



Superannuation
Complaints
Tribunal

SCT Quarterly
Bulletin

Issue No. 62

1 October 2010 – 31 December 2010

Chairperson's Report

Over recent times, the Tribunal has commissioned an external review and implemented an organisation restructure as part of our continuous improvement program to enhance the delivery of our statutory objectives.

The review into the Tribunal's operations and effectiveness recommended the development of a new structure that reflects current and emerging stakeholder and business needs, recognising the extensive changes in superannuation in recent years; and recommended options to streamline processes to increase our efficiency.

These changes are intended to help us continue to adapt to a rapidly evolving superannuation environment impacted by larger account balances, increased complexity of superannuation funds, volatile investment markets and changing community understanding and expectations of superannuation.

Accordingly, the office's organisational structure has been streamlined into three business teams that clearly articulate the Tribunal's functions and accountabilities: complaints resolution, legal and business support. We have also employed a public relations officer to assist the Tribunal in its communications with its stakeholders.

New visual style

The Tribunal is currently reviewing its visual style and will be launching a new look quarterly bulletin next issue. This is the first step in our move to improve our communications - ensuring that they are clear, understandable and accessible by all stakeholders.

Quarterly statistics

During the quarter, the total number of written complaints received by the Tribunal decreased by 2.4 % compared to the previous quarter. The number of telephone enquiries decreased by 1.9 % from the previous quarter but still remained at higher levels than previously experienced by the Tribunal.

61 % of complaints received were within the Tribunal's jurisdiction (last quarter 66.2 %). The Tribunal received 162 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 requested to ensure that communications clearly indicate that complaints or queries must first be directed to the fund/trustee, and that, in addition to the Tribunal's contact details, the fund/trustee's contact details for complaints are clearly set out.

The number of complaints within jurisdiction relating to fund administration as a percentage of total complaints remained static at 50.9 % (last quarter 50.0 %) of all complaints during the quarter. Complaints about death benefit distributions decreased to 32.4 % (last quarter 34.3 %) of all complaints. Complaints about disability benefits increased by 2 % to 13.3 % of total complaints.

The Tribunal finalised 568 complaints in the quarter, a decrease of 1.3 % on the previous quarter. At conciliation, the Tribunal achieved a settlement rate of 78.1 % (previous quarter 67 %).

The Tribunal determined 42 cases during the quarter (previous quarter 21 complaints). Overall, the Trustee's decision was affirmed in 61.9 % of these cases.



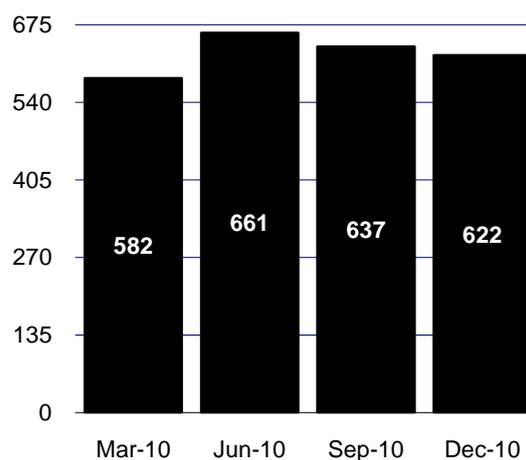
Jocelyn Furlan
Chairperson

Performance

Statistical Overview

Written Complaints

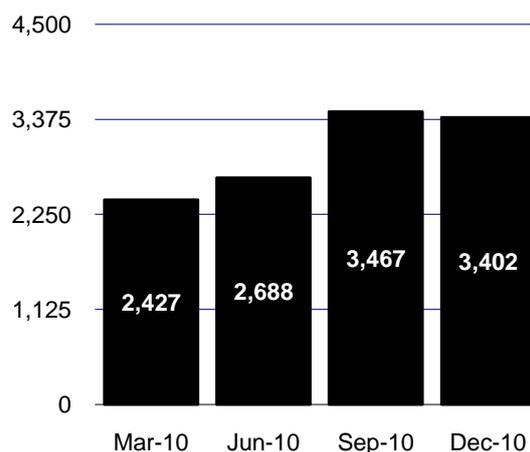
This quarter, the Tribunal received 622 written complaints (last quarter – 637), which is a decrease of 2.4% compared with the previous quarter.



Telephone Enquiries

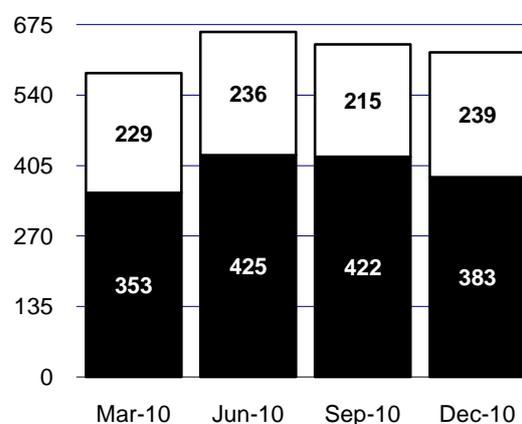
The Tribunal received 3,402 telephone calls this quarter (last quarter – 3,467), which is a decrease of 1.9% compared with the previous quarter.

The Tribunal dealt with a wide range of enquiries, the most popular were complaints related enquiries (24.0%), followed by fund administration enquiries (19.8%) and questions about the Tribunal itself (9.0%).



Jurisdiction

Of the 622 written complaints received this quarter, 383 (61.6%) complaints were within jurisdiction (previous quarter – 66.2%). Of the 239 (38.4%) complaints closed as outside jurisdiction, 162 (67.8%) were closed pursuant to s.19 of the SRC 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 – 61.4%).

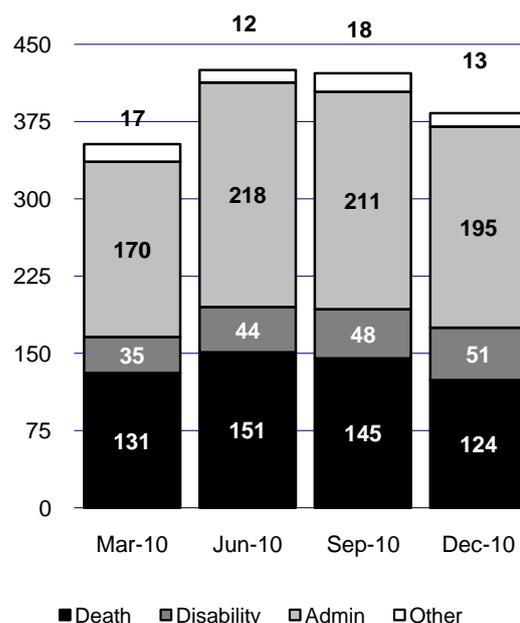


■ In □ Out

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 – 50.9% (last quarter – 50.0%). ‘Death’ complaints made up the second-largest category at 32.4% (last quarter – 34.3%), followed by ‘Disability’ at 13.3% (last quarter – 11.4%).

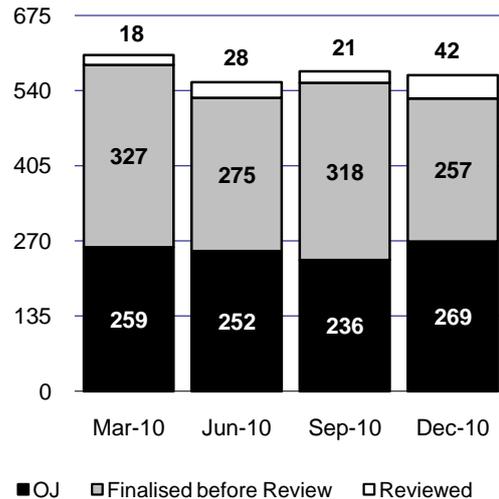


■ Death ■ Disability □ Admin □ Other

Complaints Finalised

The Tribunal finalised 568 written complaints this quarter, down from 575, or 1.3%, in the last quarter, including some complaints carried over from the previous quarter.

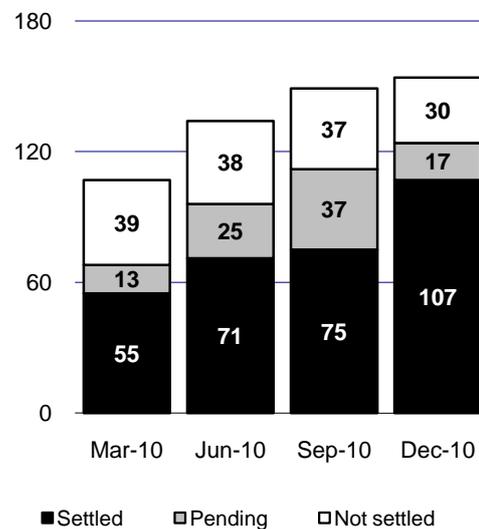
Of the 568 finalised complaints, 7.4% were finalised at review (last quarter – 3.7%), 45.2% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 55.3%) and 47.4% were outside jurisdiction (last quarter – 41.0%).



Conciliation Conferences

The Tribunal conciliated 154 cases in the quarter, an increase of 3.2% on last quarter's 149.

Of the 137 cases concluded, settlement was achieved in 107, resulting in a settlement rate of 78.1% (last quarter – 67.0%). The outcome is pending in 17 cases (11.0%) compared to 37 cases (24.8%) for last quarter.



Nature of Conciliation Cases

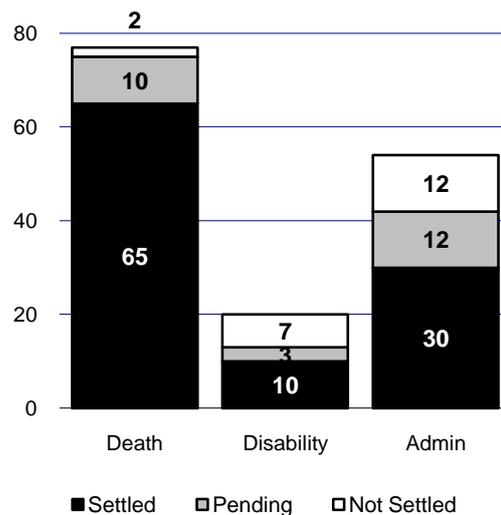
The categories of note in the quarter are as follows:

Death Benefits – Of the 75 concluded cases, 65 (86.7%) were settled.

Disability – Of the 17 concluded cases, 10 (58.8%) were settled.

Administration – Of the 42 concluded cases, 30 (71.4%) were settled.

Other – Of the 2 cases concluded, 1 (50%) was settled.



Review Determination Outcomes for the Quarter

The Tribunal determined 42 cases this quarter (last quarter – 21 cases).

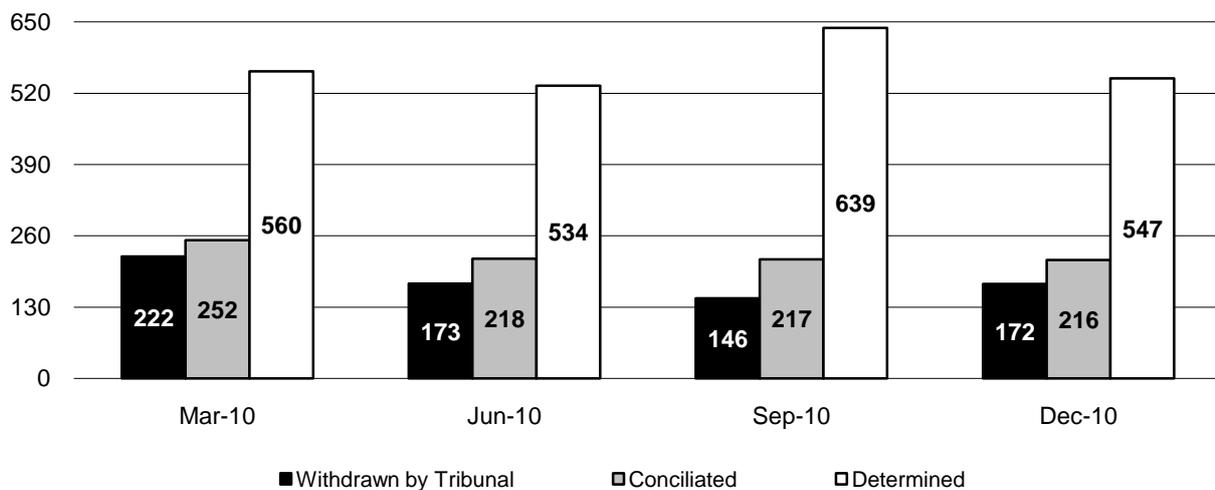
The largest category of complaints determined at review was death complaints – 29 (69.0%). Administration complaints made up the second largest category - 7 (16.7%), followed by disability complaints – 6 (14.3%) and other 1(2.4%).

	Death		Disability		Admin		Other		Total		
	Qtr	YTD	Qtr	YTD	Qtr	YTD	Qtr	YTD	Qtr	YTD	YTD %
Affirmed	19	26	4	10	3	7	0	0	26	43	69.4
Remitted	0	0	1	1	0	0	0	0	1	1	1.6
Varied	0	0	0	0	0	0	0	0	0	0	0.0
Set aside	10	12	1	1	4	4	0	1	15	18	29.0
Total	29	38	6	12	7	11	1	1	42	62	100.0

61.9 per cent of Trustee decisions were affirmed during the quarter, compared with 85.7 per cent in the June quarter and 72.2 per cent in the March quarter.

Efficiency

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



Recent Determinations of Interest

D10-11\039

Complainant 1 was the sister and the legal personal representative (LPR) of the Deceased Member. Complainant 2 was the mother of the Deceased Member. Each Complainant lodged a complaint with the Tribunal that the decision of the Trustee to pay 100 per cent of the death benefit to the Spouse was unfair and unreasonable in the circumstances. The Complainants are both seeking that the benefit be paid to Complainant 2.

There was no preferred beneficiary because the Deceased Member did not complete a membership application form. In his will, the Deceased Member made his mother (Complainant 2) his sole beneficiary. His sister (Complainant 1) was named as his executor and probate was granted to her on 9 July 2009.

The first thing the Trustee must do in cases such as this is to identify the potential beneficiaries (if any). The Trustee must then distribute the benefit among those persons who are beneficiaries. The Tribunal adopts the same approach.

The Trustee determined that the Spouse met the definition of 'dependant'. In the Tribunal's view the Spouse satisfied the definition of 'dependant' as she was the legal spouse of the Deceased Member. Therefore, she could be considered in the distribution of the benefit. Complainant 1 and 2 drew attention to the fact that the Spouse did not live with the Deceased Member at the time of his death. This was relevant to the question of how the benefit should be distributed between the beneficiaries. It did not alter the fact that the Spouse remained legally the wife of the Deceased Member at the time of his death.

The Son, Daughter 1 and Daughter 2 are each children of the Deceased Member. The Trustee made an attempt to contact them but was unsuccessful. The Tribunal was successful in contacting them. Daughter 2 did

not wish to be joined to this complaint and did not want further contact on the matter.

Complainants 1 and 2 contended that Complainant 2 was also a potential 'beneficiary' on the basis that she was either financially dependent on the Deceased Member or satisfied the definition for interdependency. To support this claim they stated that the Deceased Member 'lived with his mother most of his life over 47 years, and he was financially dependant (sic) on her to help him pay his mortgage and everyday living expenses and liabilities, they both provided each other with love and emotional support'.

The Complainants stated that Complainant 2 was also financially dependent on the Deceased Member. This financial dependence 'relates to the money that [the Deceased Member] owed her and money that [the Spouse] borrowed from her...' The Tribunal noted that the purpose of superannuation is not to satisfy debts owed by the Deceased Member at the time of his death. Those debts may be satisfied by the estate, if it has assets.

In relation to an interdependency relationship, each of the following criteria must be satisfied in order to meet the definition of 'interdependency relationship':

- they must have a close personal relationship
- they must live together
- one or each of them must provide the other with financial support
- one or each of them must provide the other with domestic support and personal care.

Complainant 2 and the Deceased Member had separate houses and separate domestic arrangements, although they provided support and assistance to each other. There were statements that the Deceased Member said he would move in and care for Complainant 2 if or when he sold his own home, but this had

not happened at the time of his death. Complainants 1 and 2 stated that the Deceased Member often stayed with Complainant 2 on week nights and weekends or on his day off and provided domestic help such as cooking meals, washing dishes, mowing lawns and shopping. This may represent a degree of domestic support but in the Tribunal's opinion it was of an ad hoc nature rather than being organised and systematic.

It was not disputed that Complainant 2 and the Deceased Member did not live together at the time of his death. Living together is also a requirement of an 'interdependency relationship'. However, Regulations 1.04AAA(3) and (4) permit persons who do not actually live together but otherwise satisfy the requirements of section 10A of the SIS Act to be treated as living together where:

- (a) the reason they do not live together is because they are temporarily living apart (Sub-regulation (3)); or
- (b) one or other of them has a disability (Sub-regulation (4)).

The domestic arrangements of the Deceased Member before his relationship with the Spouse are not entirely clear. It appears that the Deceased Member had been married before he married the Spouse and that he and the Spouse jointly purchased a matrimonial home with the intention of living there as a married couple, separately from Complainant 2. The establishment of the matrimonial home by the Deceased Member and the Spouse was not intended as a temporary measure. After the Deceased Member and the Spouse separated, the Deceased Member continued to live in the matrimonial home. In all the circumstances, it was not appropriate to say that the Deceased Member's permanent residence or "base" was in the house of Complainant 2 and his absences from it were temporary. It appears more appropriate to say that the Deceased Member had left the house of Complainant 2 and returned there temporarily

from time to time, when circumstances required.

Complainant 2 stated that she could not move to the area in which the Deceased Member lived because she needed to be near medical and other services and the Deceased Member did not have a car. The Deceased Member was not similarly constrained. He remained living in his house. In these circumstances, the Tribunal is not persuaded that the Complainant satisfied either Regulations 1.04AAA(3) or (4). This means that Complainant 2 did not satisfy the requirement that she and the Deceased Member lived together and that she was not a 'dependant' for this reason as well.

Complainant 2 was not a 'beneficiary' within the meaning of that expression in the Trust Deed. Therefore, she cannot be considered in the distribution of the benefit on the basis that she was financially dependent on the Deceased Member or on the basis that she was in an interdependency relationship with the Deceased Member.

The Tribunal considered whether Complainant 1 was a beneficiary in her own right and concluded that no evidence was provided that she was a financial dependant of the Deceased Member or that she was in an interdependency relationship with the Deceased Member and noted that she had made no such claim on her own behalf. However, Complainant 1 was the executor of the Deceased Member's estate and probate has been granted. The benefit could lawfully be paid to her as the LPR.

Having decided that the Spouse, the Son and Daughter 1 and Daughter 2 were eligible beneficiaries, the Tribunal then turned to the allocation of the benefit. Ordinarily, superannuation is intended to provide support for dependants in retirement or on the death of the member. This generally leads to the conclusion that a spouse has a strong claim to receipt of a death benefit. However, in the present case, the marriage was of quite short duration; the Spouse was separated from the

Deceased Member and not financially dependent at the time of his death; there was evidence that divorce proceedings were in train and, in a letter dated 21 February 2007 from her solicitor, the Spouse had agreed that each party should retain their own superannuation. The Tribunal was persuaded that the Spouse's claim was weakened by these facts.

The Tribunal noted that the Son and Daughters appear not to have had regular contact with the Deceased Member or his family. Although they were not financially dependent on the Deceased Member at the time of his death, the material which touched on the Deceased Member's relationship with their mother suggests that he did not contribute significantly to their upbringing. None of the children were minors at the time of the Deceased Member's death, but they were quite young, the eldest being 23. Their financial circumstances appeared to be poor.

The Tribunal considered the facts that the Spouse, the Son and Daughter 1 were all estranged from the Deceased Member and that none of them were financially dependent on him at the time of his death or would have expected financial assistance from him in the future and concluded that their claims on the benefit are not to be distinguished.

The Will of the Deceased Member showed his intention that his mother, Complainant 2, would receive the benefit on his death. However, she was not a 'beneficiary'. Payment to her could only have been effected by payment to the LPR. Payment to the LPR might have been appropriate if there were no dependants identified. However, dependants were identified.

The Trustee proposed to distribute the whole of the benefit to the Spouse and none to the Son and Daughter 1. Although a spouse might ordinarily have a greater claim to a death benefit than independent adult children, the marriage between the Spouse and the Deceased Member was a short one and they were no longer together. The Tribunal

considered that each stood effectively on an equal footing in relation to the benefit. Each was a financially independent member of the family of the Deceased Member and was estranged from the Deceased Member at the time of his death. In these circumstances, the Tribunal considered that each of the Spouse, Son and Daughter 1 should have been treated equally and the decision under review was unfair and unreasonable in its operation in relation to the Son and Daughter 1 because it did not treat each of these beneficiaries equally. The Tribunal determined to set aside the decision under review and substitute its own decision that the benefit be distributed equally between the Spouse, the Son and Daughter 1.

D10-11\040

The Complainants were the parents of the Deceased Member and lodged a joint submission stating that the decision of the Trustee to pay them the death benefit as non-dependants was unfair or unreasonable because an interdependency relationship existed between them and the Deceased Member.

The decision of the Trustee to pay the death benefit of the Deceased Member in equal shares to the Complainants was not disputed by any party. The issue was whether the Complainants qualified as dependants under the Trust Deed and therefore would receive more favourable tax treatment on the payments.

The Complainants state that they met all the requirements of an interdependent relationship:

- they had a close personal relationship with the Deceased Member for 29 years which was well known by the public;
- they provided the Deceased Member with food, accommodation, transport, meals, clothing and bedding;
- they provided the Deceased Member with domestic support and personal care in the

form of cooking, laundry, cleaning, shopping and transport;

- the Deceased Member was diagnosed with depression and put on medication and that with his condition it was extremely likely that the Deceased Member would have remained living with the Complainants; and
- the Deceased Member was still living with the Complainants at the time of his death.

Complainant 1 (the mother) had advised the Tribunal in earlier correspondence that the Deceased Member had confined himself to his bedroom at their house for two years leaving it only to eat and wash and going out of the house for very occasional short periods. She stated that after seeing a psychiatrist he was hospitalised for four months and treated for depression and she visited him nearly every day.

The Trustee submitted that in making its decision it referred to the Explanatory Statement for the SIS Regulations concerning interdependency relationships which stated that, generally speaking, it was not expected that children would be in an interdependency relationship with their parents. The Statement also noted that there needed to be unusual or exceptional circumstances before an interdependency relationship was established between such parties.

The Trustee stated that it acknowledged that a close personal relationship existed between the Deceased Member and his parents. However, there were no distinguishing circumstances to make this situation anything other than a normal parent-child relationship. It was also noted that Regulation 1.04 of the SIS Regulations asks that all of the circumstances of the relationship between the parties be taken into account, including any evidence that the parties intend the relationship to be permanent. It was submitted that there was no evidence that the Deceased Member's intention was to reside with his parents permanently and, without any special

circumstances such as disability or illness, it was reasonable to assume that he would have moved out of the family home and pursued an independent life. Therefore, the Trustee submitted that, in its view, the Complainants were not in an interdependency relationship with the Deceased Member at the time of his death and as a result could not be considered 'dependants' under superannuation law.

The Trustee lodged a later submission in which it stated that when considering the interdependency claim by the Complainants, it relied upon the information provided by them at that time. The Trustee submitted that the Complainants made reference to information in their complaint to the Tribunal that was not previously disclosed to the Trustee. This information related to the mental health of the Deceased Member at the time of his death and was not considered in the Trustee's decision or its review.

The Tribunal noted that the Trustee had referred to the Explanatory Statement of the SIS Act and Regulations concerning interdependency relationships. The Statement was issued to provide guidance when applying the legislation governing interdependency relationships and the Tribunal believes it was fair and reasonable for the Trustee to seek clarification from this document.

The Tribunal considered the submissions of the Complainants and was satisfied that they provided significant care for the Deceased Member of the kind allowed for under SIS Regulation 1.04AAAA (2). The Tribunal further noted that the Explanatory Statement also applied guidance for sub-regulation (2):

The preparation of a meal or assistance with medication when a person is unwell would not normally of itself satisfy this provision. More likely the kind of care and support normally provided in a close personal relationship would extend to constant care (for example, overnight), attending medical appointments with the

person or the provision of personal and physical assistance where required.

This provision distinguishes between the kind of care outlined above and the care that a friend or flatmate might reasonably be expected to provide, for example merely checking in on a person when they are unwell and cooking or providing pre-cooked meals.

Taking the main elements of the statutory definition of interdependency relationship into account, the Tribunal found that:

- there is no reason to dispute that the Complainants and the Deceased Member enjoyed a close personal relationship;
- the Complainants and the Deceased Member were living together at the time of his death;
- the Complainants provided the Deceased Member with ongoing financial support; and
- the Complainants provided the Deceased Member with domestic support and personal care.

The Tribunal also found no reason to dispute the Complainants' submission that the Deceased Member suffered from depression, had been unwell for years, rarely left the house for extended periods and that Complainant 1 (the mother) had attended medical appointments with the Deceased Member and visited him almost daily while he was being treated in hospital.

The Tribunal was satisfied that unusual and exceptional circumstances existed sufficient for the relationship between the Complainants and the Deceased Member not to be determined as a "normal" parent-child relationship and for the Complainants and the Deceased Member to satisfy the requirements of SIS Regulation 1.04AAA (2) and therefore Section 10A of the SIS Act.

The Tribunal found the Complainants were in an interdependency relationship with the Deceased Member and therefore satisfied the

requirements to be classed as dependants under the Trust Deed. Accordingly, the Tribunal set aside the decision under review on the grounds that it was not fair and reasonable and substituted its own decision that the death benefit be paid to the Complainants as dependants.

D10-11\025

The Complainants were the parents of the Deceased Member. Their complaint was that the decision of the Trustee to pay the death benefit to the Ex-Partner on trust for the Daughter and the Son in equal shares (subject to a payment of \$6,994.90 to the Complainants for funeral expenses) was unfair and unreasonable. They also argued that the failure of the Trustee, in notifying them of its proposed payment of the death benefit, to allow 28 days for any objection was unfair and unreasonable.

The resolution sought by the Complainants was that the legal personal representative (LPR) of the Deceased Member hold the benefit in trust for the children subject to reimbursement of some further costs incurred by them.

The Tribunal first determined it had jurisdiction regarding the complaint and concluded that the Trustee's failure to provide notification of the prescribed objection period fell within the exception under Section 15(2)(c) of the *Superannuation (Resolution of Complaints) Act 1993*. Accordingly, the failure of the Complainants to make their complaint to the Tribunal within the time specified did not prevent the Tribunal from exercising jurisdiction in relation to the complaints.

The Tribunal then reviewed the Trustee's nomination of potential beneficiaries. The Son and the Daughter were the natural children of the Deceased Member. Each was a minor and both were the beneficiaries of a child support assessment made in their favour with the Deceased Member as liable parent. The Trustee correctly, in the view of the

Tribunal, identified them as potential beneficiaries.

The Trustee also recognised an interdependency relationship between the Deceased Member and the Complainants. The Deceased Member had been living with the Complainants in their home following his last separation from the Ex-Partner in about March 2007 until the date of his death (15 December 2007). According to an interdependency relationship questionnaire completed by the Complainants, while the Deceased Member was in employment he contributed towards the expenses of the household. However after he became unemployed he was unable to maintain these contributions and was supported by the Complainants. The Deceased Member continued to provide non-financial help around the home and the Complainants stated that there was mutual emotional support between them. Considering the breakdown in the relationship between the Deceased Member and the Ex-Partner, the Tribunal was of the opinion that it was reasonable to assume that, had he lived, this relationship with the Complainants would have continued for some time.

In the case of parents and an adult child it is generally considered that there needs to be strong evidence to support an interdependency finding. In the circumstances, the Tribunal considered that the Trustee had investigated the relationship between the Deceased Member and the Complainants and that, based on the evidence before the Trustee, it was open to the Trustee to determine interdependency. The Tribunal regarded the Trustee's finding that an interdependency relationship existed was fair and reasonable in the circumstances.

The Tribunal also reviewed the wishes of the Deceased Member and noted that a preferred benefit nomination form had been provided at the time the Deceased Member joined the Fund. As it was not signed, it was returned to him. A signed form was never lodged. In these circumstances, in the view of the

Tribunal, the only logical conclusion which could be drawn was that the Deceased Member chose not to make any nomination.

While the Complainants, the Daughter and the Son all satisfied the definition of dependency, the Daughter and the Son, as infant children, were entitled to significant priority in relation to the payment of the death benefit. By its decision the Trustee had apportioned the benefit by paying approximately 4% to the Complainants 'representing the amount for funeral expenses' and 47% to each of the children.

In reviewing the Trustee's decision, the Tribunal affirmed that it was inappropriate and contrary to the primary purpose of superannuation for any part of a benefit to be applied towards reimbursement of past expenses such as funeral costs. It was, nevertheless, in the Tribunal's view, reasonable for the Trustee to have allocated a small part of the benefit to the Complainants because of their interdependency relationship with the Deceased Member. In the present case it may have been reasonable for the Trustee to have made a slightly higher payment to the Complainants. Nevertheless, in the Tribunal's opinion, it could not be said that the decision of the Trustee fell outside the range of decisions which was fair and reasonable. Accordingly, the Tribunal affirmed the Trustee's decision.

D10-11\049

The Complainant made a claim for a total and permanent disablement ('TPD') benefit on 18 June 2007. The Insurer approved the claim on 16 July 2009 and the Trustee paid the insured sum and the Complainant's account balance to her on 11 August 2009. The decisions under review were the refusal by the Trustee and the Insurer to pay interest on the insured amount of the TPD benefit for the period from 18 January 2008 to the date of payment of the benefit.

The Tribunal was certain of the following facts. On 17 June 2007 the Complainant claimed payment of a TPD benefit from the Fund. On 9 June 2009 the Complainant complained to the Tribunal about the Trustee's and the Insurer's failure to make a decision about her application for a TPD benefit. At the time the Complainant lodged her complaint with the Tribunal, no decision had been made in relation to her claim for a TPD benefit. On 16 July 2009 the Insurer advised the Trustee that it had admitted her claim and on 11 August 2009 the TPD benefit was paid to the Complainant. On 3 August 2009 the Complainant advised the Tribunal by telephone that she wished to continue with her claim for interest on the basis that there had been an unreasonable delay in the assessment of her claim.

The resolution sought by the Complainant was payment of interest from 18 January 2008, being the date of a certification by another superannuation fund, of which the Complainant was a member, that she was totally and permanently incapacitated. In her submission, the Complainant stated that she did not believe that the Insurer and the Trustee processed her claim in a timely fashion, and noted that she continued to provide reports supporting her claim unprompted to the Trustee and the Insurer during 2008.

In its brief submission to the Tribunal, the Insurer referred to information previously supplied and maintained that the Complainant 'fails to substantiate how [the Insurer] did not meet its obligation in accordance to the Terms and Conditions of the Policy and therefore no liability with respect to interest should be payable (in accordance to section 57(2) of the *Insurance Contracts Act*).'

The Tribunal determined that it was convenient to deal first with the Trustee. Under Clause 29(h) of the Trust Deed, the Trustee was not obliged to pay the insured component of a TPD benefit until the insured benefit had been received from the Insurer.

The material before the Tribunal indicated that the Trustee acted reasonably promptly in forwarding requests and documentation received from the Complainant or the Insurer to the other party, but it did not appear that the Trustee took any action to request updates from the Insurer unless prompted by the Complainant. However, the Tribunal did note numerous emails from the Trustee to the Insurer, including emails dated 20 April 2009, 4 May 2009 and 12 May 2009 (after the Complainant had complained about the delay), requesting updates in relation to the assessment of the claim, and an email dated 15 May 2009 summarising the evidence available as at July 2008 and asking the Insurer to confirm whether there was enough evidence already available to make a decision. In the Tribunal's view, in the circumstances of this complaint, this was evidence of reasonable attempts by the Trustee to follow up the claim with the Insurer.

The Tribunal was satisfied that the decision of the Trustee not to pay interest on the insured amount for any period prior to its receipt of the insured amount from the Insurer was fair and reasonable in the circumstances because:

- it did not have the funds until they were paid by the Insurer to the Trustee, and
- the Trustee regularly followed up the Insurer for updates in relation to the claim.

The Tribunal then reviewed the Insurer's decision. The Trustee wrote to the Insurer on 7 February 2008 indicating that another superannuation fund had determined that the Complainant was TPD. However, the Tribunal noted that the Insurer was entitled to make its own enquiries in order to assess the claim in accordance with the definition in the Policy, and on 29 February 2008 independent medical examiner Dr AKL, a consultant neurologist, reported to the Insurer at the Insurer's request. He stated that, at that time, the Complainant had no work capacity, she was unable to perform any work activity, whether part-time or full-time, and that no

employment was possible at that time. With respect to prognosis, he stated:

It is probable that the condition will continue indefinitely and impairment will increase.

In my opinion it is most unlikely that a remediable diagnosis will be reached. On this basis, deterioration will be over a period of a few or more years.

...

A complete recovery is unlikely – unless the condition proves to be primarily psychiatric, and even then the prognosis is poor.

In addition, Dr GT had reported on 4 July 2007 that the Complainant was not fit for work in any way, shape or form, and in a further report dated 19 October 2007 which the Trustee advised had been forwarded to the Insurer on 27 November 2007, stated that he did not see the Complainant returning to the workplace in the foreseeable future in any capacity for which she was suited by training or experience. Dr MR reported on 25 September 2007 that the Complainant was unemployable and it would be unsafe to put her into any type of office environment.

The only reports before the Insurer querying the veracity and severity of the Complainant's symptoms were from advisers to the Insurer who had not examined the Complainant, and neither of which expressed any opinion that the Complainant was capable of working, rather recommending further tests because no definitive diagnosis of the Complainant's condition had been made.

The Insurer, therefore, had before it in early March 2008, numerous reports indicating that the Complainant met the definition of TPD, together with a report prepared for it by an independent medical examiner conclusively stating that the Complainant was unable to work at that time, and opining that her condition would deteriorate and her prognosis was poor; and no reports saying that the

Complainant was capable of returning to work.

The definition of TPD in the Policy required the Insurer to form an opinion that the Complainant had become incapacitated to such an extent as to render her unlikely ever to engage in any gainful profession, trade or occupation for which she is reasonably qualified by reason of education, training or experience. Given the independent opinion of Dr AKL that it was probable that the Complainant's condition would continue indefinitely and that impairment would increase, and given that, in his opinion, the Complainant was totally incapable of work at that time, the Tribunal was of the view that the Insurer became liable to pay the Complainant's claim after receipt of Dr AKL's report.

Accordingly, from the medical evidence, the Tribunal was not satisfied that the Insurer's decision not to accept the Complainant's claim for TPD after receipt of Dr AKL's report and to request further information was fair and reasonable in its operation in relation to the Complainant in the circumstances. The Insurer had overwhelming evidence that, on balance, the Complainant was TPD and no contrary evidence at that date.

Section 57 of the *Insurance Contracts Act 1984* (the ICA Act) provides that where an insurer is liable to pay to a person an amount under a contract of insurance, the insurer is also liable to pay interest on the amount. The period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount and ending on whichever is the earlier of the following days:

- (a) the day on which the payment is made;
- (b) the day on which the payment is sent by post to the person to whom it is payable.

The rate at which interest is payable is the rate set by the regulations under the *Insurance Contracts Act 1984*, compounded annually.

Having allowed for a reasonable time for the Insurer to complete its assessment after receipt of Dr AKL's report, which was sent directly to it, the Tribunal was of the view that the date upon which it became unreasonable for the Insurer to have withheld payment of the insured TPD benefit was 31 March 2008.

Accordingly, the Tribunal considered that the decision of the Insurer to reject the Complainant's claim for interest on the insured component of the TPD benefit was not fair and reasonable in its operation in relation to the Complainant in the circumstances. The Tribunal ordered the to pay interest.

D10-11\047

On 22 April 2009 the Complainant lodged a complaint with the Tribunal in relation to the action of the Trustee in treating his crystallised defined benefit as invested in its growth investment option from the date of his retirement until the date of rollover and its subsequent decision refusing to compensate him for loss suffered by him as a result.

The Complainant's defined benefit account had commenced in 1978 and his membership of the Fund in 1996. He was made redundant on 12 October 2008 and, on that date, as he had satisfied a condition of release, his defined benefit crystallised.

Following his retirement he contacted the Trustee by telephone to inform the Trustee that he had retired and proposed to rollover his benefit to another fund. He was informed that he would have to await receipt by the Fund of his final employer contribution. His understanding was that the defined benefit would be held uninvested until rollover and he continued to obtain periodic statements and website information which re-assured him that this was the case.

Following receipt by the Fund of the final employer contribution late in December 2008 he completed and lodged a rollover application which was processed by the Trustee on 25 February 2009. It was upon receipt of his rollover benefit statement and exit statement that he discovered that his defined benefit had been treated by the Trustee as held in his existing separate accumulation account with the Fund and invested in the growth investment option, between the date of his retirement and the date of rollover. During this period the defined benefit amount was reduced through application of negative investment returns.

The Complainant lodged a complaint with the Trustee alleging that its action in treating the defined benefit sum as invested in his accumulation account was undertaken without his consent or authority. He requested that the negative returns be reversed. The Trustee rejected this complaint.

In reviewing the Trustee's submission, the Tribunal accepted that a defined benefit crystallises at the date of termination of employment and that information from an employer is reasonably required in order to correctly calculate the amount of a benefit. Nevertheless, the issue arising from this complaint was not the manner in which the Complainant's defined benefit was calculated but the way in which it was treated by the Trustee between the date of employment termination and the date of rollover.

The Complainant stated that, prior to receipt of his rollover benefit statement in early March 2009, he had no knowledge that his crystallised benefit had been treated as invested in the Fund's growth investment option or in any other manner. He had made the assumption that, pending any instruction from him or action on his part, the proceeds of the benefit would be retained in cash form.

The Trustee stated that, after crystallisation, a benefit is converted to an accumulation account at the event date (termination) and

invested in the member's elected investment option. It also stated that the process of applying investment earnings based upon the member's investment choice was consistently applied to all defined benefit members.

However, there was no evidence that the Complainant was told of such a policy. The Fund's Product Disclosure Statement ('PDS') dated 13 September 2006 had a section headed 'Benefits – Defined Benefit Members' in which information was provided as to benefits on retirement. Nowhere within this section of the PDS did it state that a defined benefit amount would be credited to an existing accumulation account.

The Fund also made available to members a Member Investment Choice Booklet. Again, there was no suggestion that a crystallised defined benefit entitlement would be credited to an existing accumulation account and, indeed the implication was that, in the absence of a specific choice by a member, no funds other than normal accumulation account contributions would be allocated other than to the balanced option.

In the Tribunal's view the Complainant was entitled to assume, in the absence of his specific authorisation to the contrary, that no investment decision would be made in relation to his defined benefit entitlement. The Tribunal wondered what the Trustee might have done had the Complainant not had a separate accumulation account with the Fund. Presumably, there would have been no basis for retrospectively applying growth option earnings.

In the Complainant's case there were other relevant factors:

- the Fund website continued to reflect the impression that the defined benefit amount was intact;
- the website, in fact, as late as 19 February 2009, contained the words 'Your Member Investment Choice strategy relates only to your accumulation benefit';

- the defined benefit amount was significantly higher than the existing accumulation account balance so that to presume, without specific authorisation, that a member would make the same investment choice in relation to such a significant sum is not reasonable;
- On the contrary, it could be expected that a member in the Complainant's circumstances might choose the growth investment option for his accumulation benefit component in the knowledge that the bulk of his overall benefit was secured as a defined benefit.

Finally, the Trustee contended that to freeze a defined benefit until finalisation would place the investment risk with other members. The Trustee provided no rationale for such a statement and the Tribunal did not see how treating a sum to which a member was presently entitled as uninvested pending payment to the member could prejudice other members.

In these circumstances the Tribunal considered that the action of the Trustee in retrospectively applying growth option earnings to the Complainant's crystallised defined benefit from the date of his retirement to the date of rollover without his authorisation was unfair or unreasonable.

The Tribunal considered that the Complainant was entitled to receive the amount of his defined benefit at rollover without adjustment by investment earnings between the date of retirement and the date of rollover. The Tribunal further considered that as, due to the Trustee's refusal to compromise his claim, the Complainant had lost the benefit of the additional amount due to him, he should receive interest representing the earnings which would have accrued on that sum after the date of rollover.

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