Superannuation Complaints Tribunal

Quarterly Bulletin

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1 Oct – 31 Dec 2014

Chairperson's report

Some final thoughts

In my final Chairperson's Report before a new Chair takes the reins in March, I find myself reflecting on the superannuation industry and the Tribunal's role within it.

It is important that the industry keep the best interests of members and their beneficiaries at the centre of everything we do, not simply because that's the industry's obligation, but also because superannuation is compulsory.

Australians are compulsorily required to invest the best part of 10% of their income into the superannuation system and the relationship between funds and their members must reflect this. As this participation is not a choice, trustees have a special fiduciary responsibility to their members and this responsibility will increase in line with increases in contributions and account balances.

As the development of post retirement products has become part of the superannuation conversation, comment has often been made of superannuation's role in contributing to dignity in retirement. To me, this means not only financial dignity but also transactional dignity. Members should not have to take a deep breath and gird their loins against a sense of vulnerability and impending frustration before they pick up the telephone to call their superannuation fund. The industry must do better in empowering members and arming them with information and tools to enable them to transact with confidence on their superannuation.

Funds must also ensure they provide appropriate dispute resolution services and, in cases where complaints cannot be resolved internally, members must have access to a free, credible place to complain. It's this final right of access - to a fair and independent dispute resolution body – that is the Tribunal's function.

The role the Tribunal plays within the superannuation system is vital. It has a responsibility to members and funds to provide fair and meaningful resolution of superannuation complaints. In performing this duty, the Tribunal strives to be explicable in its decision making and consistent in its approach. So, while each complaint is considered in light of its own unique circumstances, consistency in processes and principles means that the outcomes should not be surprising.

It is a credit to the industry that, although funds and insurers are required by law to participate in the Tribunal's processes, and are bound by its determinations, the relationship between the Tribunal and the industry is positive and productive.

I am proud of what the Tribunal has achieved during my tenure including the introduction of independent reviews and mapping and completely re-engineering our complaints resolution process, all of which culminated in a 26% increase in output in the last financial year and financial efficiency superior to our peers.

Much, however, remains to be done. The Tribunal must secure adequate resources to deliver on its objectives, and the transparency of the funding arrangements and the Tribunal's accountability to the

superannuation industry and other stakeholders need to be enhanced.

The resources made available to the Tribunal for 2014-15 were decreased by 14% from those available in 2013-14, compared with an increase, as at 31 December 2014, of 18% in the number of complaints received compared to the previous year.

It is important that the Tribunal is adequately resourced, otherwise the backlog of complaints, which has been so successfully reduced, will build up again.

Thanks go to each member of the Tribunal's staff, the part-time members and the members of the Tribunal's Advisory Council. Their hard work, support and continued contributions have positioned the Tribunal such that, with sufficient resources, the Tribunal is well placed to continue to carry out its important function of promoting fairness for participants in Australia's compulsory superannuation system.

Farewell and thank you

Rod Smith

(14 December 2009 – 30 January 2015)

I would like to take the opportunity to farewell our Deputy Chairperson, Rod Smith. Rod has been integral to the Tribunal's development over the last five years, providing significant input into strategic decisions and asking the challenging questions when needed. More personally, I am thankful for the support, friendship and assistance that he has provided me as chairperson. He is a true gentleman.

While his contributions in the role will be missed greatly, we are fortunate enough to have benefit of his expertise as a part-time member until 30 April 2015.

I would also like to acknowledge the hard work and contribution of three part-time members who are retiring on 8 February 2015 and who have elected not to have their appointments extended.

Ross Christie

(1 December 1998 to 8 February 2015)

Ross Christie has been a member for 16 years having joined the Tribunal only a few years after its formation. His clear and well-reasoned determinations reflected his pragmatic nature and extensive experience in superannuation.

Dr Carolyn Re

(4 April 2000 to 8 February 2015)

Dr Carolyn Re has been a medical member for nearly 15 years, and her thoughtful and practical approach has made her an invaluable member of disability review panels. Carolyn's contribution to review meetings and her medical summaries and reasons demonstrated generosity of spirit coupled with an innate and deep understanding of fairness.

Oscar Shub

(9 February 2012 to 8 February 2015)

While Oscar Shub may have only been with the Tribunal for one term, his legal expertise and exceptional knowledge of insurance were highly valued.

I wish them the best in their next endeavours and am immensely grateful for the time and energy they have given the Tribunal.

Jocelyn Furlan
Acting Chairperson

Statistical overview

Quarterly statistics – Oct to Dec 2014

Telephone inquiries

The Tribunal received 2,921 telephone calls this quarter (last quarter – 3,254), which is a decrease of 10% compared with the previous quarter.

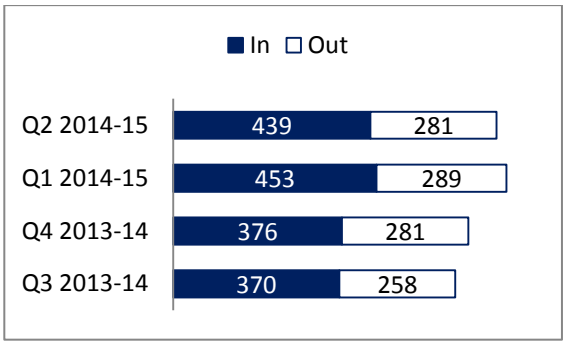
The Tribunal dealt with a wide range of inquiries, the most popular were queries about the Tribunal itself (78.6%), followed by complaint related inquiries (15.0%).

Written complaints

This quarter, the Tribunal received 720 written complaints (last quarter - 742), which is a decrease of 3% compared with the previous quarter.

Jurisdiction

Of the 281 complaints closed as outside jurisdiction, 191 (68%) 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 (63.3%).

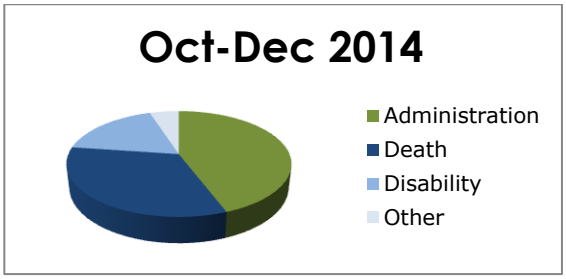


Complaints within jurisdiction

Nature of written complaints within jurisdiction

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

Administration complaints comprised the largest category of all written complaints received within jurisdiction – 44.2% (last quarter – 43.7%). Death benefit complaints made up the second-largest category at 33% (last quarter – 27.6%), followed by disability at 17.8% (last quarter – 24.1%). Other complaints made up 5% (last quarter – 4.6%).



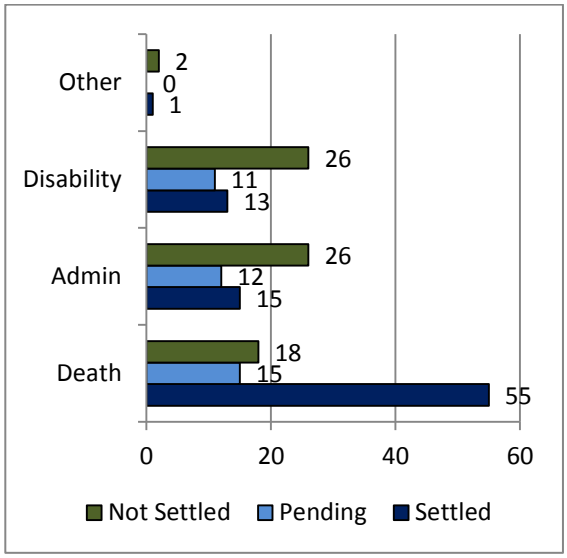
Nature of written complaints within jurisdiction

Performance

Complaints finalised

The Tribunal finalised 763 written complaints this quarter, a decrease of 10% compared to the previous quarter.

Of the 763 finalised complaints, 9.8% were finalised at review (last quarter 11.3%), 48.1% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 48.6%) and 42.1% were outside jurisdiction (last quarter 40.1%).



Settlement by conciliation

Conciliation conferences

The Tribunal conciliated 194 cases in the quarter, a decrease of 25.6% on last quarter's 261.

Of the 156 cases concluded, settlement was achieved in 84, resulting in a settlement rate of 53.8% (last quarter – 51.8%). 38 cases (19.5%) were adjourned in the quarter (last quarter – 45).

Nature of conciliation cases

The categories of note in the quarter are as follows:

Death benefits – Of the 73 concluded cases, 55 (75.3%) were settled.

Administration – Of the 41 concluded cases, 15 (36.5%) were settled.

Disability – Of the 39 concluded cases, 13 (33.3%) were settled.

Other – Of the 3 concluded cases, 1 (33.3%) were settled.

Review determination outcomes for the quarter

The Tribunal determined 75 cases this quarter (last quarter – 96 cases).

The largest category of complaints determined at review was administration complaints: 30 (40%)

Admin	Qtr	YTD
Affirmed	23	45
Remitted	0	0
Varied	0	1
Set aside	7	12
Total	30	58

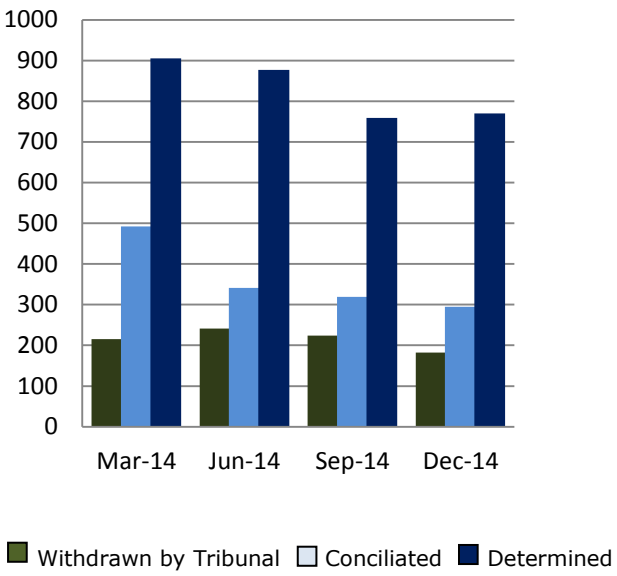
The second largest category was death benefit complaints: 26 (34.7%)

Death	Qtr	YTD
Affirmed	20	64
Remitted	0	0
Varied	0	1
Set aside	6	15
Total	**26**	**80**

Followed by disability complaints: 19 (25.3%)

Disability	Qtr	YTD
Affirmed	17	29
Remitted	0	0
Varied	0	0
Set aside	2	4
Total	19	33

80% of trustee decisions were affirmed during the quarter, compared with 81.2% last quarter.



Efficiency

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

Recent determinations of interest

D14-15\069. Death Benefit

The Complainant lodged a complaint with the Tribunal that the decision of the Trustee to find that the Complainant was an ineligible beneficiary and pay the portion of the death benefit arising from the death of the Deceased Member which was nominated to her in a non-lapsing nomination in equal shares to the three children of the Deceased Member was unfair and unreasonable. The Complainant sought to have the benefit paid as per the Deceased Member's non-lapsing nomination, which included a share to the Complainant as his ex-spouse and mother of his minor son. The Tribunal found that there was no reason to doubt the arrangements between the Complainant and the Deceased Member was not of regular financial benefit and that she was consequently partially dependent on the Deceased Member at the time of his death. The Tribunal therefore set aside the decision of the Trustee, and determined to pay a portion of the benefit to the Complainant as a financial dependant.

The Complainant was the former spouse of the Deceased Member. On 27 October 2012, the Deceased Member made a Non-lapsing nomination of beneficiary, requesting that each of his three sons be paid 21% of his benefit and the remaining 37% be paid to the Complainant.

The Trustee decided that the portion of 37% that was nominated to the Complainant should be divided equally between the Deceased Member's three children on the basis that the Complainant did not meet the definition of 'dependant' as required under the *Superannuation Industry (Supervision) Act 1993* ('the SIS Act') and therefore the nomination was not valid.

The Deceased Member was aged 49 years at the time of his death. He was divorced from the Complainant and was survived by three sons from his marriage to the Complainant. The three sons were aged 21, 19 and 10 years at time of the Deceased Member's death. The Deceased Member was not in any other relationship at the time of his death.

The Deceased Member left a will dated 31 October 2012. The Will listed three superannuation policies as major assets. In relation to the benefit from the Fund, the Deceased Member requested that each of his three sons be paid 21% of the benefit and that the Complainant receive 37%.

After bequests of personal items and payment of debts and funeral expenses he left 25% of the remainder to the Complainant and each of his three children.

The Trustee decided that the three sons of the Deceased Member met the definition of 'dependant' but, as the Complainant was divorced from the Deceased Member and not financially dependent on him at the time of his death, she did not meet the definition of dependant.

The Trustee argued that it could not pay part of the death benefit in accordance with the Deceased Member's direction because it was of the opinion that the Complainant was not a dependant at the time of death and was therefore an 'ineligible' beneficiary.

The Tribunal noted that in her initial letter to the Trustee the Complainant stated that she was not financially dependent on the Deceased Member. She later amended that statement to claim financial dependency.

From the evidence, the Deceased Member provided child support payments but, in May 2011, the Complainant requested the Child Support Agency to stop collecting child support, including arrears of $1,228.77 owed to her. The reason for this was stated as the Deceased Member's illness and consequential inability to work.

The Complainant stated that following the cessation of regular child support collected by the Child Support Agency she and the Deceased Member had an arrangement where, in lieu of regular child support payments, the Deceased Member undertook childcare duties for their youngest son. This enabled her to undertake paid employment to maintain herself and the Minor Child. This included taking night shifts. Since the death of the Deceased Member the Complainant had had to reduce her hours worked.

The Complainant also stated that, in addition to the provision of regular childcare, the Deceased Member also assisted her by paying for the cost associated with the upbringing of the Minor Child, such as school expenses, clothing, haircuts, holidays and school activities. These costs were incidental and no records are available.

While it was somewhat difficult to separate the financial dependence on the Deceased Member of the Complainant and the Minor Child, if the Deceased Member had not been ill, he would have been required to pay her ongoing child support and the arrears he owed her. Both she and the child benefited financially by her ability to undertake paid employment while the Deceased Member took on some childcare. His death left her and the Minor Child in a worse financial position.

The Tribunal could find no reason to doubt that the childcare arrangement was a regular financial benefit to the Complainant and consequentially she was partially dependent on the Deceased Member at the time of his death. The Tribunal therefore determined to set aside the decision under review and substitute its own decision that the death benefit be paid in the proportions of 21% each to the three sons, and 37% to the Complainant as a financial dependant.

D14-15\117. Death Benefit

The Complainant argued that the decisions of the Trustee and the Insurer to decline to pay the death benefit of $200,000, upon the death of the Deceased Member, were unfair or unreasonable. The Tribunal found that the Trustee had failed to take all due proper enquiries to ascertain if the Deceased Member was entitled to continue making contributions to the Fund prior to it cancelling a deduction authority, and thereby causing his insurance policy to lapse. The Tribunal determined to set aside the decision of the Trustee, and substitute its own decision that the Trustee compromise the Complainant's complaint and pay the Complainant an amount of $200,000.

The Complainant was the Spouse of the Deceased Member. The Deceased Member became insured under a life insurance superannuation plan on 1 August 1994. The Deceased Member arranged for his insurance premiums to be paid by monthly direct debit from a bank account.

The Insurer declined to pay the death benefit on the life of the Deceased Member, on the basis that the policy had lapsed at the time of death.

The Trustee submitted that contributions to the policy were cancelled due to the failure of the Deceased Member to confirm that he was eligible to continue to make contributions to the Fund as he was over 65 years of age and was required to satisfy the 'work test'.

The Trustee wrote to the Deceased Member on 13 August 2010 ('the Work Test letter') to enquire whether he was still eligible to make contributions to the Fund as he was aged 65. It submits that the letter clearly informed the Deceased Member that he must respond and notify the Fund of his employment status otherwise contributions could not be accepted. The Trustee indicated that as no response was received to its letter dated 13 August 2010, and it did not receive any returned mail, the direct debits being deducted from the Deceased Member's account to pay for the cost of insurance, ceased.

The Complainant stated that the Deceased Member never received the Work Test letter. The Complainant also stated that the first notification the Deceased Member received that there was an issue with his policy, was

when he received a letter from the Insurer dated 2 February 2011, headed 'Cancellation Warning'.

The Complainant advised that following receipt of the Cancellation Warning letter, the Deceased Member contacted the Customer Service Centre nominated on that letter to ascertain what the problem was. The Complainant indicated that the only reason the Deceased Member called was because the letter stated there were insufficient funds to cover the ongoing costs of the policy and it was the first occasion that he was informed about the Work Test letter and that he had to demonstrate that he was eligible to make contributions to the Fund, as he had turned 65. The Complainant believed that the Deceased Member told the Customer Service Officer that he was working and eligible to make contributions to the Fund as he had been working continuously from the time he turned 65. In fact he continued to work until 24 January 2012, a few weeks before he died.

The Tribunal noted that the Fund accepted the Deceased Member's contributions from the date he turned 65, on 3 March 2010, until the date it ceased accepting contributions in December 2010. This was a period in excess of 9 months after the Deceased Member turned 65. Interestingly, the Trustee made no refund of contributions to the Deceased Member after cancelling the policy.

The Tribunal also noted that apart from the letter dated 13 August 2010 the Trustee took no other steps to satisfy itself that the Deceased Member was entitled to continue to make contributions to the Fund and that it was complying with superannuation legislation.

The Tribunal found that the Trustee failed to take all due and proper enquiries to ascertain if the Deceased Member was entitled to continue making contributions to the Fund prior to it cancelling the deduction authority and thereby ceasing to accept contributions to the Fund in December 2010. The Tribunal also believes that the Deceased Member had until the end of that financial year to satisfy the Trustee that he was 'gainfully employed'. By taking the unreasonable unilateral action of cancelling the Deceased Member's automatic bank deduction it caused the Deceased Member to be confused about his circumstances as he knew he had the funds to cover the superannuation contributions.

The action of the Trustee in cancelling the Deceased Member's deduction authority placed it in a position where it had no funds to pay the premiums to the Insurer.

Given that the Trustee failed to pay the premiums to the Insurer, the Insurer quite rightly and acting in accordance with the Policy cancelled the Deceased Member's cover. Therefore the Tribunal was of the view that the Insurer acted fairly and reasonably in cancelling the Policy.

As a result at the date of death of the Deceased Member, the Policy was not current and a death benefit was not payable under the Policy. The Tribunal was of the view that the Insurer acted fairly and reasonably in not paying a death benefit.

The Tribunal found that a trustee acting fairly and reasonably in all the circumstances had a duty to make proper enquiries as to the Deceased Member's eligibility to make contributions to the Fund prior to cancelling his deduction authority and ceasing to accept contributions in December 2010. The Tribunal found that the Trustee failed to pursue sufficient enquiries and give genuine consideration to ceasing to accept the Deceased Member's contributions to the Fund including the consideration that he may well have satisfied the requirements in the 30 days prior to 30 June 2011. It was the actions of the Trustee which resulted in the policy lapsing.

The Tribunal considered that the decision of the Trustee not to compromise the Complainant's complaint by paying an amount equivalent to the death benefit in the sum of $200,000, was not fair and reasonable in the circumstances, therefore, the Tribunal determined that the Trustee compromise the Complainant's complaint and pay the Complainant an amount of $200,000.

D14-15\135. Death Benefit

The Complainant lodged a complaint with the Tribunal that the decision of the Trustee to pay the benefit arising on the death of the Deceased Member in equal shares to the Complainant and the Joined Party as dependants was unfair and unreasonable. The resolution sought by the Complainant was for the entire benefit to be paid to her as the Legal Personal Representative (LPR) on behalf of the Deceased Member's estate. The Tribunal was satisfied that the Joined Party, and alleged partner of the Deceased Member, was not a dependant of the Deceased Member under the provisions of the Trust Deed at the relevant time, and therefore determined that the benefit be paid to the Complainant as the Deceased Member's LPR.

The Deceased Member was a 28 year old male who had never been married and had no children. He lived in a relationship with the Joined Party from early 2007 until at least July 2009. The Joined Party took out an Intervention Order against the Deceased Member in September 2010 for a period of six months which she subsequently renewed until September 2011. The Deceased Member apparently spent time with the Joined Party in the two months before his death in early November 2011. The Deceased Member did not make a beneficiary nomination in respect of his benefit in the Fund nor did he leave a will.

The Tribunal noted that the Deceased Member joined the Fund before the start of his relationship with the Joined Party and had made no beneficiary nomination in respect of the Fund at that time, or at any later date. In those circumstances, the Trust Deed provides that the Trustee may pay the benefit to the LPR of the Deceased Member on behalf of his estate or to one or more of the Deceased Member's dependants.

The Complainant submitted that she was in an interdependency relationship with the Deceased Member at the time of his death, although she seeks payment of the benefit to the estate for which she had been granted letters of administration.

The Joined Party submitted that she satisfied the definition of a dependant because she was the Deceased Member's de facto spouse at the time of his death, or because she was in an interdependency relationship or because she was wholly or partially dependent on the Deceased Member at the time of his death.

The Complainant submitted that the Deceased Member was living with her at the time of his death and this had been the case off and on since the end of his lease with the Joined Party in June 2009, except for 2 periods in 2010 when he lived in a share house and later rented his own accommodation after a lottery win.

The Joined Party, in contrast, had submitted that he lived with her from 2006 to the date of his death except for the 12 month period when an AVO was in place between September 2010 and September 2011.

The Tribunal noted that there was no indication that the Deceased Member ever nominated the Joined Party's address as his home address, even though she claims that he had lived there both in 2009-10, before the AVO, as well as afterwards from September 2011.

The Complainant's address was shown as the Deceased Member's address on his death certificate, even though the Joined Party was listed as the informant for this document, and was similarly reported by her as his address when she notified police that he was missing.

In the light of the conflicting evidence put forward by the Parties about the nature of the relationship between the Deceased Member and the Joined Party around the time of his death, including the conflicting statutory declarations from family and friends, the Tribunal considered that the most reliable evidence was that provided by members of the police force who were involved with the Joined Party and the Deceased Member at various times during their relationship.

In this regard, the Tribunal noted the evidence of the police officer present at the events which gave rise to the AVO in 2010 and who

received the Joined Party's call on 8 November 2011 that the Deceased Member had been missing for 2 days. The officer stated:

> I asked if she was back together with [the Deceased Member] and she denied this saying they saw each other sometimes but they were not together nor would they get back together.

This same perspective was provided in a phone call to the Fund from another police officer who also indicated that the Joined Party was the Deceased Member's ex-girlfriend and that she was in an 'on again off again' relationship with the Deceased Member, who resided with the Complainant. The Joined Party did not address or dispute these statements in her extensive submissions.

The Tribunal found that there was no substantive evidence that the Joined Party and the Deceased Member lived in either a de facto or an interdependent relationship at the time of his death. It was also not satisfied that the Joined Party was wholly or partially dependent on the Deceased Member.

The Tribunal could also find no evidence that the Joined Party was financially dependent on the Deceased Member as she claimed. The Tribunal noted that in her initial application for the Deceased Member's death benefit the Joined Party stated that she was not financially dependent on him, although in her Statement of Financial Circumstances and Interdependency Statement she claimed that she was, or that they shared expenses. The Tribunal accepts that this may have been the case when they lived together in their jointly rented residence some years earlier, but there was no evidence that this was still the case at the time he died.

The Tribunal was therefore not satisfied that it was fair and reasonable for the Trustee to conclude that the Joined Party was a dependant under the provisions of the Trust Deed at the relevant time.

In relation to the Complainant, on the evidence before it, the Tribunal was similarly not satisfied that she was in an interdependent relationship with the Deceased Member or financially dependent on him at the time of his death. The Tribunal accepts that the Deceased Member lived with her for substantial periods of time as an adult when he was not sharing a house with friends, living with the Joined Party or living in his own rented premises.

However, in the Tribunal's view this was an arrangement of mutual convenience between an ailing parent and adult child of limited means rather than one of commitment to a shared life as envisaged by the interdependency provisions in the relevant legislation. The Tribunal also noted the Complainant's submission that the Deceased Member bought cigarettes for her and paid for some take-away meals, but does not consider that this can be said to amount to even partial financial dependency.

The Tribunal was therefore not satisfied that it was fair and reasonable for the Trustee to conclude that the Complainant was a dependant under the provisions of the Trust Deed at the relevant time.

The Tribunal determined that in the absence of dependants, the Trustee was to provide for the payment of the benefit to the Complainant as LPR of the Deceased Member's estate.

D14-15\068. Administration

The Complainant argued that the decision of the Trustee to reject the Complainant's request that he be permitted to elect the pension option for his Fund benefit was unfair or unreasonable. The Complainant sought reinstatement of the pensionable component of his superannuation plan. The Tribunal found that the delays in finalising the transfer from the Transferor Fund added to the complexities of the issue for the Complainant and it would have been reasonable for the Trustee to have granted the Complainant some leniency with regard to the election period. The Tribunal determined that the Trustee compromise the Complainant's claim by permitting him to

defer his Fund benefit and elect the pension option under the Fund.

The Complainant was employed by the First Employer and as such was a member of a superannuation fund established by the First Employer (the Transferor Fund). A merger took place between the First Employer and the Second Employer in March 2011. As a consequence the Complainant became an employee of the Second Employer and his benefits were transferred from the Transferor Fund to the Fund. The transfer was completed in December 2012. During the period of the transfer the Complainant was retrenched.

The Complainant was entitled to defined benefits under the Transferor Fund. The Complainant was entitled to pension benefits under the Fund (which were more or less equivalent to obtaining defined benefits under the Transferor Fund) providing he elected to do so before a specified day. The Complainant did not make the election by that day, and was automatically transferred to the Fund's 'retained category' which did not include defined (or pension) benefits. The Complainant made a number of attempts during May 2013 to elect to obtain pension benefits. The Trustee refused the request on the basis that the date for election had passed.

The central issue for the Tribunal was whether the Trustee acted fairly and reasonably regarding: (1) the manner and the form in which it provided information to the Complainant to enable him to make a decision about electing to take the pension benefit and to inform him of the steps to take if he decided to elect; and (2) rejecting his request to elect to take the pension benefit when he contacted the Fund in May 2013. The Complainant made the request to elect the pension benefit after the 11 April 2013 deadline for an election.

The Complainant joined the Transferor Fund in 1993, and was entitled to receive defined benefits. With the transfer from the Transferor Fund to the Fund and his retrenchment came a requirement for him to make an election within a specified time if he wished to receive pension benefits. His retrenchment more or less coincided with the funds transfer, which added complexity to the decisions to be made about his benefits.

At issue was whether the information provided and the way it was provided by the Trustee to the Complainant was of a nature and quality to reasonably inform him of his choices. The adequacy of the information can be assessed by asking whether an ordinary prudent member of the Fund in the Complainant's position would have been reasonably positioned to be made aware of the benefits options available, the requirement to make an election if certain benefits were to be obtained and the steps to take if he or she decided to elect.

The Complainant received a welcome letter from the Fund dated 24 October 2012 recommending he read the PDS, plan summary and fact sheets, and provided a web address for the fact sheets. The letter made no specific mention of the option to obtain pension benefits. The Complainant was retrenched on 26 October 2012. He contacted the Fund on 23 November 2012 seeking information about his benefits under the Fund and received an emailed response on 3 December 2012.

The email referred to an election to 'withdraw part of your Non-Pensionable component'. It also requested 'instructions at this time on where you would like the remainder of your funds to be placed'. A Withdrawal and Transfer Form was attached to the email. The form does not specifically relate to electing a pension benefit. The form stated that it can be used for withdrawals, transfers and refunds. It does not specifically refer to exercising an option regarding the pension plan.

On the basis of this information an ordinary prudent member of the Fund would not necessarily have understood that he or she was required to make an election to receive a pension benefit. Nor was the member provided with a clear explanation about how to make such an election.

The next significant item of correspondence was a letter of 11 January 2013. The letter informs the reader that a member can elect to leave all or part of the member's benefit in the plan as a deferred member. It stated that a deferred member's benefit is split into a pensionable and a non-pensionable benefit. It stated that to retain the pensionable benefit a member is required to elect to transfer this portion of the benefit to the deferred membership. The reader is further informed that if 'you do not elect an option within 90 days of this letter the total benefit will automatically be transferred to the Retained Category'.

This letter would alert an ordinary prudent member that he or she was required to make an election within 90 days of the date of the letter if he or she wished to take the pension option. The Complainant submitted that he did not receive the 11 January 2013 letter as he was on his summer holiday. Even so, he was given 90 days to make an election, allowing him until 11 April 2013. The Tribunal found that the Complainant was allowed a sufficient and reasonable period of time to make an election, even allowing for his absence for his summer holidays.

The 11 January 2013 letter provided the only clear and explicit reference to the need to make an election for a pension benefit by a specified date, although it was not explicit about how the election was to be made. Although prior correspondence made some mention of the pension benefit and the need for election to receive the benefit, the Tribunal considered that the information was unclear, inadequate and confusing. For instance, reference was made to the requirement to make an election within 90 days of leaving service. However the correspondence variously referred to his date of leaving service as 26 October 2012, 21 December 2012 and 6 May 2013.

The next issue was whether the Trustee's refusal to compromise the Complainant's claim was unfair and unreasonable given that the Complainant contacted the Fund a number of times during May 2013 seeking to be transferred to the pension category. For the purposes of the 11 January 2013 letter, the deadline for making the election was 11 April 2013.

The Complainant first contacted the Fund after the election deadline on 7 May 2013. He says that he was informed by an employee of the Fund that his funds had not yet been transferred. He informed the employee that he did not wish to have his funds transferred until he received further information and any relevant forms to make an election. He received a letter from the Fund later in May indicating that his funds had been transferred to the Retained Category on 6 May, the day before his phone call. The Complainant made a further five calls to the Fund in an attempt, in effect, to be transferred to the pension category.

In acting in the best interests of beneficiaries, the Trustee was required to have sufficient regard to the Complainant's interest in exercising the option to obtain the pension benefit. The Trustee sent information to the Complainant that was complex, confusing and less than fully transparent, with the exception of the 11 January 2013 letter. It also specified three different dates as the day of the Complainant's cessation of service. This was significant given that it marked the starting date for making a nomination regarding the pension benefit. Clearly, the delays in finalising the transfer from the Transferor Fund added to the complexities of the issue for the Complainant and it would have been reasonable for the Trustee to have granted the Complainant some leniency with regard to the election period. Although the Complainant first contacted the Trustee some 28 days after the end of the election period, he had done so the day after his benefits were transferred to the Retained Category. Therefore, the Tribunal determined that Contrary to the Trustee's submissions, it had the power under the Trust Deed to compromise the Complainant's claim.

D14-15\115. Administration

The Complainant lodged a complaint with the Tribunal that the decision of the Trustee to propose payment of the sum of $1,000 in compromise of his claim arising from loss allegedly suffered by him as a consequence of being unable to operate on his Fund account due to its suppression during a period when the Trustee was changing administrator was unfair or unreasonable. The Complainant sought compensation from the Trustee, for his loss in the amount of $6,325.89. The Tribunal determined that the Trustee compromise the complaint by payment to the Complainant's Fund account of an amount representing any lessening in earnings on his account balance.

The Complainant had been a member of the Fund since 2005. On 7 October 2011 the Trustee notified members by Significant Events Notice ('SEN') of its intention to suspend member services, including account access, whilst it transferred to a new Fund administrator. The letter stated that it was anticipated by the Trustee that aspects of member access and services would again become active on a series of dates between 21 November and 30 November 2011 but that these dates could be subject to change in which case members would be notified through the Fund's website.

On 16 November 2011 members were informed by further SEN which gave no estimated date of re-activation of services.

During December 2011 the Trustee announced in its quarterly online newsletter that the changeover of administrator had been postponed. It appears that member services recommenced for a period.

On 7 February 2012 members were informed through the website that a further service interruption would commence on that date. A further SEN dated 20 February 2012 confirmed the suspension of member services from 7 February and stated that member online login services including processing of benefits switches and rollovers should be re-activated on 27 February 2012. Again this date was to be subject to change.

The suppression of the Complainant's account was lifted from 8 August 2012. The Complainant stated that he had wished to make a change in his investment profile during the period of account suppression and that his inability to do so had led to loss of earnings.

The basis of the complaint, firstly, was that the Trustee failed to complete the changeover of administrator within a reasonable period and, secondly, that, in any event, it failed to provide the Complainant with adequate information, during the transition to the new administrator, of the restrictions applying to his account from time to time.

It appears that, as a result of the delay, member access to the Fund's administration was either not suspended or, at least, quickly resumed at the time of or after this second SEN. Nevertheless, the 16 November notice made no reference to this and it appeared that the Complainant was not expressly notified that access was available.

In the Tribunal's view it might have been assumed that, given the terms of the first SEN, specific notification of the continued availability of or resumption of services would have been given to members at that time. On the other hand, as the wording of the 16 September notice clearly created some doubt, it might also have been thought that a person wishing to access an account for any transaction would have enquired before assuming that there had been a suspension.

Accordingly, in the Tribunal's view, it was understandable for the Complainant to have assumed, on reading the 16 November 2011 SEN, that the account suppression remained in place. Nevertheless, by not taking the step of making a specific enquiry, he may have contributed to his own misunderstanding of the situation.

The next relevant notification to members by the Trustee appears to have occurred on 7 February 2012 through the website. As the 7 February website notice coincided with the commencement of the account suspension to which it referred, and the Complainant, at that time, was under the misapprehension that his

account was suppressed, there was no opportunity for him, had he wished to do so, to transact on his account after seeing the 7 February notice but before the commencement of proposed suspension.

On 5 June the Complainant was informed that the account suppression continued and it was acknowledged on behalf of the Fund that he had been denied the facility of switching investments.

Finally, on 2 July 2012 the Complainant was informed that the current suggested date for account re-activation was 30 October 2012. He was told that he could lodge a written switch request but it was acknowledged that this would not be processed until his account was again active.

The Tribunal considers that, during the period up until 7 February 2012, whilst the information provided by the Trustee might have been clearer, it was fair and reasonable in the circumstances. Additionally, whilst noting that the Complainant was generally alert to any opportunity to revisit his investment choices where market changes dictated, the Tribunal was not satisfied from the evidence that the Complainant had formed the intention, during this period, to effect a particular switch.

By around mid-February 2012, however, this situation appeared to have crystallised. The Complainant appeared to have clearly had in mind a switch from his 100% cash investment strategy and stated that, on several occasions at that time, he had attempted to access his account and found it suppressed.

The Trustee had suspended account access from 7 February to facilitate the previously deferred administration change and had notified members of its then expectation that the suspension would last about 3 weeks. In the event, although other members had accounts re-activated progressively over the ensuing months, the Complainant's account remained suppressed for approximately 5 months.

It may have been due to circumstances outside the Trustee's control that this long suspension occurred. Nevertheless, the Tribunal considers that it was unfair and unreasonable for a member to be without access to account information or the ability to transact for such a long period. For this, in the Tribunal's view, the Trustee must reasonably bear responsibility to an affected member.

Accordingly, the Tribunal considers that the Trustee should compensate the Complainant for loss reasonably suffered as a result of his inability to effect an investment switch from no earlier than 12 March 2012 (being 2 weeks after the Trustee's projected re-activation date).

The Complainant's account suppression was lifted on 8 August 2012. The Trustee had provided no evidence of any notification of the lifting of the suppression and it appears that the Complainant did not become aware until some days later. In fact he understood that the suppression was lifted on 31 August 2012.

The Trustee argued that the Complainant could have lodged a manual switch application from June 2012 which, it implied, could have been processed, and that any period of compensation should end at about this time. This statement conflicts with the information provided by Fund representatives to the Complainant during telephone calls between March and July 2012 to the effect that any manual switch would become effective only from the time at which his account was re-activated.

During October 2012 the Complainant made a switch of his investments from 100% in the cash investment option to 50% in Australian shares, 25% in international shares (hedged) and 25% in international shares (unhedged). He claims, however, that, had he been able to switch at an earlier date, he would have made a different choice due to differing market conditions at the relevant time. He stated that such a switch would probably have been to 100% international shares (unhedged).

Whilst of the view that the Complainant was entitled to be reasonably compensated, the Tribunal did not consider it appropriate to base compensation on a hypothetical investment switch. The evidence indicated that, when he chose to make a switch, the Complainant selected the investment options outlined above. It was only on this choice that the Tribunal considered any compensation should be based.

Accordingly, the Tribunal proposed to direct that the Trustee should compromise the Complainant's complaint by paying to him the equivalent of any deficiency in earnings on his account balance between the amount credited to the account through the existing cash option and the amount which would have been credited had he been able to switch to his chosen profile.

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