



## Chairperson's report

### Superannuation and Market Volatility

While there is no doubt that superannuation is a long-term investment, and that the market volatility of recent times will most likely be just a blip on the benefit graph in years to come, trustees need to be aware that market instability can and does cause problems for some fund members, whether or not they are approaching retirement.

Consider the example of a member who is rolling a benefit from one fund to another. On the day he decides to roll out of his fund, he checks his balance online and notes that he has \$20,000 in his account. By the time his request is processed, perhaps a week or two later, his account balance has dropped to \$19,000 due to negative investment performance.

The member can be forgiven for believing he has lost \$1,000 so he lodges a complaint, perhaps because he blames the trustee for not processing his request promptly. He may not have actually suffered a loss, but the trustee must still deal with the complaint, as must the Tribunal if the complaint is not resolved to

the complainant's satisfaction within 90 days of the complaint being lodged with the trustee.

So did the member actually suffer a loss? Not necessarily; if the member's new fund's investment performance was not as good as that of the fund he is leaving, it may well be that, had his rollover request been processed sooner, he would have lost even more, say \$1,200. Arguably, the member has "saved" \$200.

Members who find themselves in this situation need to demonstrate not only that the processing of their rollover request was unreasonably delayed, but also that they would not have lost as much in the new fund had their rollover had been processed without delay.

In times of market volatility, the Tribunal also receives complaints from members of defined benefit funds who have recently retired. These members have always understood that they were unaffected by negative investment performance; that their benefit was "defined" as a multiple of their final average salary and years of service.

So it comes as a surprise to many of these members that their defined benefit, which is crystallised at the date their service with

their employer ends, is subject to investment performance, positive or negative, until paid out. Because the trustee cannot calculate the benefit until final contributions are received from the employer, it may be weeks or longer before the defined benefit is calculated (at the date they retired) and then credited, or debited, with interest to date of payment.

Depending on the trustee's policy for investment of crystallised benefits, members might argue that the trustee should have invested their crystallised defined benefit conservatively (in falling markets where the trustee's policy means that the member's benefit is invested in a 'growth' or 'balanced' option with exposure to growth assets). Alternatively, in periods of rapidly rising markets the member might complain that the trustee deprived them of investment growth (if the benefit is invested conservatively or not invested at all).

Trustees of funds with defined benefit members should ensure that their disclosure material clearly informs members about what happens to their crystallised benefit between the date they retire and the date they are paid.

## Quarterly statistics


During the quarter, the Tribunal received 590 written complaints, (a decrease of 3.2% compared to the previous quarter). The number of telephone enquiries, 3449, increased by 7% from the previous quarter.

For the year to 30 June 2011, telephone enquiries increased by 18.2%.

64% of the 590 complaints received during the quarter were within the Tribunal's jurisdiction (last quarter 63%). The Tribunal received 146 complaints during the quarter which were outside its jurisdiction due to the complainant not having first complained to the fund. As planning for year end communications takes place, trustees are again requested to ensure that communications clearly indicate that complaints or queries must first be directed to the fund/trustee, and that the fund/trustee's contact details for complaints are clearly set out.

The Tribunal finalised 611 complaints in the quarter. At conciliation, the Tribunal achieved a settlement rate of 61.6%.

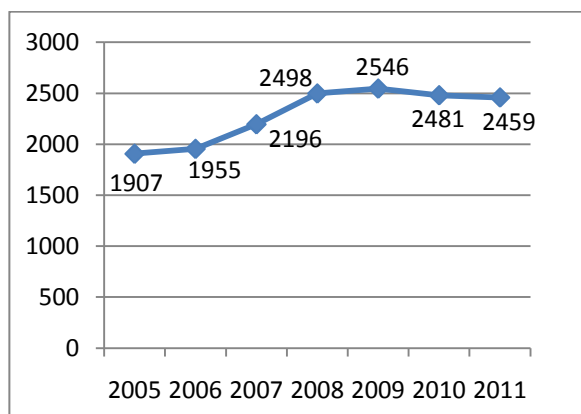
The Tribunal determined 39 complaints during the quarter (previous quarter 22 complaints). Overall, the Trustee's decision was affirmed in 59% of these cases.



**Jocelyn Furlan**  
**Chairperson**

## Statistical overview

### Number of written complaints received per financial year



*NB: The Tribunal received 2459 written complaints for the financial year 2010/2011.*

## April - June 2011

### Telephone inquiries

The Tribunal received 3449 telephone calls this quarter (last quarter – 3,227), which is a increase of 7% compared with the previous quarter.

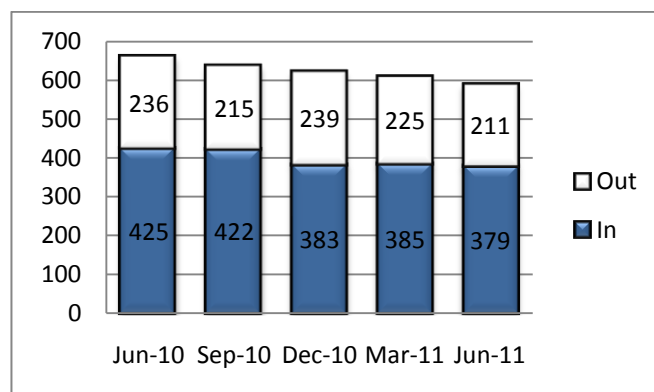
The Tribunal dealt with a wide range of inquiries, the most popular were complaints related inquiries (24.64%), followed by questions about the Tribunal itself (15.86%) and fund administration inquiries (12.32%).

### Written complaints

This quarter, the Tribunal received 590 written complaints (last quarter – 610), which is a decrease of 3.2% compared with the previous quarter.

### Jurisdiction

Of the 590 written complaints received this quarter, 379 (64.2%) complaints were within jurisdiction (previous quarter – 63.1%). Of the 211 (35.8%) complaints closed as outside jurisdiction, 146 (69.1%) were closed pursuant to s.19 of the Complaints Act because the complainant had failed to lodge a complaint with the trustee or the 90 day time limit had not passed from the date of complaint to the trustee, (last quarter – 69.7%).

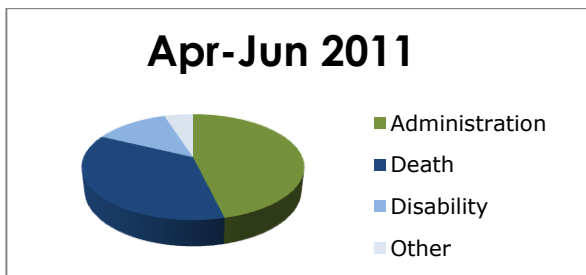


Complaints within jurisdiction

## Nature of written complaints within jurisdiction

Complaints fall into four major categories – ‘death’, ‘disability’, ‘administration’ and the catch-all category of ‘other’.

Leaving aside the ‘other’ category, administration complaints comprised the largest category of all written complaints received within jurisdiction – 46.2% (last quarter – 48.5%). Death complaints made up the second-largest category at 35.9% (last quarter – 32.7%), followed by disability at 12.9% (last quarter – 12.9%).



Nature of written complaints within jurisdiction

## Performance

### Complaints finalised

The Tribunal finalised 611 written complaints this quarter, same as last quarter.

Of the 611 finalised complaints, 6.5% were finalised at review (last quarter – 3.6%), 52.5% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 58.4%) and 41% were outside jurisdiction (last quarter – 38%).

## Conciliation conferences

The Tribunal conciliated 168 cases in the quarter, a increase of 10.5% on last quarter's 152.

Of the 125 cases concluded, settlement was achieved in 77, resulting in a settlement rate of 61.6% (last quarter – 64.6%). The outcome is pending in 43 cases (25.5%) compared to 39 cases (25.6%) for last quarter.

### Nature of conciliation cases

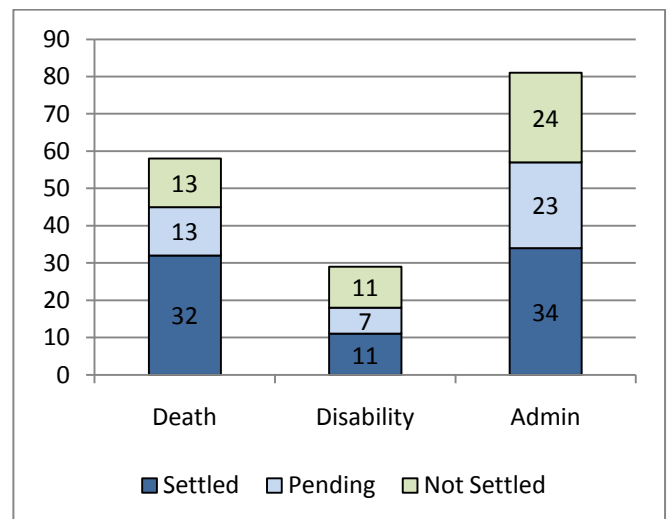
The categories of note in the quarter are as follows:

Death benefits – Of the 45 concluded cases, 32 (71%) were settled.

Disability – Of the 22 concluded cases, 11 (50%) were settled.

Administration – Of the 58 concluded cases, 34 (59%) were settled.

Other – none.



Settlement by conciliation

## Review determination outcomes for the quarter

The Tribunal determined 39 cases this quarter (last quarter – 22 cases).

The largest category of complaints determined at review was death benefit complaints: 23 (59%).

<b>Death</b>	Qtr	YTD
Affirmed	13	51
Remitted	0	0
Varied	0	0
Set aside	10	24
<b>Total</b>	23	75

Administration complaints made up the second largest category: 10 (25.6%)

<b>Admin</b>	Qtr	YTD
Affirmed	6	14
Remitted	0	0
Varied	0	0
Set aside	4	10
<b>Total</b>	10	24

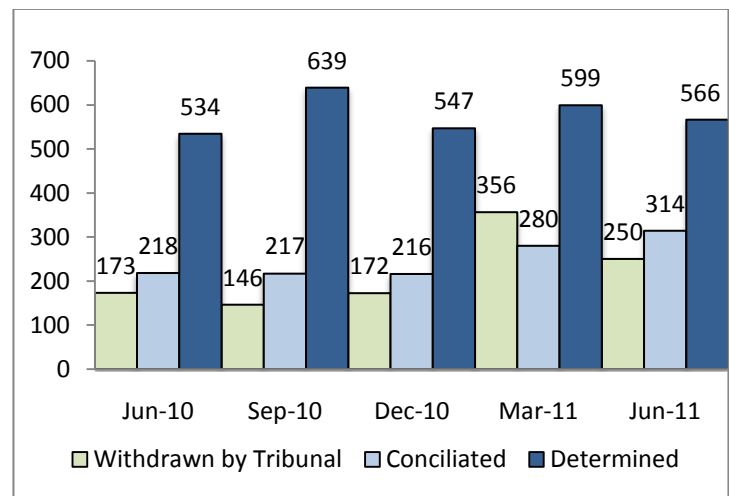
Followed by disability complaints made up the second largest category: 6 (15.4%)

<b>Disability</b>	Qtr	YTD
Affirmed	4	16
Remitted	1	3
Varied	0	0
Set aside	1	4
<b>Total</b>	6	23

59% of trustee decisions were affirmed during the quarter, compared with 63.6% in the March quarter, 61.9% in the December quarter, 85.7% in September quarter and 64.3% in June quarter.

## Efficiency

Median number of days from receipt of complaint to date closed.



## Recent determinations of interest

### Death benefit distribution: D10-11\073

*The complainant (the deceased member's father-in-law) lodged a complaint with the Tribunal regarding the trustee's decision to pay the death benefit to the Public Trustee (in the state which the deceased member died) to be held in trust equally for the deceased member's minor step-daughter and minor daughter (the daughters). Following the deceased member's death, the complainant established a trust for the daughters with himself and his daughter (the co-trustee) as trustees. The complainant sought that the death benefit be paid into the trust which he established. The Tribunal set aside the trustee's decision and directed that the death benefit be paid into the trust established by the complainant.*

The complainant did not object to the trustee's decision to pay the death benefit for the benefit of the daughters. Rather, his objection related to the decision to pay the benefit to the Public Trustee. Accordingly, it was not necessary for the Tribunal to consider the issue of the identification of potential beneficiaries of the benefit.

The complainant's greatest concern about the Trustee's decision was that the public

trust would incur administration charges and investment losses that would gradually reduce the funds available for the daughters.

In reaching its decision, the Tribunal took into account the following:

- that the Family Court had granted the complainant custody of the daughters with the consent of the father of the deceased member and the father of the step-daughter;
- the complainant had established a trust into which the death benefit could be paid;
- there was no evidence that the complainant would not administer the trust for the benefit of the daughters;
- the Fund's trust deed clearly contemplated that a death benefit could be paid to the custodian of a minor beneficiary; and
- payment to the Public Trustee would involve commission expenses and additional administrative requirements for the complainant in arranging reimbursement for expenses incurred in the maintenance and advancement of the daughters.

The Tribunal therefore determined to set aside the trustee's decision on the grounds that it would not operate fairly and reasonably in relation to the complainant and the daughters, and ordered that the death benefit be paid into the trust established by the complainant.

#### Death benefit distribution: D10-11\074

*The four complainants were the three adult daughters of the deceased member and the legal personal representative (LPR) of his estate. They lodged a complaint with the Tribunal regarding the trustee's decision to pay the death benefit to the deceased member's de facto spouse. The complainants sought that the death benefit be paid to the deceased member's estate. The Tribunal affirmed the trustee's decision to pay the death benefit to the de facto spouse.*

The deceased member died in 2008 aged 67. On his application form completed in 2002, he nominated his estate as his preferred beneficiary. In his will dated 1998, he bequeathed a life interest in his half property (owned with the de facto spouse as tenants in common) to the de facto spouse and divided his residuary estate equally between his three daughters. Probate of the will was granted to the fourth complainant.

The complainants submitted that it was the deceased member's intention that his

superannuation be paid into his estate to form the family inheritance for the benefit of his daughters and their children. They also submitted that the de facto spouse was not the spouse of the deceased member and that in any event, sufficient provision had been made for her in the deceased member's will.

The Tribunal noted that under the terms of the trust deed in effect at the time of the deceased member's death, each of the complainants and the de facto spouse was a potential beneficiary. The complainants were dependants, being children of the deceased member.

In its deliberations, the Tribunal took into account the wishes of the deceased member, the financial circumstances and needs of the potential beneficiaries and the nature of the relationship between the beneficiaries and the deceased member.

Despite submissions from the complainants to the contrary, the evidence showed that the deceased member and the de facto spouse were living in a bona fide domestic relationship as husband and wife at the time of the deceased member's death, such that the de facto spouse came within the definition of 'spouse' in the trust deed. They were in a relationship for about 16 years until the death of the deceased member and had discussed getting married; they had purchased a home

together as tenants in common and lived together in that home until the deceased member's death. The de facto spouse also produced cards from the deceased member indicating a loving relationship between them. In addition, the Tribunal was satisfied that the de facto spouse was financially dependent on the deceased member at the time of his death – household expenses were shared and he contributed to the standard of living enjoyed by himself and the de facto spouse.

The Tribunal acknowledged the complainants' expectation that the death benefit would form part of the deceased member's estate and that without this, the complainants would receive a substantially lesser amount from the estate. However, the Tribunal reiterated its view that the purpose of superannuation is to provide benefits for a member and his or her spouse in retirement, or, in the event of death to provide for those who had a right to look to the deceased member for financial support had the member not died. There was no evidence that the deceased member was providing any of the complainants with financial support prior to his death or that they would have received financial support from the member had he not died.

The Tribunal affirmed the trustee's decision to pay the death benefit to the de facto

spouse as fair and reasonable in the circumstances.

#### Total and permanent disability complaint: D10-11\080

*The complainant lodged a complaint with the Tribunal that the refusal by the trustee and the insurer to pay him a total and permanent disability (TPD) benefit was unfair or unreasonable. The complainant sought a declaration that he was TPD and entitled to the benefit. The Tribunal affirmed the decisions of the trustee and insurer to deny the TPD claim.*

The complainant is aged 63 years. He joined the employer in 1985, where he worked initially as an assembly line worker and cleaner. In 2004, the complainant suffered a heart attack. He returned to work in 2005, after three months of treatment, and was transferred to lighter duties in the laundry where he remained until he was made redundant in August 2007.

The complainant claimed that he ceased work because he suffered from heart problems, tiredness, problems with his right shoulder and cramping in his legs. He claimed that he had these health issues prior to August 2007 but remained with the employer after finding out he was going to be made redundant as the employer was in the process of closing its factories.



The complainant had not made any work-cover compensation claim but is on a disability pension with Centrelink.

In reviewing the trustee's and insurer's decisions, the Tribunal took into account the relevant definitions of total and permanent disablement in the trust deed and insurance policy that were in effect on the date when the complainant ceased employment. The only medical reports available to the Tribunal were provided by the complainant's general practitioner.

The Tribunal noted that the complainant worked up until the point of being made redundant and that his leave history showed that he only had one day of sick leave in the two years prior to ceasing work. The complainant only saw his doctor for regular check-ups and, although he suffered a heart attack in 2004, does not appear to have had further or ongoing treatment since that time.

The Tribunal also noted that even though the complainant was granted a disability support pension by Centrelink, this does not of itself satisfy the definition of TPD under the trust deed and insurance policy as the eligibility criteria for these forms of compensation are very different.

As there was no supporting medical opinion directly relating to the question of whether the complainant was TPD within the trust deed or insurance policy definitions and the complainant was capable of undertaking his duties up until his redundancy, the Tribunal considered that the decisions of the trustee and the insurer were fair and reasonable in the circumstances.

#### Administration complaint: D10-11\081

*The complainant is the spouse of the deceased member. She lodged a complaint against the trustee's decision not to pay the insurance component of a death benefit in respect of the deceased member. The trustee claims that the death benefit insurance was cancelled when the deceased member's account balance became insufficient to cover the insurance premiums. The Tribunal affirmed the trustee's decision.*

The deceased member was provided with \$54,000 death and total and permanent disability (TPD) insurance cover under the Fund which was disclosed to him on his 30 June 2007 and 31 December 2007 member statements. The trustee advised that the deceased member's insurance benefits were cancelled on 29 February 2008 because the account balance had insufficient funds to cover the insurance premiums. The trustee did not issue any correspondence to advise the deceased member that his cover would be lapsing

although his December 2007 member benefit statement showed a balance of \$17.80.

The complainant submitted that the Fund should have notified the deceased member that his insurance cover was about lapse, either directly by letter or by placing a warning on his member statements.

The deceased member made contributions in December 2003, June 2004 and June 2005 but had ceased paying contributions from that date until his death three year later. In each case the amount was \$120. The trustee provided member protection for the deceased member's account by adjusting his benefit at the end of each reporting period in accordance with regulation 5.17 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) – which in general terms provides that the sum charged as administration costs in respect of a relevant member reporting period must not exceed the investment return applied to the member's minimum benefits for that period.

The deceased member's account balance reduced to nil on 16 February 2008, and, in accordance with the trust deed and insurance policy, his insurance cover lapsed. Subsequently, on 30 June 2008, member benefit protection (MBP) was applied to the deceased member's account in accordance with regulation 5.17 which

resulted in a balance of \$59.41 in the account.

The Tribunal determined that the trustee acted fairly and reasonably in accordance with regulation 5.17 in maintaining that the MBP adjustment is only done at the end of the reporting period (30 June) rather than on an ongoing basis throughout the year. It is only at the end of the reporting period that it can be determined whether the member qualifies for MBP. Therefore, it is possible that during the year the account can reduce to zero due to insurance premium deductions as happened in the case of the deceased member.

The relevant Product Disclosure Statement (PDS) disclosed that insurance ceases on the date a member's balance is insufficient to pay the premium on a continuing basis. The trustee was not under a legal obligation to advise the member that his insurance cover was about to lapse, nor had the trustee created any expectation in the member that he would be so notified.

The Tribunal determined that the trustee's decision that the deceased member had no entitlement to an insured benefit was fair and reasonable in its operation in relation to the complainant in the circumstances.

Administration complaint: D10-11\087

*The complainant lodged a complaint with the Tribunal against the trustee's decision to charge an early exit fee of \$3,031.04 on the transfer of her account balance to another fund. The complainant sought that the exit fee be reduced to \$573.65, which was the amount quoted by the trustee prior to her exit from the fund. The Tribunal set aside the trustee's decision and directed that the difference between the exit fee quoted and the exit fee charged be refunded to the complainant.*

The complainant joined the fund in 1991. On 27 February 2008, her financial adviser contacted the fund, with the complainant present, to request information about the complainant's investment and was advised that the early exit fee was \$573.65. On 17 July 2008, the complainant signed a request to transfer her benefit to another fund. On 31 July 2008, the fund transferred the complainant's benefit to the other fund and deducted \$3,031.04 as an early exit fee. The amount of the benefit in dispute was the difference between the exit fee advised and the exit fee charged, being \$2,457.39.

The Tribunal accepted that the Trustee had correctly calculated the complainant's benefit (including the exit charge) under the terms of the policy which was issued to the complainant at the time she commenced her investment in the fund.

However, the Tribunal also noted that the lower exit fee quoted by the trustee to the complainant's financial adviser was consistent with the exit fee amounts shown on the complainant's benefit statements and the reduction in these amounts each year. The statements from 2003 onwards showed that the exit fee was gradually reducing, and the verbal quote of an exit fee of \$573.65 on 27 February 2008 was entirely consistent with this trend.

The Tribunal also accepted that the complainant relied on the exit fee quoted to her in deciding to transfer her benefits to another fund. The Tribunal accepted her submission that if she had been aware of the correct amount of the exit fee, she would have deferred her withdrawal for a period of around 2.5 years, at which time the exit fee would have been nil.

The Tribunal set aside the trustee's decision not to honour the reduced exit fee on the basis that its operation in relation to the complainant would be unfair and unreasonable. The trustee was directed to compromise the complainant's claim by paying to the complainant the difference between the exit fee quoted and the exit fee charged, a total of \$2,457.39.

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