SUBMISSION TO THE PRODUCTIVITY COMMISSION

REVIEW OF SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1993 AND CERTAIN OTHER SUPERANNUATION LEGISLATION

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1 INTRODUCTION

This submission is made in response to the Productivity Commission's Draft Report dated September 2001. The submission is confined to Chapter 8 of the Draft Report which relates to the Superannuation (Resolution of Complaints) Act 1993 ("the Act").

Maurice Blackburn Cashman is a national law firm with the largest practice in superannuation and insurance acting for consumers in claims and disputes against superannuation funds and insurance companies. We have the largest number of complaints of any Australian law firm before the Superannuation Complaints Tribunal (SCT), the Financial Industry Complaints Service (FICS) and the Insurance Enquiries and Complaints Service (IEC) - as well as before all the major civil courts on the Eastern seaboard.

The partner in charge of the superannuation and insurance department, John Berrill, was the consumer representative on the FICS Panel between 1995 and 2001 and has been actively involved in the consumer movement in consulting with various alternative dispute resolution schemes, industry groups and governments.

It is our strong view that the SCT should be retained in its present form and the Act should not be repealed.

The SCT can certainly be improved but, in our view, replacing the Tribunal with an industry-based alternative dispute resolution scheme would be a regressive step which would adversely impact on access to justice for the consumers of superannuation and insurance products.

In this submission, we will briefly discuss some of the issues raised in the Productivity Commission's Draft Report and make some suggestions for change.

2 ALTERNATIVE DISPUTE RESOLUTION SCHEMES V. COURTS

2.1 Powers of Review

The civil courts have limited powers of review in relation to decisions of superannuation fund trustees.

Most superannuation Trust Deeds give trustees broad discretionary powers and the courts have traditionally been reluctant to interfere with the exercise of trustee discretions. A court will not set aside a trustee's decision simply because it would have reached a different conclusion on the balance of the evidence.

Generally, a civil court will only review a trustee's exercise of a discretion if the trustee:

- Acted in bad faith.
- Acted for an improper purpose.
- Failed to give real and genuine consideration to the exercise of the discretion.

- Gave reasons for a decision and those reasons were not sound.
- No reasonable trustee would have acted in the same manner or made the same decision[1].

In contrast, under the Act the SCT has the power to set aside, vary or order a reconsideration of decisions which are unfair or unreasonable[2].

The Tribunal's broader powers of review have opened up trustees decisions to scrutiny and have made trustees much more accountable to their members and beneficiaries.

Since the mid 1990s there has been a dramatic sea change in the conduct of the trustees and their insurers and this is due in large part to the existence of the SCT.

Whilst it could be said that FICS, the IEC and other industry-based alternative dispute resolution schemes have also had an impact on their respective industries, in our opinion none have had anything like the impact of the SCT.

2.2 Costs and Time Lines

The SCT's charter is to be "... fair, economical, informal and quick..."[3].

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1 See *Karger v Paul (1984) VR 161* and *Telstra Super Pty Ltd v Flegeltaub (2000) VSCA 180.*

2 Section 37 of the *Superannuation (Resolution of Complaints) Act 1993.*

3 Section 11 *Superannuation (Resolution of Complaints) Act 1993.*

In regards to costs, the Tribunal compares very favourably with the civil courts. The Tribunal has no filing fees, no power to award costs against an unsuccessful complainant and by dealing with complaints on the papers and without being bound by the restrictive and cumbersome rules of evidence of civil courts, the resources involved in taking complaints to determination are modest.

In contrast, the costs involved in taking a civil court action to judgement are very substantial. For example, the costs involved in taking a matter to judgement in the Victorian Supreme Court could range from $20,000.00 to upwards of $60,000.00 for each party.

The goal of the SCT to be "quick" has been badly affected by the prolonged challenge to its jurisdiction in the late 1990's and the subsequent difficulties in clearing the large backlog of complaints.

However, the time delays have reduced in the last twelve months - although the continuing delays of upto twenty weeks or more in written decisions being published following review meetings is still of concern.

An increase in the Tribunal's budget beyond the pre-1998 funding levels would be of assistance, particularly given the Tribunal's complaint numbers and work load have continued to increase.

Industry-based schemes operate under similar time and costs - neutral guidelines.

None of the alternative dispute resolution schemes have implemented filing fees on grounds of equity, access and the

administrative costs involved in processing and collecting what would necessarily be a modest a filing fee[4]. This is also consistent with the Australian Securities and Investments Commission (ASIC) Policy Statement 139 which asserts the fundamental principle that *"... consumers of financial products and services have free access to the complaints resolution procedures offered by a scheme*[5]*"*.

It is submitted that the same fundamental principle of access is applicable to the consumers of superannuation products and that, accordingly, there should be no filing fee for a SCT complaint.

3 INDEPENDENCE

One of the cornerstones of any successful dispute resolution scheme is independence from the stakeholders.

Without independence, both real and perceived, consumers will not have confidence that their grievances will be properly dealt with and they will abandon the alternative dispute resolution scheme in favour of the traditionally independent Court system.

The SCT is an alternative dispute resolution scheme with statutorially enshrined protections for independence, including the appointment of the Chairperson, Deputy Chairperson and part time Tribunal members, prescribed jurisdictional limits, powers and procedures, and defined funding sources. As a creature of statute, its rules and protections cannot be varied, except by Federal Parliament.

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4 The one exception to this is motor vehicle third party insurance complaints to the IEC which attract a filing fee of $150.00 (see the IEC Terms of Reference 3.2(d)).

5 See Australian Securities and Investments Commission PS 139.101

Whatever its sins, there has always been a clear public perception that the SCT is independent of the superannuation and insurance industries.

In contrast, industry-based alternative dispute resolution schemes have from time to time struggled with a public perception of being too close to industry and not completely independent.

Industry-based schemes are overseen by boards, often without true equal representation between industry and consumer groups, particularly with recurring controversies about "consumer" appointments to both the boards and decision making panels.

The schemes are funded directly by industry through memberships and fee-for-service complaint fees. Although the SCT's budget is funded through the Financial Sector Levy, there is much less of a perception that the SCT is directly "bankrolled" by industry.

The industry-based schemes are set up under terms of reference which can be more easily amended than statutory schemes and, conversely, worthy amendments can often be vetoed by industry groups directly or via the boards.

Most of the industry-based schemes have more restrictions on access such as monetary limits and the exclusion of certain products. They have also often struggled with issues of procedural fairness, the exchange of information and documentation and the role of case managers in processing and assessing complaints. In contrast, the SCT has statutorially prescribed procedural rules.

We would submit that a statutory scheme reporting directly to Federal Parliament is more accountable that an industry-based alternative dispute resolution scheme which is accountable to its board, with some

supervision from ASIC. Accordingly, the statutory underpinning of the SCT means it is better placed to offer and fine tune an effective alternative dispute resolution scheme than industry-based schemes.

4 APPEALS

It was suggested in the Draft Report that one advantage of an industry-based scheme was that decisions could be subject to appeals to the courts on questions of law and fact, whereas appeals against the SCT's decisions can only be made on questions of law.[6]

With respect, the contention is not strictly correct insofar as there is no unfettered appeal from a decision of an industry-based scheme (except perhaps on the grounds of breach of natural justice or procedural fairness). An unsuccessful complainant is simply free to pursue his or her claim / complaint through the civil courts if they are not prepared to accept the outcome of the complaint before the industry based scheme.

Potentiall at least, superannuation fund members have a similar right to pursue their complaints through the civil courts following a decision of the SCT. However, they have an additional right to seek a review of the decision of the SCT on a question of law to the Federal Court.

Accordingly, the SCT in fact creates additional rights of review over and above those that would be available under an industry-based mechanism.

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[6] See *Productivity Commission Draft Report* September 2001, p. 138

5 NATIONAL COMPETITION POLICY

The basis of the preference for an industry based scheme to the SCT in the Draft Report appears to be that an industry-based scheme would open dispute resolution in superannuation to competition consistent with National Competition Policy.

With respect, we would submit that it is not appropriate to talk of a dispute resolution as a commodity that is open to competition. Such a notion contemplates a diversity in the quality of dispute resolution schemes and acknowledges a lack of equality and equity.

We would submit that proper and accountable dispute resolution is not a commodity that can be bid for or competed for, but must be a given - particularly in the context of compulsory employment-based superannuation.

6 POSSIBLE IMPROVEMENTS TO THE SCT

Despite our support for the retention of the SCT, we do believe that some possible improvements to the current system are worthy of consideration:

6.1 Excluded Complaints

As the Productivity Commission pointed out in the Draft Report, a substantial proportion of complaints are outside the Tribunal's jurisdiction.

Of the excluded complaints, nearly 50% have consistently been outside jurisdiction because complainants had not lodged

complaints with the Trustees prior to lodging the complaints with the Tribunal, or had failed to allow the Trustee 90 days to consider the complaints pursuant to s.101 of the *Superannuation Industry (Supervision) Act* 1993.

Whilst many such complaints will ultimately be able to be dealt with by the Tribunal, the continuing high numbers are frustrating for consumers unaware of their obligations and administratively costly.

Communication of the requirement to lodge the s.101 complaint is the key to reducing the numbers. It is suggested that a standard form of words should either be mandated by way of a Regulation to the Act, or offered as a guide by the Tribunal, perhaps as a Practice Note.

It is our view that the Draft Report suggestion of listing excluded complaints would not be appropriate for a letter of rejection on a claim or a s.101 complaint as it would be too long. Further, a list would have little impact if only included in brochures or annual statements.

6.2 Extending Statutory Time Limits

The SCT has no jurisdiction to determine a complaint relating to the payment of a benefit on the grounds of total and permanent disablement. If the claim was lodged more than twelve months after the claimant's employment was terminated, or outside twelve months after the first rejection of the claim by the Trustee.[7]

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[7] See Sections 14(6A) and 14(6B) of the *Superannuation (Resolution and Complaints) Act* 1993

Maurice Blackburn Cashman has many clients who are unable to take their complaints to the SCT because of the operation of the two time limits and they are left with the option of taking their complaints to the civil courts with the inherent time delays and costs risks involved.

We agree with the draft recommendation that the Tribunal should be given a discretion to extend the time limits[8] perhaps by way of imposing an obligation on the complainant to show that no substantial prejudice arises because of any delays.

Alternatively, the one year time limit for lodging the complaint to the SCT could be extended to two years, or perhaps three to six months from the date of a decision on a s.101 complaint.

6.3 Conciliation

Alternative dispute resolution schemes have traditionally had a poor success rate in conciliating settlements of complaints.

This has been true of FICS, the IEC and the SCT.

By comparison, a large percentage of civil court actions settle - perhaps because of the financial cost risks of having a matter proceed to judgement.
Whilst it is true to say that the SCT has improved its strike rate in the last twelve months, arming the Tribunal with the power to order compulsory conciliation would ameliorate the problem.

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8 See Draft Recommendation 8.2

Compulsory mediation has been a feature of many civil courts and has contributed in no small part to the large early settlement rate of many civil courts, such as the Victorian County Court.

Accordingly, we would recommend that the Tribunal be given the power to order compulsory conciliation in an appropriate form.

6.4 Naming Parties

Under the Act, the Tribunal publishes written decisions but does not name the parties involved. This is consistent with the practice of all industry-based schemes.

We see little justification for the continuation of this practice and would recommend that for reasons of transparency and accountability, the names of the parties to a decision should be published subject to a discretion in the Tribunal to suppress details in appropriate circumstances.

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