



Chairperson's report

Statistics

Preliminary results for 2013/14 are very pleasing. The Tribunal finalised 2,719 complaints, an increase of 18.4% compared to last year (2,296).

268 complaints were resolved at review, compared to 133 in 2012/13, an increase of 101.5%.

748 conciliation conferences were held compared with 424 for the previous year, an increase of 76.4%, and median times for complaints resolved at review have decreased by 137 days.

During the June quarter, complaints received increased by 4.6%, telephone enquiries increased by 2.5% and complaints finalised increased by 4.4%.

Death benefit distributions and minor children

Trustees of superannuation funds sometimes decide that a death benefit should be paid for the benefit of a minor beneficiary in his or her own right.

From time to time the Tribunal receives a complaint on behalf of such a minor beneficiary that a trustee's decision to pay a benefit to the Public Trustee or other person, rather than to his or her guardian (often the surviving partner or former partner of the deceased member), as trustee for the minor beneficiary is unfair or unreasonable.

Many fund trustees respond to this type of complaint by pointing to an internal fund policy they have in relation to this situation that dictates that the trustee of the benefit

should be an independent person or body. Alternately, the fund trustee indicates that it has received information that indicates the surviving parent/guardian is unfit to be trustee of the benefit.

The Tribunal's role is to review the fairness and reasonableness of a trustee's decision in its operation in relation to the complainant in that particular complainant's circumstances.

Accordingly, the Tribunal expects that trustees will have considered the circumstances of each minor beneficiary and have reasons for their decision that the parent/guardian is unsuitable to be the trustee of the benefit.

Trustees should be careful about applying rules without regard to individual circumstances, especially if different rules are applied depending on whether the surviving parent/guardian was themselves dependent on the deceased member. In the Tribunal's view, there is unlikely to be a sound reason, relating to the ability to be a trustee of the benefit, for treating a surviving dependent parent/guardian differently from a surviving non-dependent parent/guardian, all other things being equal.

In the absence of evidence that the parent/guardian is unfit to care for the beneficiary's physical, mental and emotional wellbeing, significant independent evidence would be required to indicate that that person is unfit to care for the beneficiary's financial wellbeing.

Where no concerns have been raised about the parent/guardian's capacity to care for the beneficiary generally, requiring him or her to seek approval and funds from a third party trustee of the benefit to provide for the minor beneficiary's needs is a significant impost, in an environment that has already been affected by a death that is usually premature and often unforeseen.

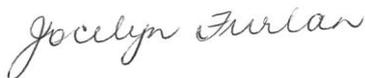
In cases where there is an objection by another person to the surviving parent/guardian being the trustee of the benefit, and the objector want to be the trustee themselves, the objection usually occurs because of some difficulties or acrimony in the relationship. In such a case, giving trusteeship (or shared trusteeship) to the person complaining may result in an unworkable arrangement and may well not be in the best interests of the minor beneficiary.

Should a fund trustee determine to pay the benefit to the Public Trustee, regard should be had to the costs of so doing, and their potential to erode the value of the benefit.

The Tribunal recommends a careful and considered approach if a fund trustee makes a decision to separate the parent/guardian, who has the responsibility for the care and upbringing of the minor beneficiary, from the money available for the benefit of that beneficiary.

We have moved

On 4 July 2014, the Tribunal moved to Level 7, 120 Collins Street, Melbourne. Our postal address and telephone and facsimile numbers remain unchanged.



Jocelyn Furlan
Acting Chairperson

Statistical overview

Quarterly statistics – Apr to Jun 2014

Telephone inquiries

The Tribunal received 3,072 telephone calls this quarter (last quarter – 2,997), which is an increase of 2.5% compared with the previous quarter.

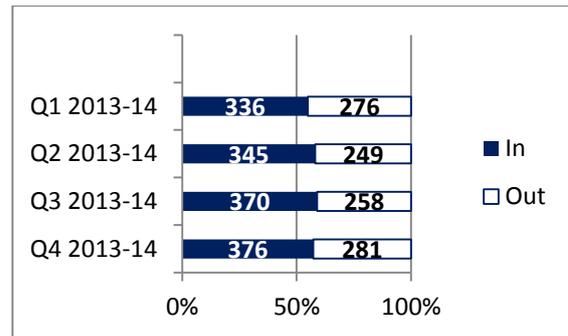
The Tribunal dealt with a wide range of inquiries, the most popular were queries about the Tribunal itself (80.4%), followed by complaint related inquiries (15.8%).

Written complaints

This quarter, the Tribunal received 657 written complaints (last quarter - 628), which is an increase of 4.6% compared with the previous quarter.

Jurisdiction

Of the 657 written complaints received this quarter, 376 (57.2%) complaints were within jurisdiction (previous quarter – 58.9%). Of the 281 (42.8%) complaints closed as outside jurisdiction, 189 (67.2%) 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 67%).

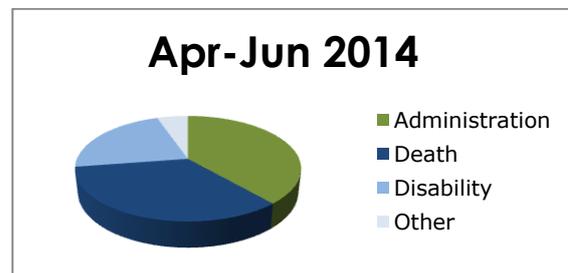


Complaints within jurisdiction

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 – 38.6% (last quarter – 41.9%). Death benefit complaints made up the second-largest category at 34% (last quarter – 31.6%), followed by disability at 22.1% (last quarter – 21.9%). Other complaints made up 5.3% (last quarter – 4.6%).



Nature of written complaints within jurisdiction

Performance

Complaints finalised

The Tribunal finalised 723 written complaints this quarter, an increase of 4.4% compared to the previous quarter.

Of the 723 finalised complaints, 12.3% were finalised at review (last quarter 9.7%), 47.3% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 51.7%) and 40.4% were outside jurisdiction (last quarter 38.6%).

4 cases were suspended in the quarter.

Conciliation conferences

The Tribunal conciliated 182 cases in the quarter, a decrease of 12.5% on last quarter's 208.

Of the 153 cases concluded, settlement was achieved in 78, resulting in a settlement rate of 51% (last quarter – 52.6%). 29 cases (16%) were adjourned in the quarter (last quarter – 39).

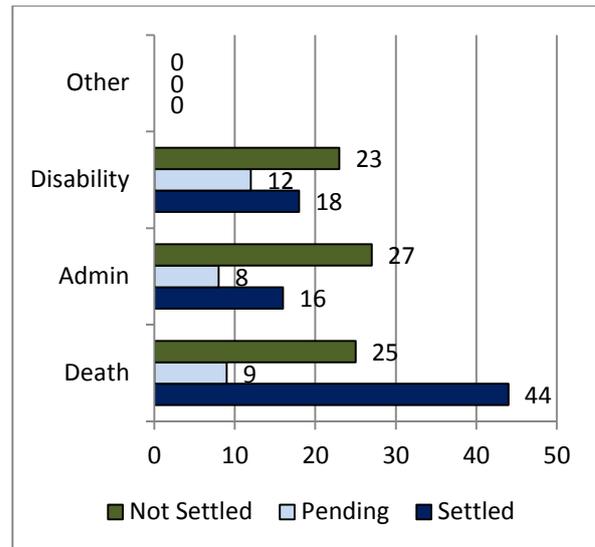
Nature of conciliation cases

The categories of note in the quarter are as follows:

Death benefits – Of the 69 concluded cases, 44 (63.7%) were settled.

Administration – Of the 43 concluded cases, 16 (37.2%) were settled.

Disability – Of the 41 concluded cases, 18 (44%) were settled.



Settlement by conciliation

Review determination outcomes for the quarter

The Tribunal determined 89 cases this quarter (last quarter – 67 cases).

The largest category of complaints determined at review was administration complaints: 37 (41.6%)

Admin	Qtr	YTD
Affirmed	32	96
Remitted	0	2
Varied	0	0
Set aside	5	17
Total	37	115

Death Benefit complaints made up the second largest category: 30 (33.7%)

Death	Qtr	YTD
Affirmed	25	73
Remitted	0	0
Varied	0	1
Set aside	5	14
Total	30	88

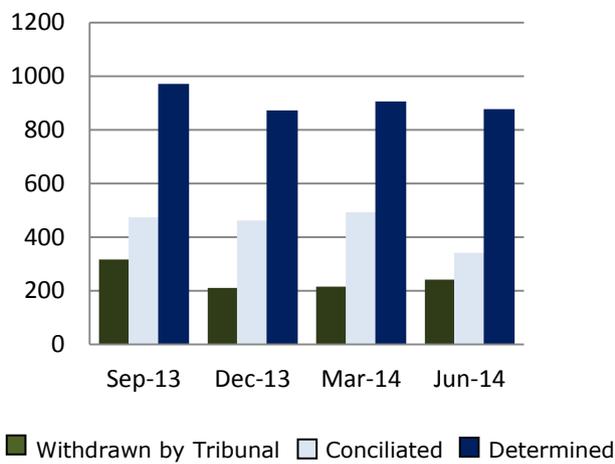
Followed by disability complaints: 22
(24.7%)

Disability	Qtr	YTD
Affirmed	19	51
Remitted	0	2
Varied	0	1
Set aside	3	13
Total	22	67

85.4% of trustee decisions were affirmed during the quarter, compared with 85.1% last quarter.

Efficiency

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



Recent determinations of interest

D13-14\136. Death Benefit

The Deceased Member, who was a member of the Fund, died on 10 December 2006. The Trustee was advised that he was survived by a number of children but was initially unable to identify or locate all of them. After it had made numerous attempts to establish the identities and contact details of all the children, the Trustee determined to distribute 25% of the benefit to the Second Daughter, 20% to the First Daughter and keep 55% of the benefit in reserve pending location of other children of the Deceased Member. The Trustee later received information about other possible claimants. Following further investigation, and objections from the Parties, the Trustee decided to distribute the Death Benefit between all of the five children located- 43% for the benefit of the Second Daughter, 26% for the benefit of the First Daughter, 13% for the benefit of the Complainant's Son (the third son), 10% for the benefit of the Second Son, and 8% for the benefit of the First Son. The Tribunal affirmed the decision of the Trustee.

On 19 April 2011 the Complainant lodged a complaint with the Tribunal that the decision of the Trustee to pay the entire benefit arising on the death of the Deceased Member, in the proportions stated above, was unfair or unreasonable. The resolution sought by the Complainant (the Mother of the Third Son) was the division of the death benefit equally between all five children. According to the Trustee, the amount of the death benefit payable was \$186,126.98.

The mothers of the two Daughters objected to the Sons being included in the distribution.

The Trustee determined that each of the

three Sons and the two Daughters were children of the Deceased Member and therefore potential beneficiaries of the death benefit. The Mothers of the potential beneficiaries did not claim any part of the benefit for themselves. In relation to the children of the Deceased Member, his death certificate noted only the First and Second Daughters as his children. It also stated that the Deceased Member was never married and no details of any partner are given.

The Mother of the Deceased Member made a statutory declaration identifying the three sons and the two daughters and declaring that they were all children of the Deceased Member. The Tribunal formed the view that the Trustee's decision that each of the Deceased Member's three sons and two daughters were his children, and not to consider any other potential beneficiaries, was a fair and reasonable decision in the circumstances.

The next issue for consideration by the Tribunal was the fairness and reasonableness of the Trustee's distribution of the death benefit between each of the Deceased Member's children.

The Tribunal considered the financial arrangements and ages of each child.

The Second Daughter was the youngest child, having been born in 2001. Her mother indicated that the Deceased Member paid \$400 per month in support of her and he paid the enrolment fee for the Second Daughter's school. It appears to the Tribunal that the Second Daughter was receiving more financial support than any of the other children and would have expected this to continue had the Deceased Member not died.

The First Daughter was born in November 1996 and it was clear from the material before the Tribunal that the First and Second Daughters knew each other and that their mothers knew each other. The material before the Tribunal indicated that the Deceased Member provided financial support for the First Daughter, albeit not at the same level as that provided to the Second Daughter.

The Tribunal was satisfied that the Deceased Member had an ongoing relationship with both the First and Second Daughters and provided financial support to both. . In the Tribunal's view, both of them had an expectation of ongoing financial support from him had he not died.

The Second Daughter is five years younger than the First Daughter and therefore would have expected to receive financial support from the Deceased Member while she was still under 18 for a longer period than the First Daughter. In the Tribunal's view it was fair and reasonable for the Second Daughter to receive a greater share of the benefit than the First Daughter.

The three sons were born between 1994 and 1996. It appeared to the Tribunal that they had less contact with the Deceased Member than the First and Second Daughters. The sons were all minors at the time of the Deceased Member's death and at the time of the Trustee's decision, but the First Son has since turned 18. The Complainant's submission indicated that her son received no financial support from the Deceased Member although her mother submitted that there was child support outstanding.

There was no information as to any financial support provided by the Deceased Member in relation to the Second Son. The First Son advised the Tribunal that he did not receive any financial support from the Deceased Member.

The Trustee determined to give 8% of the benefit to the First Son, 10% to the Second Son and 13% to the Complainant's Son, which correlated somewhat with their ages. The Tribunal was satisfied that it was fair and reasonable for the First Son to receive the least.

In the absence of any material indicating that the Deceased Member provided any financial support to the Sons, the Tribunal regarded the Trustee's decision that they receive less than the Daughters as fair and reasonable.

Whilst the Tribunal noted the very small age difference between the Complainant's Son and the First Daughter, the financial arrangements differed such that the Trustee's decision to provide a greater amount to the First Daughter was fair and reasonable in the circumstances.

The Tribunal could find no unfairness or unreasonableness in the Trustee's calculation of each percentage awarded to each child. The Tribunal was satisfied that the Trustee's decision operated fairly and reasonably in relation to the Parties in the circumstances, and therefore affirmed the decision of the Trustee.

D13-14\212. Administration

The Complainant argued that the decision of the Trustee to decline the Complainant's request to withdraw his money from the Fund due to the suspension of certain investment options was unfair and unreasonable. The Tribunal considered this decision to be fair and reasonable in relation to the Complainant in the circumstances and affirmed the decision of the Trustee.

On 25 July 2003 an allocated pension was established for the Complainant in the Fund. His account had a starting balance of \$90,159.39 and he was invested in cash, mortgages, capital guaranteed investments and property securities. In August 2008 he transferred all his investments in property securities to the Mortgages fund.

On 7 November 2008, the Trustee advised members that the liquidity of the Mortgages fund (amongst others) needed to be increased to ensure equitable treatment between those members who remained in the Mortgages fund and those who requested to transfer out of it. Withdrawals from the Mortgages fund were therefore suspended.

The Tribunal noted that, beginning November 2008, the Trustee had made a number of requests to APRA under r. 6.37 of the SIS Regulations to defer

the processing of redemptions from certain investment options, including the Mortgages fund, on the grounds that it would have an adverse effect on the other members of the Fund.

The Tribunal further noted that APRA had granted the Trustee's requests for portability relief from the requirements of r. 6.34(5) of the SIS Regulations for illiquid investments up to 31 August 2013. The period covered by this relief included the time of the Complainant's requests for withdrawal of his Mortgages fund assets.

On 28 November 2008 the Trustee provided the Complainant with details concerning the suspension of withdrawals from the Mortgages fund.

In this letter it advised, *"You can continue to submit withdrawal and switch out requests. We will hold the withdrawal/switch out request and lodge the request when a withdrawal offer is made. The withdrawal and switch out requests will then be considered for payment. We intend to allow quarterly withdrawals from the Suspended Fund. The actual withdrawal amount paid to each investor will depend on the value of all withdrawal requests received during the withdrawal offer period and the level of cash made available within the Suspended Fund to meet the requests at that time. All withdrawal requests will receive the same proportion of their request, irrespective of when the request is received."*

The first withdrawal offer opened on 2 February 2009 and closed on 2 March 2009. Seven subsequent offers were opened on an approximately quarterly basis with the last one closing on 19 November 2010.

The Tribunal noted that the notification to members concerning these withdrawal offers was done via the Fund's website and not by direct communication with members.

In April 2011 the Trustee advised members that any available liquidity would automatically be returned to

members on a quarterly basis beginning immediately.

The first transfer for the Complainant under this arrangement was made on 20 April 2011 when \$4,082.30 was transferred from the Mortgages fund to his Cash Advantage fund.

The Tribunal considered the communication material issued by the Fund concerning the problems with the Mortgages fund. It noted that although the withdrawal windows were only communicated to members via the Fund website, the letter of 28 November 2008 advised members that they could lodge withdrawal requests at any time.

The Tribunal noted that the first request from the Complainant to the Fund to withdraw his non-suspended funds was on 28 June 2011. It appeared that his first formal request for the withdrawal of his suspended funds was in March or May 2012.

The Tribunal was satisfied that the Trustee had fairly and reasonably notified the Complainant that he could have applied for his non-suspended funds earlier than 2011 and this request would have been processed when the next offer was made.

The Tribunal noted that the Trustee had a fiduciary duty to administer the Fund in the best interests of all members. The Tribunal was satisfied that the Trustee's decision to not allow redemptions from the Mortgages fund when it recognised the problems with its liquidity was fair and reasonable in the circumstances. In the opinion of the Tribunal the Trustee acted to safeguard the investments of all members of the Mortgages fund rather than redeem liquid assets to pay members who wished to transfer out of it. The Tribunal considered this approach to be fair and reasonable, ensuring the assets of remaining members were not unfairly affected by reducing values and market movements.

While the Tribunal had sympathy for the Complainant's frustration in not being able to access his Fund balance, the

Tribunal was satisfied that the Trustee had acted fairly and reasonably in the best interests of all the members with assets in the Mortgages fund in the circumstances. It was further satisfied that the Complainant should have been aware that he could have withdrawn monies from his non-suspended investments earlier than he did.

The Complainant submitted that his financial adviser did not explain to him that his money could reduce in value and he had wanted his capital to be secure. The Tribunal noted that the quality of advice received by the Complainant is not an issue for the Tribunal to determine.

The Tribunal therefore considered that the decision of the Trustee to decline the Complainant's request to withdraw his money from the Fund due to the suspension of certain investment options was fair and reasonable in its operation and affirmed the decision of the Trustee.

D13-14\188. Administration

The Complainant lodged a complaint with the Tribunal that the decision of the Trustee to refuse to alter the start date of his pension to the date he made his application in the office of the Trustee was unfair and unreasonable. The Trustee allocated a commencement date to a day later than the Complainant's application. The complaint to the Tribunal ultimately became that the Trustee should treat his application for the commencement of a pension to be invalid. The Tribunal determined that the commencement of the pension was valid but that the decision about the start date of the pension should be set aside and a decision substituted that the commencement date of the pension should have been 22 October 2009. However, in view of the time that has elapsed since the pension commenced, the Tribunal determined that it was not appropriate to require the Trustee to alter the commencement date of the pension but that the Trustee should compromise the Complainant's claim by paying to the Complainant the amount of \$6,642.65.

The Complainant was a member of the Fund and had an account balance in the Fund. On 22 October 2009, he completed, in the office of the Trustee and in the presence of an officer of the Trustee, an application to establish a pension payable from the Fund. At the same time that he made the application he made a lump sum contribution of \$15,000, which was to be paid into his pension account. The application specified that the commencement date of the pension was to be the date on which the application was completed, which was 22 October 2009. However, the Trustee subsequently allocated a commencement date of the pension to a day later, on 23 October 2009. The start date was important to the Complainant, and he, therefore, complained to the Trustee in relation to the commencement date being delayed by a day.

In its submission, the Trustee stated that the reason for refusing to alter the commencement date from 23 October 2009 to 22 October 2009, was that the application to open a pension account was accompanied by a contribution paid by cheque of \$15,000 and it takes one day for such a contribution to be processed with the consequence that the commencement date could not be 22 October 2009 as specified in the Complainant's application for the opening of a pension account.

Nevertheless, in an email to the Tribunal of 18 October 2013, the Trustee made an offer to pay \$8,075.00 (which included interest) as compensation to the Complainant for the loss he incurred by the commencement date of the pension account being delayed by one day. That offer was conditional on the Complainant's complaint being withdrawn. The Complainant did not accept that offer of compensation.

The Complainant asserted that his application to open a pension account was invalid and, as his complaint related to the validity of his application, the offer received from the Trustee or any other compensation is irrelevant as the deficiency in the application form meant

that his application to open the pension account was invalid.

In the view of the Tribunal, the product disclosure statement (PDS) for the pension was relevant to this complaint. The PDS described the pension account that was being offered, and stated that a minimum amount of \$100,000 applied to the opening of a pension account (this was satisfied by the Complainant transferring a larger amount from another division of the Fund). It was also stated that applications received on a business day prior to 3pm will be processed using that day's unit price. It was the Tribunal's understanding that the Complainant's application was received by the representative of the Trustee who interviewed the Complainant before 3pm on 22 October 2009.

The Tribunal found that the PDS did not make any qualification to the statements that a contribution was paid by cheque. It did not state, for example, that if the application is accompanied by a cheque for a contribution, the application will be processed using the next day's unit price.

On the question of whether the Complainant's application was a completed application, given that two of the pages were missing until the Complainant sent them to the Trustee the following day, the Trustee initially submitted to the Tribunal that it was not a completed application and that that was the reason for the one day delay in the commencement date of the pension account. However, the Trustee later changed its approach and said that the incomplete information was not the reason for the one day delay but, rather, it was because the application was accompanied by a cheque which took one day to process.

In the Tribunal's understanding, the Trustee had, therefore, treated the Complainant's application as a completed application and the Tribunal therefore found that a completed application was received by Trustee on 22 October 2009.

The Tribunal found therefore, that the Complainant's application was not invalid, and that a valid application was made by the Complainant on 22 October 2009. The Trustee should, therefore, have treated the application as one that was made before 3pm on 22 October 2009 and, consistent with what is stated in its PDS referred to above, it should not have treated the application as one received on the following day because it was accompanied by a cheque.

The Trustee's decision to refuse to treat the application as having been received on 22 October 2009, was not, therefore, fair and reasonable and the Trustee's decision resulted in a loss to the Complainant because of the adverse change in unit prices between 22 October 2009 and the next day.

In the Tribunal's opinion, the initial offer of compensation made by the Trustee was an appropriate offer to compensate the Complainant for the loss he incurred as a result of the incorrect commencement date being allocated to the pension. The Tribunal set aside the decision of the Trustee as to the start date of the pension, and substituted its own decision that the Complainant's claim should be compromised by the Trustee paying to the Complainant the sum of \$6,642.65, with interest, representing the Trustee's calculation of the loss to the Complainant, caused by the difference in the unit prices between 22 and 23 October 2009.

D13-14\202. Total and permanent disability

The Complainant lodged a complaint with the Tribunal regarding the refusal of the Trustee to compensate her for loss resulting from her reliance on the Total and Permanent Disability (TPD) insurance cover, quoted on her benefit statements from the Fund. The Tribunal found that neither the Complainant's eligibility for, nor the amount of, a TPD benefit were guaranteed, and that both were subject to assessment by the

relevant insurer in accordance with the terms and conditions of the applicable policy. The Tribunal therefore affirmed the decision of the Trustee.

The Complainant claimed she relied on information about her TPD insurance cover provided on her annual member statements in making decisions about her financial affairs. The information she referred to was a stated insured TPD benefit of \$194,400 which appeared on her 31 December 2005 contribution update and 30 June 2006 annual member statement. She further claimed that when she later queried the amount of the insurance with a Fund representative she was advised that as at 31 December 2006 the amount had dropped to \$178,000 because of her age but she was assured that the amount payable would attract interest from the date of the claim to the date of payment. She claims that she has suffered financial loss because of 'negligent misstatement' by the Trustee.

Initially the Insurer approved the Complainant's claim for an insured TPD benefit of \$76,400. When the Complainant sought a review of the amount of the benefit, the Insurer discovered that she was not in fact covered by its policy. The Trustee then referred her claim to the Former Insurer, who paid an insured benefit of \$104,800. She was also paid a settlement by the Former Insurer of \$22,341.02 because of the delay in payment of her benefit as a result of its mistaken processing of her claim.

The Tribunal noted the fact that, under the transfer terms of the policy, the Complainant was not eligible for cover under the Insurer's Policy from its inception and this was not in dispute. The Complainant's complaint related to the information provided by the Trustee about her insurance cover, which she

considers amounted to 'negligent misstatement'. She considered that she suffered financial loss as a result of her reliance on that information.

The Tribunal first reviewed the whole of the information provided by the Trustee to the Complainant and the circumstances in which it was provided. The Trustee submitted that it was required by law to provide information to fund members at least annually about any insured benefits to which a member may be entitled. It stated that its practice, consistent with other like funds, is to provide such information on the basis of the records it holds about its members and the current insurance provisions for the Fund.

The Trustee further submitted that because it was aware that the member information it holds may not always be correct, it provides disclaimers or warnings on its member statements that 'Benefits we have recorded for you are not guaranteed and subject to you meeting the policy conditions and our records being correct'. This is followed by a statement to the effect that the insured benefit reflects the member's situation as at the end date of the reporting period and may change. Members are invited to contact the Fund for further information they may require to understand their benefits.

The Trustee, in its submission, explained that when it changed the insurance arrangements of the Fund through the appointment of the Insurer in 2004 and the introduction of improved insurance benefits in 2005, its default position for reporting and premium assessment was to assume that such new arrangements would apply to all members who held insurance at that time. Although the transfer terms of the 2004 Policy restricts eligibility for cover to those members 'at work' at the time of

transfer and excludes anyone in receipt of disability benefits, the Trustee argued that it would be impractical to ascertain the insurance status of all its members at the time of transfer. To restrict cover only to members who respond to a request for such information would deprive many members from insurance cover simply because they did not reply.

The Tribunal noted that, in the case of the Complainant, who had joined the Fund as an employer sponsored member, this meant that the Fund continued to provide information about her insurance cover on her member statements on the basis that she was still working and therefore covered by the insurance arrangements current at the time of the statement. In this case, this information was incorrect because the Fund was not aware that she had ceased her full time employment in 2002 because of incapacity, she was not working on the transfer date and was in fact in receipt of disability benefits. Indeed, the Complainant ceased work in October 2002 due to her TPD, but lodged her claim for TPD benefits more than four years later, in January 2007.

The Trustee submitted that, when the Insurer took over from the Former Insurer, it advised all Fund members, in a significant event notice (SEN), of the change and its implications as required by law. This notice stated that 'existing insurance cover held by Fund members at 31 August 2004 would be transferred to the new insurer without the need for any health evidence or other underwriting provided you are at work on 1 September'. Similarly, when insurance cover substantially increased in 2005 as reflected in the benefit statements on which the Complainant said she relied, the Trustee issued as an SEN a brochure '*We're upgrading your benefits and adding new options*'. The Tribunal noted that it stated in relation

to the insurance changes 'The new insurance entitlements apply to employer-sponsored members who are 'at work' on 30 September 2005. "At work" means that you are not absent from work due to illness or injury on that day'.

The Tribunal reviewed the information provided by the Trustee at the time of the insurance changes in 2004 and 2005 and found that in both instances it stated that those changes did not apply to members who are not at work at the relevant times. Similarly, the Tribunal noted that the disclaimers put members on notice that the accuracy of the benefit information on the statements was not guaranteed as it was based on the records held by the Trustee and that they should therefore contact the Fund if they need further information.

The Complainant did not address the information provided in the SENs in her submissions. In relation to the disclaimers, the Complainant stated that she noticed it on a statement she received in March 2007 only when it was pointed out to her and had not noticed it on earlier statements. The Tribunal, however, noted that an identical disclaimer appeared on the 2006 annual member statement. In the Tribunal's view, based on the warnings provided in both the SENs and the disclaimers, the Trustee's actions in providing the required insurance information on the Complainant's member statements were fair and reasonable.

The Complainant sought the advice of her financial adviser in relation to her financial situation, including the need to refinance her interest only mortgage and to meet tax debts and other debts she had incurred over previous years amounting to \$100,000. She submitted that, when she showed her adviser her 2006 annual member statement showing

a TPD benefit of \$194,400, he suggested that she contact the Fund because if she were eligible for a TPD benefit that might be the solution to her financial problems. She submitted that her financial adviser did not query the amount of the benefit quoted.

The Complainant subsequently submitted that she was aware that the payment of the benefit was not guaranteed but that she relied on the fact that if the benefit was approved, it would be for the amount stated on her statement.

In justification of her reliance on the stated amount of the TPD benefit, the Complainant submitted that she contacted the Fund after she received a half yearly statement (issued 23 March 2007) which showed a lower TPD amount of \$178,000. She claimed she was reassured by the Fund's representative that the amount was lower because of her age and that interest would be paid from the date of claim to the date of payment of any benefit. She submitted handwritten notes she made during the conversation in support of that claim. She also submitted that if the amount of the benefit was not guaranteed that should have been made clear to her at that time.

The Trustee asserted that Fund representatives would not have confirmed a benefit amount or the payment of interest as they would be aware that these would be a matter for assessment by the Insurer.

The Tribunal found that, in the absence of a proper record, the Complainant's brief notes of her conversation with a Fund representative could not be relied on as proof that the representative advised her that the benefit would be as stated in her latest statement.

The Complainant submitted that she did not see the disclaimer on the statements and that in any case such disclaimers do not remove the Trustee's duty of care towards members of the Fund to provide accurate information. She also argued that to the extent that she later had the disclaimer pointed out to her, she understood it to mean that it was not guaranteed that a benefit would be paid, not that the amount of a stated benefit was not guaranteed.

The Tribunal noted, however that there is no suggestion in the disclaimer that it is limited to the question of eligibility for a benefit. It considers that the reference to a recorded benefit not being guaranteed can reasonably be seen to envisage quantum as well as eligibility.

Prior to an assessment of any TPD claim, the Complainant proceeded to refinance her interest only home loan for an amount that was \$100,000 higher than her previous mortgage, although at a lower interest rate. The Complainant used the additional loan money to pay off her tax debt and other debts.

Importantly, the Tribunal noted that on her own submission, the Complainant was prepared to refinance her house, and for a considerably higher amount, knowing that there was no guarantee that she would be paid any TPD benefit. At the same time, she submitted that she would not have done so, but sold the house, had she known the benefit amount was not guaranteed and a lower amount might be payable. The Tribunal considered these claims were inconsistent.

The Tribunal noted that neither the Complainant's eligibility for, nor the amount of, a TPD benefit were guaranteed, both were subject to assessment by the relevant insurer in accordance with the terms and

conditions of the applicable policy. A disclaimer to this effect was printed on the benefit statements issued to her by the Trustee, but ignored by the Complainant.

The Tribunal therefore considered that the decision of the Trustee to refuse to compensate the Complainant for alleged loss resulting from her reliance on the TPD insurance cover quoted on her benefit statements from the Fund was fair and reasonable in its operation and affirmed the decision of the Trustee.

D13-14\239. Total and permanent disability

The Complainant argued that the decisions of the Trustee and Insurer to cease payment of her Salary Continuance benefit (SC benefit) were unfair and unreasonable. The Complainant sought a decision from the Tribunal that the benefit be reinstated and payment backdated to its cessation. The Tribunal considered that the Complainant continued to satisfy the Policy definition of partial incapacity and that the Complainant therefore was entitled to a partial SC benefit as provided in the Policy even after she commenced full time work with Employer 2 and as long as she continued to meet that definition. The Tribunal set aside the decision of the Trustee and the Insurer, and substituted its own decision that the Complainant's claim for the continuation of her SC benefit be accepted. The Insurer was ordered to pay the outstanding SC benefit from the date it was terminated, with interest to date of payment to the Trustee and continue payment until the Complainant was no longer either partially or totally disabled.

The Complainant was an employer-sponsored member of the Fund as a result of her employment with Employer 1. Her membership of the Fund included SC insurance cover for \$10,000 a month.

When that employment ceased, the Trustee advised her she had been transferred to the personal plan of the Fund effective 6 June 2007, with continuation of insurance including SC cover of \$10,000 per month.

The Complainant submitted a claim for SC benefits on 17 July 2007 as a result of severe depression and anxiety. Her claim was rejected under the employer plan but accepted on 14 March 2008 under her personal plan membership with effect from 5 October 2007.

The Complainant initially received full SC benefits, then partial SC benefits when she returned to work 4 days a week with a new employer in July 2008. This employment and the payment of benefits continued to July 2010. In November 2010 she commenced work with Employer 2 on a full time basis, advising the Trustee and the Insurer of her new position. In March 2011 the Trustee advised that her SC benefit would cease effective 21 November 2010 when she commenced full time work, on the basis that she no longer satisfied the definition of partial disability in the Policy on the grounds that her new position was similar to her pre-disability position and in the same industry. Her benefit was subsequently reinstated for the period 1 December 2010 to 28 February 2011. The Trustee subsequently advised the Complainant on 28 November 2011 that it and the Insurer had upheld their decisions to cease SC payments.

Under the Policy, SC payments continue until age 65 whilst a member satisfies the definition of either total or partial disability.

The Tribunal considered the definition of partial disability in the Policy, which provided:

When is an insured member partially disabled?

- (b) An insured member is partially disabled if he or she is not totally disabled but as a result of a sickness or an injury is:
 - (i) unable to work in his or her own occupation at full capacity;

- (ii) working in his or her own occupation in a reduced capacity, or working in another occupation;
- (iii) earning less than his or her pre disability income; and
- (iv) under the regular care of a doctor.

There was no dispute that the Complainant continued to be under the regular care of a doctor. It was also clear that the monthly income from Employer 2 (and her subsequent employer) was less than her pre-disability income. The dispute related to the question whether the Complainant was unable to work in her own occupation at full capacity.

The Tribunal carefully reviewed the descriptions and requirements of the Complainant's positions with Employer 1 and Employer 2 (and her subsequent employer). The Tribunal accepted that there were some similarities between the roles and industries involved. However, the Tribunal considered that there were also significant differences between the Complainant's pre-disability occupation and the positions she has held since her return to work in terms of the level and range of responsibilities in the respective positions.

Before she became disabled, the Complainant had a range of senior management responsibilities and accountabilities which she submitted she no longer has. These were identified by the Complainant in her submissions. The Tribunal also noted that the Insurer and the Trustee have not disputed the Complainant's claim that her employment with Employer 1 consisted of 60% account and state management, 30% channel management and 10% marketing while her position with Employer 2 was 100% channel management.

The Tribunal therefore considered that the Complainant's wider range of duties and higher level of responsibility with Employer 1 represent a substantive distinction in occupation and that the

assessment of the Insurer and the Trustee that the positions were similar was unfair and unreasonable. The Tribunal further noted that the higher level of responsibility of the Complainant's pre-injury occupation was reflected in the higher potential and actual income of the Complainant before her disability.

The Insurer submitted it relied on the medical evidence in reaching its decision that the Complainant was no longer partially disabled in November 2010. The Tribunal therefore reviewed the medical evidence as to whether the Complainant was only capable of working in her own occupation in a reduced capacity, or working in another occupation. The Tribunal noted that only one treating practitioner was confident that the Complainant would be able to return to unrestricted employment in '6 to 12 months'; however, this report was written in June 2008 before the Complainant had attempted any return to work.

The Complainant's treating psychiatrist was more cautious in 2007 and 2008, relating the Complainant's ability to function fully at work to her ability to overcome her psychological challenges. The Complainant's treating psychologist in June 2009 expressed the opinion that the Complainant's attempts at returning to high stress jobs would impact on her ability to function and recommended that she had a more gradual return to a low stress occupation.

The Complainant's treating doctor provided medical reports around the time the Insurer and the Trustee decided to cease the Complainant's SC payments as well as more recent progress reports. Once the Complainant returned to work, the treating doctor consistently reported that she was fit for full time employment only in the context of the lower stress positions that she had obtained. In March 2011, in response to a specific question from the Insurer, he considered that the Complainant was fit for full-time work in her role with Employer 2 because it involved lesser responsibility and that she continued to have a

disablement which prevented her from returning to a similar role to her pre-disability occupation. He had continued to certify her fit for lesser duties since then.

In the light of the medical evidence on her reduced work capacity, the demonstrated differences between the Complainant's pre-disability occupation and her employment with Employer 2 and her consequent reduced earning capacity, the Tribunal considered that the Complainant continued to satisfy the Policy definition of partial incapacity after she commenced full time work with Employer 2. The Tribunal therefore set aside the Trustee's and Insurer's decisions, and determined that the Complainant was entitled to a partial SC benefit as provided in the Policy even after she commenced full time work with Employer 2 and as long as she continued to meet that definition.

D13-14\248. Administration

The Complainant lodged a complaint with the Tribunal that the decision of the Trustee to cancel the insurance cover and reject the Complainant's request to have it reinstated was unfair and unreasonable. The resolution sought by the Complainant was reinstatement of her insurance cover. The Tribunal determined to set aside the decision, and substitute its own decision that the Trustee inform the Complainant of the amount she must pay to the Fund for insurance premiums to restore her to the position she would be in had the Fund not cancelled her insurance.

On 31 August 2005, a member account was established for the Complainant after the Trustee received a superannuation contribution from her Former Employer, that is, she was deemed a member of the Fund. She therefore was not required to complete a Fund application form and the Complainant's details used by the Fund were provided by her Former Employer.

The Complainant advised she had not worked for the Former Employer since

2005. The date of the last contribution made to the Fund on behalf of the Complainant was recorded as 27 January 2006. After receipt of the last contribution, insurance premiums continued to be deducted from the Complainant's account balance until 1 December 2011 when the Complainant's account balance became zero. The Trustee cancelled the Complainant's insurance cover in October 2011. The amount of the Death and Total and Permanent Disability ('TPD') cover at the date it was cancelled was \$48,080.

The Tribunal first considered whether the Trustee erred in not providing the Complainant with member statements for the periods 1 July 2010 to 31 December 2010 and 1 January 2011 to 30 June 2011 and with a letter informing her that her insurance cover would be cancelled.

The Trustee argued it contacted the Former Employer for member details on 29 June 2011 and sent the Member Statements to an address provided by the Former Employer on 14 July 2011. The Trustee has also stated in a letter to the Tribunal dated 2 January 2013 that on 15 October 2011 it sent a letter to the Complainant informing her that further contributions were needed to ensure continuation of her insurance cover. That letter, the Trustee claimed, was sent to the address provided by the Former Employer.

It was unclear why the Trustee contacted the Former Employer for the Complainant's address in 2011. In its letter to the Tribunal dated 2 January 2013 the Trustee stated 'as the Trustee was unable to process contributions received from [the Former Employer] a letter was sent to them with a list of their employees [*sic*] details for them to complete and return to [the Fund].'

From the evidence of the Fund's own records, the last contribution from the Former Employer for the Complainant was in January 2006. No evidence was presented that there was (or even appeared to be) new contribution activity from the Former Employer for the

Complainant at the time the Trustee sought employee details and there had been no evidence that her record had 'missing information'.

The Trustee provided the Tribunal with the address history recorded by the Trustee for the Complainant. The address provided by the Former Employer in 2011 was the incorrect address previously provided by it which had been updated (corrected) on the Fund's own records by the Complainant in 2006. The Tribunal noted also that the address history showed that the Complainant had updated her address again in 2010. The Tribunal could find no plausible reason why the Fund changed the Complainant's address on its records in 2011.

In addition, in view of the fact that the Trustee was the instigator to the change to its records and there was clearly an inexplicable oddity in those records (i.e. the Former Employer provided an address in 2011 which had been corrected by the Complainant in 2006 and again in 2010), in the Tribunal's view a telephone call from the Fund to the Complainant would have clarified the situation. The Complainant noted that she provided the Trustee with her mobile phone number which had not changed.

The Tribunal concluded that the Trustee changed the address of the Complainant without reasonable care and, as a result, erred in not providing the Complainant with Member Statements for the periods 1 July 2010 to 31 December 2010 and 1 January 2011 to 30 June 2011. The flow on effect of using the wrong address was that the Trustee failed to provide her with notice that her insurance cover would end and, indeed, that of her Fund membership as it was required to do under the Trust Deed.

The Tribunal next considered whether the Complainant was likely to have made contributions if she was aware that her account was near zero.

There is evidence that the Complainant was diligent in informing the Fund of her correct address. She corrected her address in 2006 after she became a

deemed member of the Fund in 2005 and the Former Employer had provided an incorrect street number in her address at that time. When she changed her residence, she again notified the Fund in 2010. She also contacted the Fund to make a binding death benefit nomination.

There was also evidence that the Complainant, through her sister, contacted the Fund in February 2012 to enquire about the Member Statements which had not arrived. Upon discovering that her insurance cover had been cancelled she requested reinstatement of her membership and the amount she needed to provide in order to restore her insurance cover. This action it appeared was over a year before she lodged a TPD claim in July 2013.

The Trustee argued that the Complainant should have calculated the time where her account balance would have gone to zero based on the amount recorded (\$187.68) in the last Member Statement she received, that she could have contacted the Fund when it failed to send her Member Statements or used the Fund's online member access 'so that she could regularly review her account balance and make a contribution if required'. The Tribunal did not accept that these are responsibilities that the Trustee could pass to the Complainant in the circumstances. In the Tribunal's view the Complainant fulfilled her obligation to the Fund by regularly updating her details.

The Tribunal could find no reason to doubt that the Complainant was an engaged member of the Fund, understood the need for regular premiums and would have made the necessary contributions to the Fund if she had been made aware of the account balance. The Tribunal therefore set aside the decision of the Trustee, and substituted its own decision, that the Trustee inform the Complainant of the amount she must pay to the Fund for insurance premiums to restore her to the position she would be in had the Fund not cancelled her insurance.

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