–4 nights and 2–3 mornings per week) was said to be in 'active employment'.

- In ***Brehrens v Retirement Benefits Fund Board*** (unreported—21 February 1992 6/92, S/Ct Tas) per Green J it was held that a period as a 'probationary student' prior to becoming a teacher did not amount to 'service'.

4.7 'as a result of ... ':

- Many TPD definitions require that the member's retirement be 'as a result of' his total and permanent disablement. In ***Rapa***, McLelland J considered the meaning of this expression. The Trustee argued that the plaintiff had taken 'early retirement' prior to claiming TPD benefits, thus he had not retired 'as a result of' his disablement. According to McLelland J, the question was whether, in order to come within the definition, 'the retirement must necessarily be preceded by the formation by the trustees of the opinion stipulated in the definition of "Total and Permanent Disablement"'. His Honour decided that it did not [p.9]. He said:

> I do not regard the prior adjudication of the trustees ... as necessary to establish the causal link between Total and Permanent Disablement of the member on the one hand and his retirement on the other, required by the expression "as a result of" in r9. In my opinion it is sufficient if the adjudicatory function of the trustees as to the seriousness and likely consequences of the illness or injury is performed after the retirement takes place.

4.8 Absence from service for six consecutive months ... :

- In ***Rapa***, McLelland J held that 'absence from the service of the Employer through illness or injury' necessarily terminates with the termination of the member's employment for the purposes of the definition.' [p. 10] In his Honour's view, the period of absence was a 'necessary and substantive element in the concept of Total and Permanent Disablement as defined, of which the member's retirement must, according to r.9, be a result.' Consequently, he concluded that it was 'difficult' to see how the period could be treated, for the purpose of the definition, as extending past the date of retirement.

4.9 Establishment of TPD:

- According to Franklyn J in ***Heitman***:

> In my opinion, save where it is unreasonable on the medical evidence provided or obtained to fail or refuse to form the relevant opinion, total and permanent disablement within the meaning of ... the policy definition exists when the conditions prescribed ... exist'

- In ***Heitman***, Franklyn J stated that the insured was TPD 'on the occurrence of [the] two events prescribed, ie: the six months absence from employment and the formation by the insurer of the opinion that the insured was TPD. He continued:

> If after a consideration of medical evidence, the relevant opinion is not formed and on an objective view of that evidence the failure or refusal to form the same is not unreasonable, then for the purposes of the policy the insured has not established total and permanent disablement, even if, as a matter of fact, he was then disabled to the extent identified in the definition and whether or not other medical evidence then existed or subsequently came into existence to show that he was, as a matter of fact, relevantly incapacitated.

- This formula was also applied by Scott J in ***Tonkin*** (first instance), and approved by the Full Court of the FCA in ***Tonkin*** (on appeal). However, note also ***Capponi v National Mutual Life Association of Australasia Ltd*** (unreported—12 September 1988, S/Ct WA), wherein Keall J said that his understanding of Franklyn J's comments in ***Tonkin*** was that the Court should 'primarily or principally' look at the evidence that was before the decision-maker; however, it could also have regard to certain events that had occurred subsequently, thereby taking a similar approach to that taken by the courts in personal injury cases where claims were judged on the available material 'rather than indulging in conjecture.'

- In ***Maciejewski v Telstra Super P/L*** [1999] NSWSC 341 (the second part of the proceedings), Windeyer J considered the date at which TPD must be established—ie. as at the date the member ceased work; or, as at the date the Trustee made its

decision. Counsel for the plaintiff argued that it was the latter; counsel for the defendant argued for the former but said that what happened subsequently was relevant and ought to be taken into account. Windeyer J decided that the relevant date was the date that the member ceased work.

- In ***Bannister***, the TPD definition was expressed to apply 'in relation to a Member'. 'Member' was defined in the Deed as including a 'former' Member. According to Zeeman J, the plaintiff's case proceeded upon the basis that once his absence from employment had been established through injury of illness for six consecutive months, he became entitled to a TPD benefit upon satisfying the balance of the requirements of the definition no matter when that six month period might have occurred. Zeeman J, however, held that the permanent incapacity was required to arise whilst the employee remained an actual member of the scheme. The reference to 'former' Members, he said, ought to be construed as being limited to cases where the facts giving rise to the benefit had arisen whilst the employee remained a member of the scheme. In short, the plaintiff's entitlement to a TPD benefit ought to be determined by reference to the extent of his incapacity as at the date he ceased employment/membership of the scheme. His Honour was, however, of the view that it was 'proper' to have regard to evidence of events which occurred after that date to the extent that such evidence 'throws light on the plaintiff's condition at the time he ceased to be a member.' On the other hand, he said, if the plaintiff demonstrated no more than that he became incapacitated to the extent referred to in the definition at a time after he ceased to be a member, then he would fall outside the definition. [p. 5]

- In ***Booker v Gumeracha District Soldiers Memorial Hospital*** (unreported—BC9100266, 18 October 1991, Full Ct S/Ct SA—Legoe, Mohr and Bollen JJ), the Deed provided for the payment of a TPD benefit provided that such disablement resulted from 'an illness, accident or injury ... which commenced or occurred while [the employee] was in service and a member [of the scheme].' The Trial Judge rejected the plaintiff's claim on the basis that she suffered from a pre-existing ailment which could not, therefore, be said to have commenced or occurred in service. A majority of the Full Court (Bollen and Mohr JJ) affirmed the Trial Judge's decision—cf. Legoe J's strong dissent.

Note, that, in the exercise of its *de novo* review powers, the Tribunal may take account of all the available evidence to decide whether or not the relevant decision, in its operation, in relation to the complainant (and other specified persons), was fair and reasonable in all the circumstances—sub-s.37(6) of the SRC Act.

4.10 'Illness' / 'Injury' / 'Disease', etc:

- The meaning of the word 'illness' is not susceptible of proof by medical evidence, and a failure to appreciate this has complicated the matter. The word 'illness' is not synonymous with 'disease'. In its primary meaning it refers to a bad moral quality and includes a bad or unhealthy condition of the body—***Burgess v Brownlow*** [1964] NSWLR 1275, 1278, 1279 per Manning J.

- In its widest sense, 'illness' covers all cases of sickness and suffering, even from accidents—***Minister of Marine v Briscoe MacNeil & Co*** (1899) 18 NZLR 722, 724, 25 per Stout CJ.

- 'The terms 'injury' and 'bodily injury' both cover psychiatric conditions—such as a psychological disorder resulting from a physical assault and fire bombing of the plaintiff's premises. Likewise 'nervous shock' causing incapacity to work comes within the notion of injury by accident—***Semaan v The National Insurance Company of New Zealand Ltd*** (unreported—BC8601240, 13 February 1986, S/Ct NSW), 26 per Yeldham J. See also ***Boyle v The Nominal Defendant*** 59 SR (NSW) 413, 418 per Owen J.

- In ***Deeble v Nott*** 65 CLR 104, 113, Williams J (with whom Rich ACJ agreed) stated that, in insurance policies, the terms 'bodily injury', 'personal injury' and 'injury' essentially mean the same thing. According to his Honour, these terms have also been held to include many diseases, including bodily disability resulting from the nervous consequences of an accident.

- In ***O'Neill v Lumbe*** (1987) 11 NSWLR 640, 644, the Full Court of the Supreme Court of NSW(Kirby P, Priestly and Clarke JJA) considered whether an aneurism suffered by the plaintiff on his way to work was an 'injury' or a 'disease', and whether , in any case, the term 'disease' was subsumed within the term 'injury'. As this case dealt with workers' compensation, it is unnecessary to recap much of the argument which is concerned with whether or not the injury/disease was work-related. Importantly, whether or not there is injury/disease was held to be a matter of fact in the particular circumstances, using the common, everyday meaning of those terms [page 646]. Also importantly, the Court held that it is a misuse of precedent to seek to decide a factual issue by reference to previous judicial statements as to the width and meaning of a particular word in a case in which the factual context is completely different to the one under consideration. Thus, it would be erroneous to conclude that because a particular condition has been described in an authoritative decision as a 'disease', any manifestation of that condition, no matter how caused, is necessarily a disease—citing ***Ogden Industries P/L v Lucas*** (1968) 118 CLR 32, 39.

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Examples of Commonly Used TPD Definitions:

- [SIS Regulations—r.6.01(2)—'**"permanent incapacity"**, in relation to a member who has ceased to be gainfully employed, means ill-health (whether physical or mental), where the trustee is reasonably satisfied that the member is unlikely, because of the ill-health, ever again to engage in gainful employment for which the member is reasonably qualified by education, training or experience.'

  '**"gainfully employed"** means employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment'

  '**"full-time"**, in relation to being gainfully employed, means gainfully employed for at least 30 hours each week.'

  '**"part-time"**, in relation to being gainfully employed, means gainfully employed for at least 10 hours, and less than 30 hours, each week.']

- [Eg Insurer Definition:—'**Total and Permanent Disablement**' is defined as:

  (a) [loss of limb(s)/eyesight clause]; or

  (b) in the case of an Insured Person who is engaged in a gainful occupation, business, profession or employment-

  (i) the Insured Person is totally unable to and does not in fact engage in that gainful occupation, business, profession or employment, as a result of an injury or illness for a consecutive period of six (6) months, and

  (ii) after that period of six (6) months, we are of the opinion that, as a result of that injury or illness, the Insured Person is disabled or incapacitated to such an extent as to rended the Insured person likely never to be engaged in any gainful occupation, business, profession nor employment, for which the Insured Person is reasonably suited by training, experience or qualification.]

- [Eg: Insurer Definition—**"Total and Permanent Disablement"** in relation to an insured member means having been continuously absent from employment with the employer through injury or illness throughout the TPD waiting period and in the opinion of National Mutual, after consideration of medical evidence that is satisfactory to National Mutual, having become incapacitated to such an extent as to render the member unlikely ever to engage in or work for reward in any occupation or work for which they are reasonably qualified by education, training or experience ... [deemed TPD is loss limb(s)/eyesight].

  The benefit payable is calculated based on the last day at work.']

- [Eg: Insurer Definition—**"total and permanent disablement"** "In relation to a life assured means having been absent from employment with the company through injury or illness for six consecutive months and in the opinion of the insurer after consideration of medical evidence having become incapacitated to

such an extent as to render the life assured unlikely ever to engage in or work for reward in any occupation or work for which he is reasonably qualified by education, training or experience.'

- [*Superannuation Act* 1976 (Cth)—CSS: Section **54A—'totally and permanently incapacitated'** has the meaning given in section 54B:

  54B For the purposes of this Part a person is totally and permanently incapacitated if, because of a mental or physical condition, it is unlikely that the person will ever be able to work in any employment or hold any office for which the person:

  (a) is reasonably qualified by education, training or experience; or

  (b) could become reasonably qualified after retraining.

Division 2—*Certification by Board*

Eligible employee not to be retired on ground of invalidity without certificate from Board

54C(1) In essence, this subsection states that an eligible employee cannot be retired on the ground of invalidity and receive an invalidity benefit unless so certified in writing by the Board.

- [*Superannuation Act* 1990 (Cth)—Deed: **'totally and permanently incapacitated'**—means that, because of a physical or mental condition, the person is unlikely ever to work again in a job for which he/she:
  - is reasonably qualified by education, training or experience; or
  - could be so qualified after retraining.

- [**Public Sector Trust Deed: 'Total and Permanent Disablement'** means in relation to a Member disablement due to illness or injury as a result of which:

  (a) [limbs/ eyesight clause]

  (b) (i) the Member has been continuously absent from work for a period of not less than six months or such lesser period (if any) as may be agreed between the Corporation and the Trustees from time to time either generally or in any particular case; and

  (ii) the Trustees receive a certificate signed on behalf of the Claims Assessor to the effect that in the opinion of the Claims Assessor the Member is incapacitated to such an extent as to render the Member unlikely ever to engage in regular employment for which the Member is, for the time being, reasonably qualified by reason of education, training or experience.