Superannuation
Complaints
Tribunal

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Our Reference: 01-3698

10 October 2001

The Commissioner
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Attention : Commissioner John Cosgrove

Dear Commissioner,

The Tribunal refers to your request for comment on the Commission's draft Report on the Review of the *Superannuation Industry (Supervision) Act* 1993 and the *Superannuation (Resolution of Complaints) Act* 1993. The Tribunal confines its comments to Chapter 8 in which the Complaints Act is addressed.

8.1 The Tribunal expresses its concern that the draft Report used statistics for 1999-2000 whereas in fact statistics for 2000-2001 had been provided at the Commission's request.

As was made clear to the Commission by the Tribunal, the 1999-2000 statistics are not representative. They arose in the year immediately following the High Court's decision in the *Breckler* case. During that period of time, the acting Chair was, quite properly, reluctant to implement changes knowing a new Chairperson was shortly to be appointed. It was also a period in which it was recognised that the SCT needed to be re-energised and staff appointed to deal with the large backlog of cases arising between 1996 and the decision in the *Breckler* case during which period the Tribunal was unable to determine any cases through the review process.

Unfortunately, the draft Report did not identify why the Commission did not use the more relevant statistics provided by the Tribunal. That it did not do so, undermines the value of the draft Report and consequently any comments which may be made in relation to it.

In addition to using unrepresentative statistics, the draft Report has misinterpreted some of those statistics. For example, it is stated at p.133 of the draft Report that only 44 decisions out of the total of 1389 complaints dealt with (of which 544 were within the Tribunal's jurisdiction) in 1999--2000 were set aside or substituted, i.e., were resolved in favour of the

complainant. This is incorrect. While 44 Trustee decisions were set aside or substituted at the review or arbitration stage of proceedings, a further 232 were resolved in favour of the complainant at the pre-conciliation or post-conciliation stage of proceedings, thus obviating the need to proceed to review/arbitration. This makes a total of 276 out of the 544 complaints within jurisdiction, or 50% of all within-jurisdiction complaints handled in 1999-2000, that were resolved in favour of complainants. (I might add as an aside that resolving complaints prior to review is a more cost-effective means of procedure.)

For the year 2000-2001, the Tribunal dealt with 1839 complaints, an increase of 32% over the previous year. Of these 1839 complaints, 853 were within jurisdiction, an increase of 309 or 57% over the number of within-jurisdiction complaints dealt with the previous year. Of these 853 complaints, 486 or 57% were resolved in favour of complainants. In addition, the number of complaints withdrawn by complainants without resolution fell by 5 percentage points (from 10% to 5.4%).

8.3 While the Tribunal appreciates the Report is in draft form, the conclusions expressed in this part of the Report are unduly tentative, e.g.

> "...The service provided by the Tribunal.....has probably improved equity more generally among Fund Members".
>
> The statutory independence of the Tribunal...could also be regarded as an advantage. Further, it could be argued that the existence of such a body helps to increase community confidence in superannuation and its processes.
>
> The Tribunal's reporting obligations...may represent an additional benefit by providing information for the regulator. (emphasis added)

It is beyond argument that a statutory body with the right to appeal to a Court and subject to administrative investigation by the Ombudsman and continuous review by the Parliamentary Standing Committee on Superannuation, as well as by the Parliament through the presentation of the Annual Report, must be more independent than an industry body. It follows that there must be increased community confidence in the industry and its processes, than is the case with an industry-funded dispute resolution scheme.

The Tribunal's reporting obligations do represent a benefit to the regulator. Information is not only provided in the Annual Report, but individual breaches of SIS legislation and regulations are required to be reported as they arise, pursuant to the provisions of section 64 of the Complaints Act.

Some additional benefits do not seem to have been mentioned in the draft, i.e. all Tribunal decisions in an anonymized form are publicly available for review by members of the industry, complainants as well as any other interested parties. The decisions are the subject of regular reporting in

industry magazines and legislative commentaries such as CCH. Accordingly, there is much more comprehensive dissemination of information than is the case with industry schemes.

Further, the public reporting by the Tribunal reveals the processes it adopts and the steps it undertakes in reaching a Determination. Accordingly, the parties are able to assess the transparency of the process and be assured that natural justice is being extended.

8.6 Internal Dispute Arrangements

The draft Report comments "the vast bulk of complaints made are outside the Tribunal's jurisdiction, a situation that involves avoidable costs" before recommending Trustees advise of the Tribunal's jurisdictional limits.

The Tribunal strongly disagrees that it would be desirable for Trustees to advise members concerning whether or not their complaint was likely to fall outside the Tribunal's jurisdiction. That is a matter for the Tribunal to determine. Any determination reached by the Tribunal can be reviewed under the provisions of the *Administrative Decisions (Judicial Review) Act*, or it can be challenged after the Tribunal has given its final determination (under the appeal provisions contained in Part 7 of the Complaints Act). Given the draft Report comments on time limits, if a potential complainant was, albeit innocently, misled by a Trustee as to his or her appeal rights and the time limit expired, then the member would be clearly disadvantaged.

The following is a breakdown of complaints outside the Tribunal's jurisdiction for the April-June quarter of 2001. This is the first time the Tribunal has been able to record such a detailed breakdown, as a result of the installation in December 2000 of a new Case Management System.

Nature of Complaint	Number received for quarter
Failure to comply with section 19	121
Disability complaints outside prescribed time limits	33
Management of the fund as a whole	32
Other	26
Exempt Public Sector Superannuation Schemes	16
Decision complained of occurred before the fund was regulated	10
Death distribution complaints outside prescribed time limits	9
Employer Decision	8
Referred to a Prescribed Complaints Handling Body	2
Self Managed Funds	1
Court Proceedings commenced	1
Total	**259**

It can be seen that the largest category of complaints outside jurisdiction remains, as in previous quarters/years, the failure of complainants to comply

with section 19 of the Superannuation (Resolution of Complaints) Act 1993. That is, complaints where the complainant had failed to lodge a complaint with the trustee prior to lodging a complaint with the Tribunal, or had not allowed the trustee 90 days to consider the complaint. This indicates that there is still much educative work to be done in this area to apprise members of the statutory requirements and this is where the focus should be rather than on appraising members of the categories of complaints that the Tribunal cannot deal with.

Industry Body

The draft Report states "decisions of an industry-based body could be subject to appeal to the courts by complainants. In contrast, appeals against the Tribunal's decisions can only be made on questions of law."

The Tribunal is unaware of any system which allows an appeal by complainants to courts against a decision of an industry-based body. Indeed, an industy-based dispute resolution body limits rather than increases rights of appeal. Consumers in an industry-based body still retain the right to proceed to court if dissatisfied with the decision of the industry-based body. That, however, is not in the nature of an "appeal". Further, the courts (at least in the U.K. and there is no reason to assume the Australian courts will decide otherwise) have disallowed appeals by industry bodies against an industry-based complaint resolution scheme. In the view of the Tribunal, finality on the findings of questions of fact are, after there has been an initial decision by the Trustee, an internal review and a further review by the Tribunal, desirable. Consequently, limiting appeals to questions of law is more desirable than allowing yet another *de novo* examination of the complaint.

It should be noted that, as a matter of fact, industry-based complaints resolution schemes are subject to influence from the industry setting them up. When the current Chairperson was the Australian Banking Industry Ombudsman, decisions were reached, after the taking of independent advice from Senior Counsel, on certain practices relating to the negotiability of third party cheques. As the result of findings against the Banking Industry, it successfully moved to delete the jurisdiction of the Ombudsman with respect to investigating third party cheque transactions.

It should also be commented that neither banking nor insurance are compulsory, whereas superannuation is compulsory for all Australian workers. In that circumstance, there is a greater legislative responsibility to ensure that prudential requirements, investigation and prosecution of offences as well as dispute resolution should be comprehensively covered. Further, as investment in superannuation grows and larger and larger amounts become involved, it becomes even more essential that the public have confidence in a dispute resolution scheme that is properly and independently scrutinised.

8.7 The draft Report states "the Commission does not see that there is a need to be prescriptive about suitable dispute resolution bodies for superannuation, other than for the Funds to choose an appropriate licensed body". If there are

several dispute resolution bodies operating in covering the same field, inconsistencies in both process and determination are more likely than not to arise. Funds would be at liberty to choose one or other of the dispute resolution bodies and accordingly, members may be advantaged or disadvantaged depending on the body joined. That does not suggest itself either as representing equity on an industry basis for Fund members or as leading to consistent decision making which the industry and Fund members can rely upon for the reaching of future similar decisions.

To suggest that complaints resolution services are in some way 'contestable' is an anathema for the reasons earlier stated.

The draft Report suggests that Funds should be named but continues "at the same time it would be appropriate for the Tribunal to point out that many complaints are resolved satisfactorily by entities without any need for use of the Tribunal's processes". The Tribunal does not have any power to generally review how complaints are resolved by Trustees. Whilst anecdotally the Tribunal is told many complaints are satisfactorily resolved on an industry-wide basis, it is in no position to point out that one or other Fund is or is not performing better than the average (whatever the average may be). Accordingly, in the Tribunal's view it is <u>not</u> appropriate for the Tribunal to be making any such comment. If the Tribunal is to name Trustees/Insurers on the basis outlined, then it would need reliable statistical information in order to present a balanced view. It does not have the power to do this now and the draft Report does not suggest that it be given such power. Accordingly, in the Tribunal's view, such a recommendation if implemented in the form suggested in the draft Report could and most probably would produce an unbalanced and misleading view of the Trustee/Insurer.

General

It should be reiterated that the Tribunal has no view one way or the other on the policy decision of whether the Tribunal should remain or be replaced by an industry body. The Tribunal is however concerned that if such a decision is to be made, it should be made on the basis of accurate factual information.

Having stated the above, it is also necessary to point out that this is the third time in the relatively short life of compulsory superannuation that the issue of whether or not the Tribunal should be a statutory or industry-based body has been raised. In each of the previous occasions (when the topic was first raised in 1993 and after the Federal Court decision in *Breckler*), it was determined that the current statutory scheme was the preferred option. It does not enhance public confidence or Tribunal staff morale in whatever type of scheme is adopted for there to be continuous review as to its structure.

Lastly, the Commission does not seem to have addressed the desirability or otherwise of the implementation of an industry-funded and industry-based scheme over which there is greater Parliamentary and Ministerial control (e.g. with respect to appointments, changes to the terms of reference which may govern such a scheme, etc.) than has traditionally been

the case with industry-based schemes in Australia. It may be that the minimal general ASIC licensing provisions need to be legislatively enhanced to provide a greater degree of Government involvement and control over an industry dispute resolution scheme in circumstances where superannuation has been made legislatively compulsory for Australian workers. It is a pity that the Commission did not raise or consider this alternative in its draft Report.

Yours faithfully

Graham McDonald
Chairperson