



## Chairperson's report

### Effective claim-staking – recent Federal Court decision

A recent case in the Federal Court highlights risks that trustees face if claimstaking letters cannot be proved to have been received by potential beneficiaries.

In *Jones v Superannuation Complaints Tribunal* [2011] FCA 1255 the Federal Court considered a case where the trustee said it had properly dispatched a notice relating to a disputed death benefit to solicitors acting for the potential recipient, but where the solicitors denied that the notice had been received at its offices.

The facts of the case were as follows:

- The deceased died and a death benefit became payable. He was survived by his mother and father who were divorced.
- The trustee decided to pay the benefit to the deceased's mother.
- The trustee wrote to the mother and father on 21 August 2008 advising of its proposed decision.
- On 11 September 2008, the father's solicitors wrote to the trustee advising that they acted for the father and objecting to the proposed payment on his behalf.

- The Trustee wrote to the father's solicitors on 17 September 2008 seeking further information, which was provided by the solicitors by letter dated 26 September 2008.
- By letters dated 13 October 2008 to the mother and the father's solicitors, the Trustee gave notice that it affirmed its earlier decision.
- Having not received any further objections, the trustee paid the benefit to the mother on 24 November 2008.
- The father's complaint about the trustee's decision was lodged with the Tribunal on 5 January 2009, outside the prescribed period of 28 days.
- The Tribunal determined that the complaint was outside its jurisdiction on the basis that the deemed delivery provision in the *Acts Interpretation Act 1901* (AIA) had not been rebutted and therefore the complaint was outside the prescribed time limit of 28 days from the date the father's solicitors were deemed to have received the trustee's letter.

The father appealed the decision to the Federal Court.

The court discussed the circumstances in which the Tribunal could rely on the presumption under s 29 of the *Acts Interpretation Act 1901* (AIA) in respect of the delivery of mail that had been properly

dispatched by a fund trustee. Where s 29 applies, a document properly addressed, prepaid and posted as a letter is generally deemed to have been given at the time at which the letter would have been delivered in the ordinary course of post.

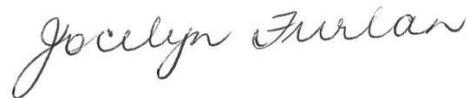
The court found that s 29 of the AIA applied to the Complaints Act but only in the limited circumstances of s 28A of the AIA. The limited circumstances were where the notice required to be given to a potential beneficiary about a death benefit distribution was properly dispatched to the place of residence or business of the potential recipient.

In *Jones*, the trustee had sent the claim-staking letter to solicitors acting for the father. The result was that the presumption of delivery under s 29 of the AIA did not apply, despite that there was no doubt that the father had authorised the solicitors to send and receive correspondence with the fund on his behalf. The court found that in this case the presumption in s 29 of the AIA did not apply to activate the time limit in the SRC Act in which to lodge a complaint with the Tribunal.

The effect of the decision is that to be certain of activating the statutory time limits in the SRC Act in relation to death benefit complaints trustees should consider sending death benefit claim-staking correspondence to the potential recipient as well as to any relevant solicitors or other representative of a potential beneficiary.

In addition, and as mentioned a previous bulletin, a simple way for trustees to avoid complaints of this type is to send all notices relating to disputed death benefit

distributions to potential beneficiaries by registered mail. As the 'prescribed period' of 28 days is calculated from the date of *receipt* of the notice, there will be probative evidence to support the receipt date of the notices.



**Jocelyn Furlan**  
**Chairperson**

# Statistical overview

## Quarterly statistics –

### July - September 2011

#### Telephone inquiries

The Tribunal received 4,124 telephone calls this quarter (last quarter – 3,449), which is an increase of 19.6% compared with the previous quarter.

The Tribunal dealt with a wide range of inquiries, the most popular were complaints related inquiries (851/20.6%), followed by questions about the Tribunal itself (772/18.7%) and fund administration inquiries (447/10.8%).

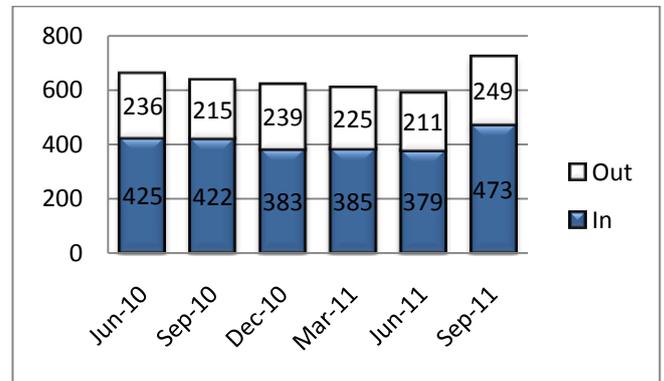
#### Written complaints

This quarter, the Tribunal received 722 written complaints (last quarter – 590), which is an increase of 18.2% compared with the previous quarter.

#### Jurisdiction

Of the 722 written complaints received this quarter, 473 (65.5%) complaints were within jurisdiction (previous quarter – 64.2%). Of the 249 (34.5%) complaints closed as outside jurisdiction, 166 (66.6%) 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 – 69.1%).

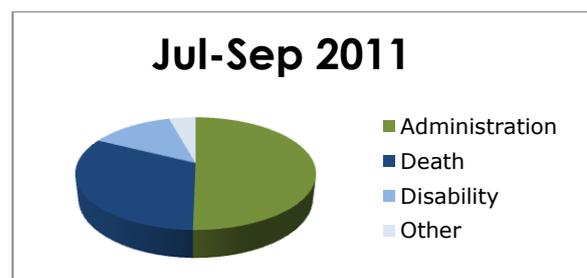


Complaints within jurisdiction

#### 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 – 50.3% (last quarter – 46.2%). Death complaints made up the second-largest category at 32.1% (last quarter – 35.9%), followed by disability at 13.3% (last quarter – 12.9%).



## Performance

### Complaints finalised

The Tribunal finalised 559 written complaints this quarter, a decrease of 8.5% compared to the previous quarter.

Of the 559 finalised complaints, 3% were finalised at review (last quarter – 6.5%), 46.8% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 52.5%) and 50.2% were outside jurisdiction (last quarter – 41%).

### Conciliation conferences

The Tribunal conciliated 127 cases in the quarter, a decrease of 24.4% on last quarter's 168.

Of the 89 cases concluded, settlement was achieved in 57, resulting in a settlement rate of 64% (last quarter – 61.6%). The outcome is pending in 38 cases (29.9%) compared to 43 cases (25.5%) for last quarter.

### Nature of conciliation cases

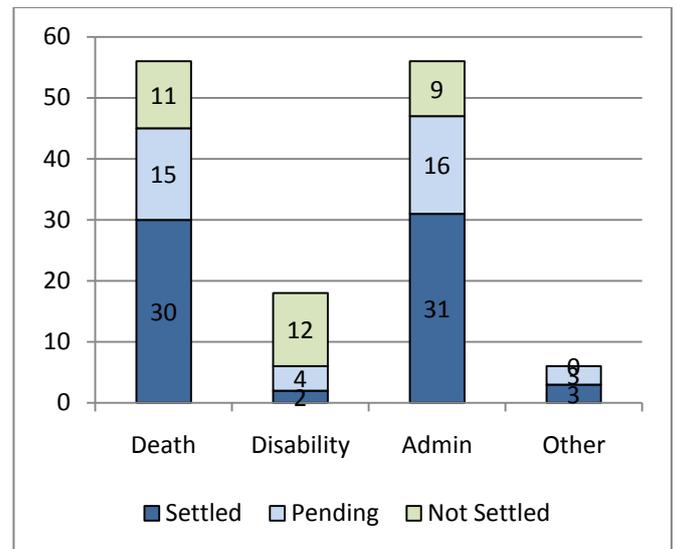
The categories of note in the quarter are as follows:

Death benefits – Of the 41 concluded cases, 30 (73.1%) were settled.

Disability – Of the 14 concluded cases, 2 (14.2%) were settled.

Administration – Of the 31 concluded cases, 22 (70.9%) were settled.

Other – of the 3 concluded cases, 3 (100%) were settled.



Settlement by conciliation

## Review determination outcomes for the quarter

The Tribunal determined 17 cases this quarter (last quarter – 39 cases).

The largest category of complaints determined at review was death benefit complaints: 7 (41.2%).

<b>Death</b>	Qtr	YTD
Affirmed	1	1
Remitted	0	0
Varied	0	0
Set aside	6	6
<b>Total</b>	7	7

Administration complaints made up the second largest category: 6 (35.3%)

<b>Admin</b>	Qtr	YTD
Affirmed	2	2
Remitted	0	0
Varied	0	0
Set aside	4	4
<b>Total</b>	6	6

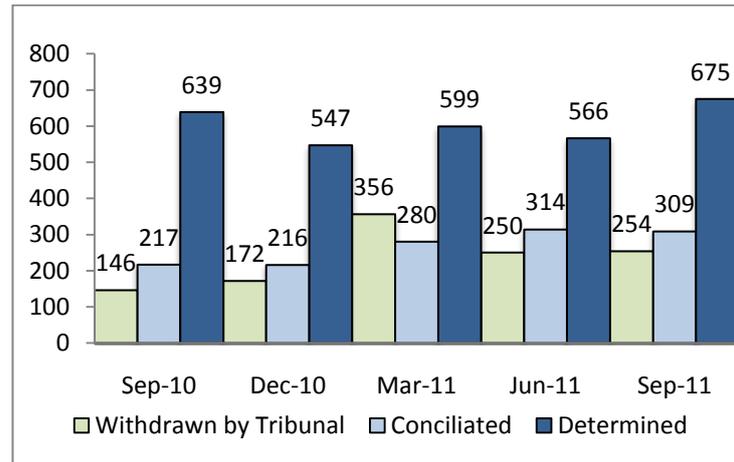
Followed by disability complaints: 4 (23.5%)

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

35.2% of trustee decisions were affirmed during the quarter, compared with 59% last quarter.

## Efficiency

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



## Recent determinations of interest

### Death benefit distribution: D11-12\001

*The complainant (the deceased member's mother and legal personal representative) lodged a complaint with the Tribunal that the trustee's decision to pay the death benefit arising on the death of the deceased member in the proportions of 80% to the joined party (the deceased member's de facto spouse) and 20 % to the complainant was not fair and reasonable. The Tribunal set aside the trustee's decision and substituted its own decision that the death benefit be paid 60% to the joined party and 40% to the complainant.*

The deceased member died in 2006 aged 31. He had known the joined party since 2000 and there had been a close relationship between them for some of this period. The joined party and the deceased member had lived together for approximately seven months prior to his death and she claimed to have been his de facto spouse, a claim which was disputed by the complainant.

The deceased member completed a non-binding nomination in favour of the complainant at the time he joined the Fund in 1994, aged 18. This nomination was not changed or updated over time. The deceased member left no will. There was

therefore no evidence of any intention on his behalf in relation to the distribution of his wider estate.

The Tribunal considered the financial circumstances and needs of the complainant and the joined party.

The complainant and the deceased member had a strong emotional bond and there was evidence that the deceased member had been 'giving money' on an irregular basis to the complainant over several years prior to his death, particularly following a work accident that she suffered in 2005, when she began to experience financial difficulty. The deceased member had also lived with the complainant at various times during the years prior to his death but was not living with her over the last seven months of his life.

The joined party and the deceased member formed a relationship in 2000 and this quickly developed to the point that they cohabited together several nights a week. Although there were breaks in this pattern, including periods of separation and reconciliation, the deceased member and the complainant remained together and appear to have cohabited continuously for the last seven months of his life.

During this period of cohabitation, the joined party and the deceased member shared their income and financial resources

and had applied for a joint mortgage loan shortly before the deceased member's death. Both the trustee and the Tribunal accepted that the joined party and the deceased member were living together on a bona fide domestic basis and that the joined party therefore came within the definition of spouse in the trust deed.

The trustee and the Tribunal accepted that both the complainant and the joined party were potential dependants under the trust deed. Both were partially financially dependent on the deceased member and the joined party also satisfied the definition of a spousal dependant.

In its deliberations, the Tribunal took into account that both the complainant and the joined party had received other superannuation benefits arising from the death of the deceased member, and that the joined party had been allocated a higher share of these benefits from another superannuation fund.

The Tribunal also took into account that the deceased member and the joined party were in a spousal relationship that would most likely have continued and developed and that it was therefore appropriate that the joined party should receive the greater share of the deceased member's fund benefit.

However, the complainant had demonstrated a strong present financial need and limited earning capacity and it is highly likely that the deceased member would have continued to provide her with financial support.

On this basis the Tribunal decided that the Trustee's decision was not fair and reasonable in its operation in relation to the Complainant. The Tribunal set aside the trustee's decision and determined to apportion the deceased member's benefit as to 60% to the complainant and 40% to the joined party.

Total and permanent disability complaint: D11-12\002

*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 Tribunal set aside the decisions of the trustee and insurer and substituted its own decision that the complainant's claim for a TPD benefit is accepted. The Tribunal directed the insurer and the trustee to pay the TPD benefit and interest to the complainant.*

The complainant was aged 64 years. He joined the fund in 1984. In 1988, he suffered a heart attack from which he recovered and returned to work. The complainant joined the most recent employer in 1999 working as a fire

sprinkler fitter. In January 2007 at age 59, he suffered crescendo angina and later that month underwent major open heart surgery. The complainant returned to work in June 2007 but ceased employment with the employer in October 2007.

The complainant claimed that he ceased work because his job as a fire sprinkler fitter was very physically demanding and too strenuous for him following his operation. Given that he had been doing the same job since he was 25 years old and had no other training, he considered that he fit the TPD definition in the insurance policy.

The relevant provision of the insurance policy defined total and permanent disablement as occurring where:

"...the Insured Person is unable to follow their usual occupation ... and in our opinion, after consideration of medical evidence satisfactory to us, is unlikely ever to be able to engage in any Regular Remuneration Work for which the Insured Person is reasonably fitted by education, training or experience."

The trustee and insurer claimed that the medical evidence did not support the complainant's TPD claim and that he could return to either part time work or lighter duties such as inspection type work, maintenance or testing.

The Tribunal reviewed the medical evidence, which included reports from the complainant's general practitioner, consultant cardiologist and treating surgeon. The Tribunal took the view that the trustee and insurer placed too much emphasis on the medical report of the complainant's cardiologist, preferring instead to place more reliance on the reports from the complainant's general practitioner and treating surgeon, who had consulted more closely with the complainant over a longer period of time. The Tribunal considered that these medical reports supported the complainant's TPD claim that he was unable to return to work in a full time capacity.

The Tribunal also rejected the insurer's argument that the complainant was fit to work part time. As the complainant was working full time with the employer prior to his disability, the relevant test was for full time work not part time work. The Tribunal also considered that the alternative occupations proposed by the insurer were not suitable to the complainant given his education, training, medical condition and work capacity.

The Tribunal set aside the decisions of the trustee and the insurer and substituted its own decision that the complainant was entitled to a TPD benefit. It also determined that the insurer should pay interest on the insured component of the TPD benefit under section 57 of the

*Insurance Contracts Act 1984.* Interest was to apply from the date that the insurer made the decision to reject the claim, the point at which it had access to all the evidence relevant to this matter, and would end on the day that the insurer paid the TPD benefit to the trustee.

#### Administration complaint: D11-12\004

*The complainants lodged a complaint in relation to the rollover of their superannuation benefits. They claimed that the date and unit price used by the trustee to effect the rollover resulted in a loss. The trustee refused to compensate them for that loss. The Tribunal set aside the trustee's decision and substituted its own decision that the trustee is to compromise the complainants' claims.*

The complainants applied to the fund to roll over their superannuation benefits to their self managed superannuation fund. They completed and signed "Applications for Payment of Superannuation Benefit" forms on 27 May 2007 which were received by the fund on 21 June 2007. The trustee processed the rollover of the complainants' benefits on 29 January 2008 using the unit price at that date. The benefits received by the complainants were less than the amount which would have been received if the calculation date had been 21 June 2007. The complainants sought compensation for this amount.

The trustee had imposed a transaction freeze between May and September 2007 whilst it was completing a fund transfer. The successor fund transfer from the first fund to the second fund occurred effective 31 May 2007. There was no change of trustee. The trustee acted as the trustee of the second fund.

The trustee argued that it was not liable to compensate the complainants because it wrote to them on 21 September 2007 requiring them to contact the trustee to confirm that they wished to proceed with the withdrawal of funds, and that a response was only received on 23 January 2008. The complainants' funds were rolled out on 29 January 2008. The trustee's policy was to calculate benefit entitlements as at the date of processing, not the date on which a request for payout was made or received. [On the evidence before the Tribunal it appears that this letter was sent by the trustee but not actually received by the complainants].

The Tribunal referred to Regulation 6.34 of the *Superannuation Industry (Supervision) Regulations 1994*. As it applied at 21 June 2007, Regulation 6.34 required trustees to complete the rollover of superannuation benefits within 90 days of receiving the request.

The Tribunal considered that Regulation 6.34 required the trustee to process the

rollover within the 90 day period (now 30 days). Any inquiries by the trustee should also have been completed within this 90 day period. In any event, the letter sent by the trustee to the complainants did not address any of the matters related to Regulation 6.34 and merely sought further confirmation that the complainants wished to proceed with the rollover. The trustee was therefore not entitled to wait for a response to that letter before proceeding with the transfer.

The Tribunal determined that the trustee should compensate the complainants for the loss caused by the delay in the roll over. The Tribunal calculated the amount based on the unit prices at 19 September 2007, being the latest date by which the trustee could have processed the rollover under Regulation 6.34. The Tribunal also took into account the fact that monies were destined for the complainants' fund which showed negative returns for the period 30 September 2007 to 29 January 2008 and made the required offset to take this into account. Finally, an amount of interest was added to the compensation amount from 29 January 2008 to the date the amount was paid to the complainants, to reflect that the trustee had use of the money during this time.

Administration complaint: D11-12\010

*The complainant lodged a complaint with the Tribunal against the trustee's decision to refuse to act on the complainant's switch request made on 25 June 2008. The rules*

*of the fund allowed two switches per year and the switch request made on 25 June 2008 was the third request for the year. The Tribunal determined to set aside the trustee's decision and substituted its own decision that the trustee compromise the complainant's claim.*

On 19 December 2007 the Complainant completed a form to switch his investment in the fund to the cash investment option ('Cash'). The form was received by the fund on 24 December 2007. The trustee advised the complainant on 25 November 2008 that the switch became effective on 2 January 2008.

On 21 May 2008 the complainant again requested a switch from Cash to the default option ('Default'). The trustee advised the complainant on 25 November 2008 that this switch became effective on 4 June 2008. The complainant then requested a further switch from Default to Cash on 25 June 2008, but the trustee advised that the switch was invalid because only two switches could be made in any calendar year, and the switch requested by the complainant on 19 December 2007 was a switch in 2008 because it became effective on 2 January 2008.

The Tribunal considered the wording of the relevant section of the fund's interest rate determination (made pursuant to its enabling legislation):

"If a person has already switched between the Default Fund and Cash Option twice in a calendar year, the person may not make another nomination under subsection (1) or (2) in that calendar year."

The complainant made a nomination to switch on 19 December 2007. He only made two nominations in 2008 – one on 21 May 2008 and one on 25 June 2008. The Tribunal considered that the wording of the above section was capable of supporting the view that the Complainant's nomination to switch made on 19 December 2007 could be regarded as switching between the Default Fund and the Cash Option in 2007.

The Tribunal then considered the disclosures made by the Trustee in its disclosure material which referred to switching, and noted that these referred to two switches being permitted in a calendar year.

The Tribunal also noted that the trustee did not issue confirmation to the complainant that the December 2007 switch became effective in January 2008 until almost a year later in November 2008. Had the trustee met its duty of care to provide members with timely advice of transactions, the complainant would have been aware that the December 2007 switch was regarded as a 2008 switch and he would have known that he could only make one further switch in that year.

The Tribunal set aside the trustee's decision not to compromise the complainant's claim. It accepted that had the complainant been made aware by the trustee of the timing of his switches, he would not have undertaken the switch to Default in May 2008. The trustee was directed to compromise the complainant's claim by payment to him of an amount to place him in the position he would have been in had not undertaken the May 2008 switch.

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