



Chairperson's report

Reasons for Trustee decisions relating to the payment of death benefits

As part of the Government's Stronger Super reforms, amendments were made to Trustees' inquiries and complaints obligations under s 101 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

In particular, SIS s 101(1)(c)(i) was inserted with effect from 1 July 2013 to require a trustee, *at the time the trustee gives notice of its decision*, to give written reasons for its decision in relation to a complaint that relates to the payment of a death benefit.

A trustee giving its decision in relation to an objection raises SIS s 101(1)(c)(i).

The decisions for which trustees are required to give reasons are therefore decisions in relation to the objection.

Under s 64 of the *Superannuation (Resolution of Complaints) Act 1993* (the Complaints Act), if the Tribunal Chairperson becomes aware that a contravention of any law or of the governing rules of a fund may have occurred, the Chairperson must give particulars of the contravention to the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority, or both.

Under the SIS Act, ASIC has the administration of SIS s 101.

As required under s 64 of the Complaints Act, the Tribunal will be obliged to refer matters to ASIC where it appears that the Trustee has not provided reasons for its decision in relation to an objection about the payment of a death benefit.

New time limit for TPD complaints

Changes have also been made to the Complaints Act to extend the time limits for some types of total and permanent disability (TPD) complaints from 2 years up to a maximum of 6 years.

Amendments have been made to s14(6A) of the Complaints Act by the *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Act 2013*. The amendments extend the time limits in which a member (or former member) may make a complaint to the Tribunal about a decision of the trustee (and its insurer) relating to the payment of a disability benefit because of TPD. The substituted s 14(6A) applies where the decisions are made on or after 1 July 2013.

If the trustee's decision was made on or after 1 July 2013, the Tribunal can only deal with a complaint about a decision of a trustee of a fund relating to the payment of a disability benefit because of TPD in the following circumstances:

- If the member permanently ceased employment because of the physical or mental condition that gave rise to the claim for the TPD benefit, then both the claim for the payment of a TPD benefit was made to the trustee within 2 years of permanently ceasing employment and the complaint is made to the Tribunal within 4 years of the trustee's decision about the claim.

- If the member did not permanently cease employment because of the physical or mental condition that gave rise to the claim for the TPD benefit, the complaint is made to the Tribunal within 6 years after the making of the trustee's decision about the claim.

There is no change in relation to the Tribunal's ability to deal with a complaint where the trustee's decision was made before 1 July 2013.

The amendments retain unchanged that aspect of the TPD time limits set out in s14(6B) of the Complaints Act that relate to whether the member permanently ceased employment because of the physical or mental condition that gave rise to the claim for the TPD benefit. In such a case, the Tribunal is still only able to deal with a complaint if the member made the initial claim for benefits to the trustee within 2 years of that permanent cessation.

New avenue for complaints about trustee reporting

The Tribunal's jurisdiction has also been expanded in relation to decisions of trustees about the reporting the trustee makes to the Commissioner for Taxation (ATO) about a member.

Section 15CA of the Complaints Act already provides an avenue for fund members to complain about the trustee's decision to set out amounts in statements given to the ATO for the purposes of:

- the superannuation surcharge; and
- the member contribution statement under s 390-5 of Schedule 1 of the *Taxation Administration Act 1953* (TAA).

The Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Act

2013 has expanded s 15CA of the Complaints Act to include complaints about trustee decisions to set out amounts in statements given to the ATO for the purposes of the arrangements for the increased rate of contributions tax on high income earners, under the new Division 293 of the *Income Tax Assessment Act 1997*.

In particular, s 15CA of the Complaints Act has been expanded to include complaints about the amounts set out in relation to defined benefits members under:

- s 133-120(2) of Schedule 1 of the TAA; and
- s 133-140(1) of Schedule 1 of the TAA.

Jocelyn Furlan

Jocelyn Furlan
Chairperson

Statistical overview

Quarterly statistics – Jul to Sep 2013

Telephone inquiries

The Tribunal received 3,285 telephone calls this quarter (last quarter – 2,961), which is an increase of 11.0% compared with the previous quarter.

The Tribunal dealt with a wide range of inquiries. The most popular were queries about the Tribunal itself (58.4%), followed by complaint related inquiries (16.8%).

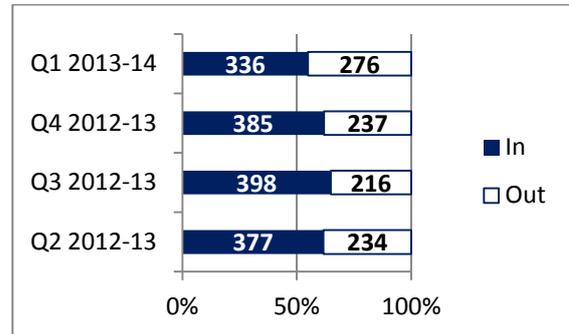
Written complaints

This quarter, the Tribunal received 612 written complaints (last quarter - 622), which is a decrease of 1.6% compared with the previous quarter.

Jurisdiction

Of the 612 written complaints received this quarter, 336 (54.9%) complaints were within jurisdiction (previous quarter – 61.8%). Of the 276 (45.1%) complaints closed as outside jurisdiction, 177 (64.1%) were closed pursuant to s.19 of the Complaints Act because the complainant had failed to lodge a complaint with the trustee or the 90 day time limit had not passed from the date of

complaint to the trustee, (last quarter 60.7%).

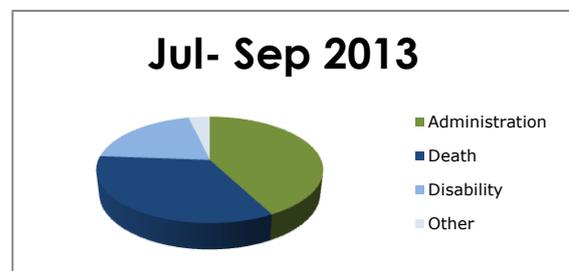


Complaints within jurisdiction

Nature of written complaints within jurisdiction

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

Administration complaints comprised the largest category of all written complaints received within jurisdiction – 42.3% (last quarter – 44.1%). Death benefit complaints made up the second-largest category at 33.9% (last quarter – 31.2%), followed by disability at 20.2% (last quarter – 16.9%). Other complaints made up 3.6% (last quarter – 7.8%).



Nature of written complaints within jurisdiction

Performance

Complaints finalised

The Tribunal finalised 651 written complaints this quarter, an increase of 13.0% compared to the previous quarter.

Of the 651 finalised complaints, 9.5% were finalised at review (last quarter 8.2%), 47.3% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 45.3%) and 43.2% were outside jurisdiction (last quarter 46.5%).

Conciliation conferences

The Tribunal conciliated 152 cases in the quarter, an increase of 18.7% on last quarter's 128.

Of the 129 cases concluded, settlement was achieved in 59, resulting in a settlement rate of 45.7% (last quarter – 51.5%). 23 cases (15.1%) were adjourned in the quarter (last quarter – 29).

Nature of conciliation cases

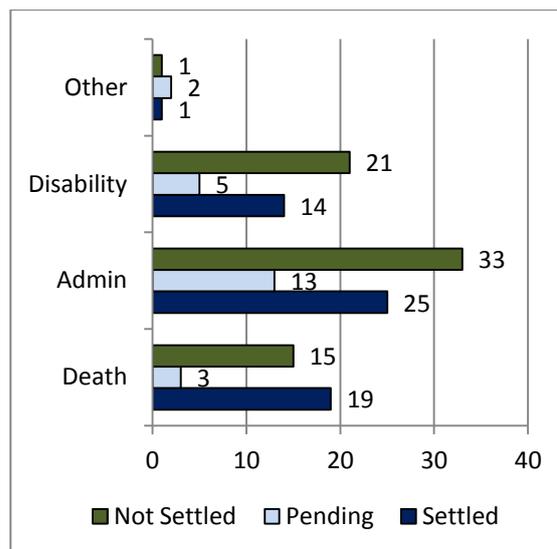
The categories of note in the quarter are as follows:

Death benefits – Of the 34 concluded cases, 19 (55.8%) were settled.

Administration – Of the 58 concluded cases, 25 (43.1%) were settled.

Disability – Of the 35 concluded cases, 14 (40%) were settled.

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



Settlement by conciliation

Review determination outcomes for the quarter

The Tribunal determined 62 cases this quarter (last quarter – 47 cases).

The largest category of complaints determined at review was administration complaints: 30 (48.4%)

Admin	Qtr	YTD
Affirmed	24	24
Remitted	0	0
Varied	0	0
Set aside	6	6
Total	30	30

Disability complaints made up the second largest category: 16 (25.8%)

Disability	Qtr	YTD
Affirmed	9	9
Remitted	1	1
Varied	1	1
Set aside	5	5
Total	16	16

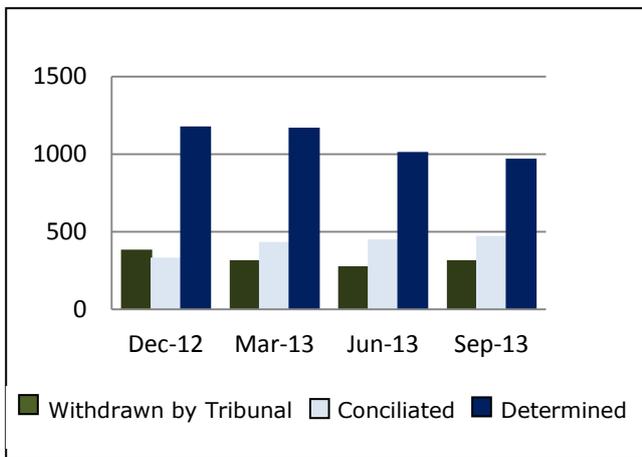
Followed by death benefit complaints: 16 (25.8%)

Death	Qtr	YTD
Affirmed	13	13
Remitted	0	0
Varied	1	1
Set aside	2	2
Total	16	16

74.2% of trustee decisions were affirmed during the quarter, compared with 66.0% last quarter.

Efficiency

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



Recent determinations of interest

D12-13\004. Administration

The Complainant argued that the Trustee acted in contradiction of its own policy, outlined in its product disclosure statement (PDS), when it continued to deduct insurance premiums after she had left employment. While the Tribunal agreed that the wording of the PDS was ambiguous, it believed the Complainant had adequate opportunity to determine the status of her account and to opt out of the insurance cover and therefore affirmed the Trustee's decision.

On 8 June 2010 the Complainant lodged a complaint with the Tribunal that the decision of the Trustee to refuse to repay insurance premiums deducted after she left employment with the Employer was unfair or unreasonable because 'documentation provided to me by [the Fund] states that when I ceased employment with my employer, "insurance cover would be terminated." But this did not happen'. The resolution sought by the Complainant was payment of around \$32,000 being the insurance premiums deducted after she left employment less any applicable administration fees. By letter dated 7 September 2010 to the Tribunal, the Trustee offered to refund \$5,668.80 of the premiums to resolve the dispute, on confirmation of the Complainant's status as a non-smoker.

The Complainant joined the Fund on 21 September 2005 and was sent a welcome letter and a copy of the Fund's PDS. On joining the Fund, the Complainant was covered for insurance under automatic acceptance conditions and insurance premiums were deducted from her superannuation account. The Tribunal noted that the Complainant was advised of this in the Trustee's letter dated 13 October 2005 which she acknowledged receiving. When the Complainant left employment with the

Employer in May 2007 her account was converted to a non-employee account and the premiums defaulted to 'smoker' rates unless a Non-Smoker Declaration form was completed. The Tribunal noted that the transfer of insurance from group rates to individual rates resulted in an increase of over \$600 in the monthly premium deducted from the Complainant's account.

The Complainant in her submission argued that Trustee policy was not followed when she ceased to be employed by the Employer in 2007. She affirmed that in the Members Employee Super, Issue number 5, 2004, provided to her when she joined the Fund, under 'termination of your cover' it stated that insurance cover would end when she ceased to be employed by the Employer. Her insurance cover, however, was not terminated. Three months after ceasing employment, the Fund sent her a letter, which she did not receive, advising that a different procedure had been implemented.

The complaint centred on the wording in the PDS which stated under 'Termination of your cover' that insurance cover ceased when 'you cease to be employed by the employer group'. The Complainant stated that she 'naturally expected that insurance cover ceased upon my resignation from [the Employer]'.

The Tribunal considered the wording in the PDS and was satisfied that the paragraphs titled 'What happens if you leave your employer?' and 'Continuation option' explained clearly that upon ceasing employment the Complainant's account including her insurance would be automatically transferred to a superannuation account and the insurance premiums would increase. However, the Tribunal considered that the wording of the paragraph titled 'Termination of your cover' was not clear and seemed to conflict with the 'Continuation option' paragraph which appeared immediately above it.

Although the PDS wording was ambiguous, the Tribunal did not consider

that it was the sole factor in determining whether the Trustee acted fairly and reasonably in relation to the complaint. The Tribunal was of the opinion that the wording of the PDS was only relevant if the Complainant had relied on any misleading statements to her detriment.

The Tribunal considered the telephone conversations the Complainant had with the Fund's staff. It appeared to the Tribunal that the Complainant was not aware when she first contacted the Fund that she had been covered by insurance. When the Complainant contacted the Fund on the third occasion, she had located the PDS and quoted the section that seemed to support what she believed the situation to be with no mention of the conflicting paragraphs. The Tribunal was not convinced that the Complainant was aware of the contents of the PDS prior to her contact with the Fund in 2010, nearly three years after she ceased employment with the Employer. The Tribunal, therefore, was satisfied that it was fair and reasonable of the Trustee to determine that she did not rely on the 'Termination of your cover' paragraph to come to her conclusion that she was no longer covered by insurance in the Fund after ceasing employment in 2007.

The Complainant submitted that the Trustee had not followed its own procedure by not terminating her insurance. The Tribunal was satisfied that the trust deed provided the Trustee with the power to administer the Fund in the manner that it did and it was fair and reasonable for it to transfer the Complainant's account, investments and insurance to its superannuation account on termination of her employment in accordance with its procedures provided it communicated this to the Complainant.

The Tribunal was of the opinion that the PDS explained the Trustee's procedure in two separate paragraphs and the conflicting paragraph should have led the Complainant to at least make inquiries prior to her leaving employment rather than assume, if she did, that the 'Termination of your cover' paragraph outlined the correct procedure.

Following the Complainant's cessation of employment, the Trustee sent her a letter in July 2007 to explain the transfer of her account and the new insurance premiums. This letter was sent to address 1. However, at this time the Complainant was residing at address 3. The Tribunal, however, noted that the Complainant had received correspondence from the Fund addressed to address 1 after she was no longer residing there. Therefore the Tribunal considered that she would have been aware that the Fund had an old address for her as this correspondence would have had to be forwarded to her new address or collected by her. The Tribunal noted that she received no mail from the Fund for over four years and this should also have suggested to the Complainant that she needed to update her details.

The Tribunal was satisfied that, in the absence of no returned mail from the Complainant, it was fair and reasonable of the Trustee to conclude that it was incumbent on the Complainant to ensure it had up to date details for her. If she had done so, she would have received the July 2007 letter explaining the procedure and she could have opted out of her insurance cover. The Tribunal therefore affirmed the Trustee's decision to offer to compromise the complaint and pay \$5,668.80 to the Complainant on confirmation of her status as a non-smoker.

D12-13\008. Death benefit

The Complainant argued that the Trustee's decision to pay the death benefit arising on the death of her father to the Public Trustee was unfair or unreasonable because it failed to consider her interest as the only child of the Deceased Member. The Tribunal determined that the Trustee had made sufficient attempts to try and contact the Complainant and her mother and obtain the required documentation to establish her as a dependant of the Deceased Member but that they failed to provide these documents. The Tribunal found that, in the absence of the required

documentation, it was fair and reasonable for the Trustee to have paid the benefit to the Public Trustee as the legal personal representative (LPR) of the estate.

The Complainant was a minor when her father (the Deceased Member) died on 20 March 2004, aged 34. As a result of his death, a benefit became payable from the Fund in respect of him. The Fund was advised of the Deceased Member's death by his mother in December 2004 and the Fund commenced locating potential beneficiaries. It located his de facto spouse, the Complainant (his daughter), and the Complainant's mother.

Between December 2004 and November 2007 the Trustee sent numerous letters to the de facto spouse, the Complainant's mother and the Complainant, (via her mother), in relation to the death benefit, but did not receive documentation it requested from them. On 18 January 2008 the Trustee determined to pay the benefit to the Public Trustee as the LPR of the estate of the Deceased Member and sent letters to the Complainant's mother and the de facto spouse advising of its proposed decision and providing them with an opportunity to object to the distribution. After no objections were received, the Trustee paid the benefit to the Public Trustee in February 2008. It appeared that the Public Trustee subsequently paid the benefit to the de facto spouse and wound up the estate in 2010.

In 2010, when the Complainant turned 18, she contacted the Fund about the benefit, thinking that the Fund had held the death benefit in trust for her until she turned 18. The Trustee advised the Complainant that the benefit had been paid to the Public Trustee in 2008 and declined to pay any further benefit to her.

The Complainant argued that the Trustee's decision to pay the Deceased Member's benefit to the Public Trustee 'defeated the purpose of superannuation in that it prevented [the Complainant] from obtaining a benefit that she would

reasonably expect as the minor child of a deceased member'. The fact that the Complainant's mother did not send documents to the Trustee was not a proper reason for paying the benefit to the LPR. Furthermore, the Trustee failed to give proper notice to the Complainant or her mother about the documents or procedure required to secure a benefit for the Complainant. The Trustee failed to properly consider whether paying the Deceased Member's death benefit to the Public Trustee would defeat his only child's interest in the death benefit.

The Trustee in its submission to the Tribunal stated that during the claimstaking process two financial dependants were identified – the de facto spouse and the Complainant, who lived with her mother. The Fund attempted to locate the Complainant and her mother over a two year period. On 18 June 2007 the Complainant's mother contacted the Fund and provided her contact details by telephone. The Fund provided claim forms and requested that she complete and return them. The Trustee issued seven letters to the Complainant's mother between 22 June 2007 and 18 January 2008. As the Fund did not receive any claim forms from the Complainant's mother, it decided to pay the benefit to the Public Trustee as LPR. Claimstaking letters were issued to all parties on 18 January 2008. As no objections were received within the 28 day period, and the letter was not returned to the Trustee as undelivered, the benefit was paid to the Public Trustee as the LPR of the estate of the Deceased Member.

The Tribunal first considered whether it had jurisdiction to deal with the complaint. Section 15 of the Complaints Act deals with time limits for the making of complaints relating to the payment of a death benefit and generally provides that a person who has been given notice of the proposed payment of a death benefit has 28 days from the date of receipt of the notice to lodge a complaint with the Tribunal. The 28 day time limit does not apply if the person was not notified and the failure to notify was unreasonable.

The letter of 18 January 2008 from the Trustee to the Complainant's mother setting out the proposed payment of the benefit to the Public Trustee was incorrectly addressed (the street name was misspelt) and was not addressed to her in her capacity as the guardian of the Complainant. Accordingly, there was real doubt whether the Complainant was notified in a manner that resulted in the time limit applying. The Tribunal was therefore of the view that it had jurisdiction to determine the complaint. The Trustee did not object to the Tribunal's view.

It was not in dispute that the Complainant was the daughter of the Deceased Member and therefore a dependant and potential beneficiary of his death benefit. The next issue for consideration by the Tribunal therefore was whether it was fair and reasonable in the circumstances for the Trustee to decline to pay the benefit to the Complainant when she claimed it in 2010. In the Tribunal's view, the Trustee's decision was fair and reasonable in the circumstances because the Trustee took all reasonable steps to locate and attempt to obtain the necessary forms and identity documentation in relation to the Complainant prior to its decision to pay the benefit to the Public Trustee. Between 14 July 2005 and 18 January 2008 (inclusive) a total of nineteen letters were sent, thirteen addressed to the Complainant's mother, and six addressed to the Complainant. Despite the Trustee sending some correspondence to an incorrect address, there was evidence before the Tribunal that both the Complainant and her mother had successfully been in contact with the Trustee. On 18 June 2007 the Complainant's mother contacted the Fund and provided her contact details by telephone. However, she did not respond to the Trustee's request for completion of forms and provision of documentation.

The sequence of events outlined also indicated that the Complainant herself was in contact with the Trustee on 3 May 2006 and was advised that her mother

would need to act on her behalf. The Complainant's mother was in contact with the Fund the next day and was advised of the documentation required by the Trustee. There was also contact between the Complainant's mother and the Fund in October 2007.

It appeared to the Tribunal that the Complainant's mother may not have represented the interests of the Complainant as well as she might and did not provide the Complainant's identity documentation to the Fund despite agreeing to do so. However, in the Tribunal's view, responsibility for the actions of the Complainant's mother could not be laid at the feet of the Trustee. Accordingly, in the Tribunal's view, there was no unfairness or unreasonableness in the conduct of the Trustee such that the decision of the Trustee to refuse to pay the benefit to the Complainant operated unfairly or unreasonably in the Complainant's circumstances.

D13-14\017. Administration

The Complainant lodged a complaint with the Tribunal that the Trustee's decision to refuse to compensate him for a debt incurred following the disallowance of his tax deductions by the Australian Taxation Office (ATO) was unfair and unreasonable because the Trustee had failed to provide him with the appropriate form. The Tribunal, however, agreed with the Trustee that taxation responsibilities rest with the member and affirmed the Trustee's decision.

The Complainant initially joined the Fund in 1986 as an employed member. In 2002 he became self employed and continued to make personal contributions into the Fund each year from 2002 to 2010 for which he claimed a tax deduction. In early September 2010 the Complainant received a letter from the ATO advising that it proposed to disallow his claimed tax deductions of \$100,000 for superannuation contributions for the year ending 30 June 2008 as he had not notified the Fund of his intention to claim and had not received an acknowledgment from the Fund.

On about 29 October 2010 the Complainant received an ATO Notice of Amended Assessment for the year ended 30 June 2008 for \$50,054.40 plus penalty interest of \$11,319.00. The Complainant subsequently complained to the Fund that it did not inform him of the need to lodge with the Fund, or provide him with, a 'Notice of Intent to Claim or Vary a Deduction for Personal Super Contributions'. On 18 November 2010 the Complainant lodged a complaint with the Tribunal that the decision of the Trustee to refuse to compromise his claim arising from a tax assessment was unfair or unreasonable. The resolution sought by the Complainant was payment of his tax assessment plus interest.

The Complainant alleged that he informed the Trustee of his change of employment status in 2002 when he lodged a personal contribution and requested a method of continuing to make contributions personally. As the Trustee had a system in place whereby the appropriate 'Intent to Claim' forms were sent to public offer members, they had failed in their duty by not sending him a form or alerting him to the need to lodge such a form. Further, statements provided to him did not contain any information to alert him to the possibility that the Trustee had not classified his contributions as deductible.

The Trustee in its submission asserted that the taxation responsibility of the member rests with the member and/or his financial advisor or accountant. There are taxation limits and rules around the level of contributions to be made to a fund and it is incumbent upon members to inform themselves of the taxation obligations when contributing to a fund. As it did not receive a 'Notice of Intent to claim or vary a deduction for Personal Super Contributions' or a request for such a form, a 15% tax was not applied to the Complainant's contributions.

Further, the Trustee stated that since 2008 they have issued 'Notice of Intent to Claim Tax Deduction' forms to members that were deemed eligible. As the Complainant was an employer

sponsored member he was accordingly not issued with a Section 290-170 notice. The Trustee acknowledged that the Complainant did attend their offices in 2002 to make a contribution, although it had no record of any discussion regarding changing his status to a self employed member.

One of the issues the Tribunal considered was whether the Complainant advised the Trustee in 2002 of his change of status to self employed member and if so, whether the Trustee had an obligation to provide the Complainant with the appropriate forms to enable him to properly claim tax deductions on his personal contributions. From the evidence provided to it, the Tribunal was unable to conclude that the Complainant advised the Trustee in 2002 that he had become a self employed member. The computer screen shot noted the Complainant's 2002 visit to its offices but simply records that he came into the office to make a personal contribution for which he was issued a receipt.

The Complainant was apparently issued with a contributions booklet containing contribution forms which he used to continue to make contributions until 2008 when at the instigation of the Trustee he commenced making his contributions using the BPay system. Each of these contributions was recorded in the Complainant's Annual Benefit Statement as a Member Direct Voluntary contribution. There is no suggestion contained in the statements that these contributions were deductible contributions and that tax had been deducted by the Trustee.

The Tribunal noted that there was information available to the Complainant to assist him in determining the requirements for claiming deductions on his contributions. The Fund's Key Features and Information Statement of May 2001 contained tax advice for self employed members and included a section titled 'How to claim a tax deduction' which noted that in order to claim a tax deduction a person must complete an approved form and return it to the Trustee. The ATO website and Tax

Pack Supplement also cover eligibility requirements for claiming deductions for personal super contributions.

Further, the Tribunal affirmed that there is no obligation in tax or superannuation legislation for a trustee to provide contributing members with a section 290-170 notice either to complete annually when making a deductible contribution or before making a rollover, withdrawal or commencing a pension. While it noted that most trustees do send such notices out annually to appropriate members or provide notices on their web site as a service to members, ultimately the responsibility for an individual's own tax arrangements falls on that individual or their advisers. The Tribunal, therefore, considered that the decision of the Trustee to refuse to compromise the Complainant's claim for payment of his income tax assessment was fair and reasonable in the circumstances.

D13-14\033. Death benefit

The Complainant argued that the Trustee should not have paid the death benefit to the Joined Party as the relationship between the Joined Party and the Deceased Member had ceased a few weeks prior to the Deceased Member's death. She argued that the benefit should instead be paid to the Deceased Member's estate. The Tribunal found that as the Joined Party could establish financial dependency on the Deceased Member and as the estate had debts owing, it was fair and reasonable for the Trustee to pay the entirety of the death benefit to the Joined Party.

The Complainant (the Deceased Member's mother) lodged a complaint with the Tribunal that the decision of the Trustee to pay the benefit to the Joined Party was unfair and unreasonable as the Deceased Member and the Joined Party's relationship had ceased a few weeks prior the Deceased Member's death. The resolution sought by the Complainant was that the entire benefit be paid to the estate of the Deceased Member. The Complainant made the

application as the Legal Personal Representative (LPR) of the Deceased Member.

It was clear from the material advanced by both parties, and not in dispute, that there was a longstanding domestic and commercial relationship between the Deceased Member and the Joined Party. It would also appear that the relationship had been somewhat tumultuous. At least two of the joint business undertakings commenced by the Joined Party and the Deceased Member appear to have failed. At the time of death of the Deceased Member, the current business was subject to private loans in the name of the Deceased Member. The Tribunal noted that it appeared from the material before it that it was these debts (in relation to the latest business venture) that were the primary driver for the Complainant's appeal from the Trustee's decision.

Both the Complainant as the LPR and the Joined Party provided evidence of the financial circumstances of the estate of the Deceased Member and themselves respectively. The Complainant stated that she had no relevant personal financial dependency on the Deceased Member. The estate claimed through a solicitor's letter to have debts of some \$35,000 (plus an unspecified additional debt to the Tax Office) and no assets. The debts of the estate related entirely to the business venture undertaken by the Deceased Member and the Joined Party.

At the time of death of the Deceased Member, the Joined Party's Statement of Financial Circumstances indicated in broad terms a shared weekly income derived from the business of some \$1,700 after deduction of business expenses. In a subsequent letter from his solicitor it was stated that he was now dependent on a Disability Support Pension of some \$265 per week.

The Complainant, through her submissions and accompanying statutory declarations, submitted that while there was a prior relationship with the Joined Party, that relationship had broken down

some two to three weeks before the Deceased Member's death. A declaration stated that her daughter had been advised to terminate the business relationship between herself and the Joined Party, however, there was no evidence before the Tribunal that the Deceased Member had indeed acted on this advice with respect to the business.

The Tribunal noted that while a number of statutory declarations supported the Complainant's proposition that the relationship between the Deceased Member and the Joined Party had recently ceased at the Deceased Member's volition, the Joined Party's evidence that they were together immediately prior to her admission to hospital could not be ignored. The Tribunal stated that it could not draw the conclusion that the relationship was over given its past history and the relatively short period of cessation that was claimed. On this basis and on the entirety of the evidence before it, the Tribunal was of the view that it was fair and reasonable for the Trustee to draw the conclusion that a relationship of financial dependency existed between the Deceased Member and the Joined Party.

The next issue for consideration was the fairness and reasonableness of the Trustee's decision to pay the entire benefit to the Joined Party to the exclusion of the estate. In the Tribunal's view the purpose of superannuation is to provide income in retirement to a member and his or her dependants. In the event of a death before retirement, the Tribunal's approach is to consider what might have occurred had the member not died, and whether there is anyone who had an expectation of ongoing financial support or a right to look to a deceased member for ongoing financial support had that member not died.

Given that the estate had a number of debts and that the Complainant was not claiming any financial dependency on the Deceased Member in her own right, the Tribunal could find no unfairness in the Trustee's decision to pay the Joined

Party as a financial dependant in preference to payment to an estate that appeared to be insolvent. The Tribunal, therefore, affirmed the Trustee's decision.

D13-14\037. Total and permanent disability

The Complainant lodged a complaint with Tribunal that the Trustee's and Insurer's decisions to reject his claim for a total and permanent disability (TPD) benefit on the grounds that his TPD did not occur whilst his cover was in force were unfair and unreasonable. The Tribunal found that there was sufficient objective medical evidence to support the Complainant's position that he was TPD before his cover ceased and set aside the Trustee's and Insurer's decisions.

The Complainant suffered from emphysema (chronic obstructive pulmonary disease or COPD) and asthma. He had always performed manual work and for the 11 years before his resignation on 19 June 2008 worked as a ceramic tiler in a coal washery. He was also a smoker of 30 or more cigarettes per day before ceasing in January 2009. The Complainant's major symptom was shortness of breath (dyspnoea) on exertion, impacting on his capacity to work. In addition he suffered from chronic low back pain, chronic left ankle pain secondary to an injury and bilateral osteoarthritis of the knees.

Under the terms of the insurance policy, cover ended 13 months after the date of cessation of employment. Accordingly, the Complainant's cover ceased on 30 July 2009.

It was not in dispute that the Complainant was TPD from at least the date Dr MH certified him as TPD on 26 August 2009, nor that it was unlikely that he will ever be able to engage in any remunerative work in the future. The Trustee had released his account balance on the grounds of permanent incapacity. The issue for the Tribunal to consider was whether it was fair and reasonable for the Insurer to determine that the

Complainant did not meet the definition of TPD prior to the cessation of his cover on 30 July 2009.

The Complainant stated that he ceased work at the end of June 2008 due to the declining state of his health and physical condition. He submitted that his disabilities were afflicting him well before he ceased work, but he did not realise at the time how bad he was feeling. He said that he did not apply for a TPD benefit at the time for two reasons, namely that he thought that he would return to work, and he was unaware until he received the Fund's letter advising him that his cover was about to lapse that he could claim a TPD benefit.

The Tribunal was provided with medical reports and opinions generated between 2007 and 2010. On 6 July 2007, as part of a health screening programme conducted in the coal mining industry, the Complainant underwent lung function testing by Dr AB. The results were interpreted as moderate obstruction with mild restriction. Dr AB informed the then treating general practitioner, Dr JK, and recommended he refer the Complainant to a respiratory physician. Dr JK referred the Complainant to Dr AA by letter dated 11 June 2008.

The Complainant stated that he attended the office of Dr JK on ceasing work in June 2008 to seek medical treatment but was informed that Dr JK would not provide any medical treatment under Medicare only under workers' compensation. The Complainant stated that as he was homeless at the time, he was focused on finding a place to live rather than another doctor. He said had he known his cover was about to cease, he would have tried harder to find a doctor sooner. He contended that 'at no time have I denied the existence of the (end of cover) period or that I fell outside of this cover time. What I have ask for *[sic]* is consideration and understanding of the length *[sic]* of time it took to see a specialist and to obtain results from tests I undertook'. The Complainant saw respiratory physician Dr AA on referral by treating general practitioner Dr MH. The medical

history Dr AA obtained from the Complainant was one of progressively increasing shortness of breath on exertion over a period of 4 to 5 years. There was no history of cough or wheeze. On examination Dr AA described the Complainant's lungs as hyper-resonant. While emphysema was considered to be the most likely cause, Dr AA also contemplated asthma and chronic bronchitis as possible diagnoses. Dr AA arranged for the Complainant to undergo formal lung function testing.

The lung function testing was performed in a major hospital under the direction of Professor PG, a respiratory physician on 5 August 2009. Professor PG considered the results consistent with COPD/emphysema and provided these results to Dr AA and Dr MH. On 21 August 2009 Dr AA provided the Complainant with a letter addressed 'To Whom it may Concern' stating the Complainant suffered from moderate emphysema as well as asthma and that he had started treatment. Dr MH certified the Complainant to be TPD on 26 August 2009.

The Complainant underwent Job Capacity Assessments on 30 March 2009 and 4 September 2009 as part of his application for a disability support pension (DSP). On each occasion his work capacity was estimated in the 0 to 7 hours/week range. The Complainant's emphysema was considered to be not fully diagnosed, treated and stabilised and therefore could not be assessed. The DSP was granted on 17 November 2009 and payment made retrospectively to 9 September 2009.

The Tribunal determined that the Complainant had objective evidence of moderately severe COPD present since at least July 2007. The COPD was attributed to his 34 pack-year history of cigarette smoking. He had also been shown to have bronchial hypersensitivity consistent with asthma. The Tribunal found that the Complainant's impaired lung function was long-standing and preceded by months to years the date at which his insurance cover ceased (30 July 2009). It also appeared that the

only reason the Complainant did not consult a doctor earlier than he did was because he did not have the funds to do so.

In the Tribunal's view the medical evidence, including the medical reports in 2007 and 2008, the Centrelink capacity assessment in early 2009 and the nature of his condition, COPD, indicate that the Complainant was TPD at or around six months after he resigned from employment, and that his illness was the reason he ceased work.

Accordingly, the Tribunal found that the Complainant met the definition of TPD in the Policy prior to 30 July 2009 and that an insurer, acting fairly and reasonably, would have regarded the Complainant as satisfying the definition of TPD whilst the Policy was in force.

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