Superannuation Complaints Tribunal

Quarterly Bulletin

Issue No. 63

1 January – 31 March 2011

# Chairperson's report

## Withdrawal of complaints

Section 22 of the *Superannuation (Resolution of Complaints) Act 1993* (Complaints Act) sets out various circumstances in which a complaint to the Tribunal may be treated as withdrawn. In particular, section 22(3)(b) enables the Tribunal to withdraw a complaint if the Tribunal thinks that the complaint is misconceived or lacking in substance.

The Tribunal withdraws a number of complaints on these grounds.

Some trustees have commented that the Tribunal puts them to significant effort in providing documents and information in circumstances where it is likely that a complaint will later be withdrawn; or that the Tribunal has chosen to put parties to the trouble of attending a conciliation conference in circumstances where the trustee has argued that the complaint should be withdrawn either as misconceived or as lacking in substance or both.

While one of the purposes of section 22(3)(b) is to provide a means of dealing expeditiously with a complaint which may be misconceived or lacking in substance, (rather than that complaint being required to be determined at review), the section requires the Tribunal to make a decision which finally affects a complainant's rights in relation to the subject matter of the complaint. The withdrawal of a complaint by the Tribunal is determinative of a complainant's rights in the same way as the issuing of a determination in relation to the complaint.

Accordingly, the Tribunal's decision to treat a complaint as withdrawn, while in the nature of a preliminary decision, nevertheless requires the Tribunal to afford a complainant procedural fairness. This means that:

- the Tribunal must provide the complainant with relevant information as to why withdrawal is being considered as well as the Tribunal's reasons, and
- the complainant must be given the opportunity to be heard, that is, to provide any submission to the Tribunal which he or she might wish to make as to why the complaint should not be withdrawn.

The Tribunal's procedure in exercising its power under Section 22(3)(b) is to first write a 'pre-withdrawal' letter to the complainant. This letter indicates that the Tribunal is considering withdrawal of the complaint, provides the Tribunal's reasons and identifies any documents on which its view is based. The complainant is invited to provide any submission opposing

withdrawal. A decision as to withdrawal is then made on the basis of all material in the Tribunal's possession including any submission by the complainant. A final letter is then written to the complainant setting out the Tribunal's reasons for withdrawal.

The consequence of the principles outlined above is that, in order to assess whether a complaint should be withdrawn, it is important that the Tribunal obtains all documentary material in the possession of the trustee relevant to the proposed decision.

Sometimes, the Tribunal forms the view that a conciliation conference would assist despite a view that the complaint is potentially withdrawable, for the following reasons:

- No decision as to withdrawal could be made without considering the complainant's arguments in relation to possible withdrawal;
- A conciliation conference, even where withdrawal may later occur, often results in greater understanding by the complainant of the reasons for the trustee's decision, and may lead to consensual resolution of the complaint, which is preferable to withdrawal by the Tribunal; and

Given the consequences for the complainant of their complaint being withdrawn, in cases where the Tribunal forms a view that a conciliation conference would assist a complainant's understanding of the issues in dispute, a conference will be arranged.

Of course, some complaints are clearly misconceived or lacking in substance and conciliation conferences are not held in these cases.

The Tribunal will continue to exercise its power under Section 22 with due regard to the rights and interests of all parties.

## Conciliation – please be prepared

It has come to the attention of the Tribunal that some trustee representatives at conciliation do not appear conversant with all aspects of the complaint. Of particular note are administration matters, where there are often multiple aspects to the complaint. For conciliation to have the greatest chance of success, a trustee needs to be fully appraised of all matters under discussion. Trustees are encouraged to be fully versed and prepared to discuss in detail all issues raised, with a view to resolving the complaint.

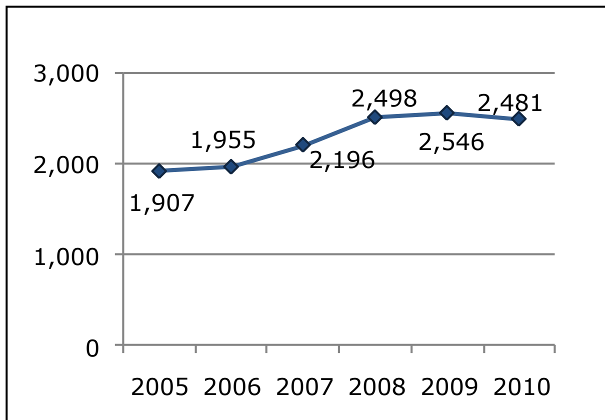
## New look bulletin

One of the many changes currently being implemented at the Tribunal as part of our continuous improvement program is revising the design of our quarterly bulletin. We would welcome any feedback on the new look.

**Jocelyn Furlan**
**Chairperson**

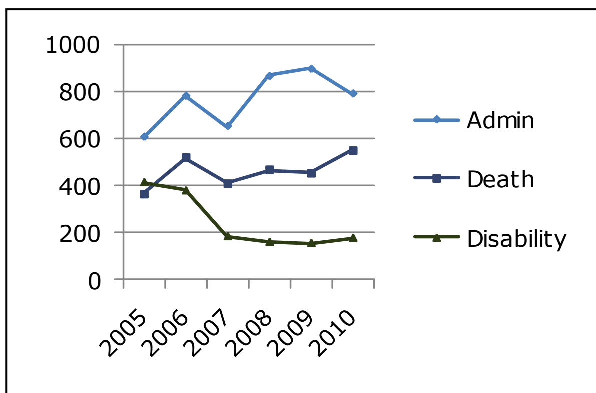
# Statistical overview

### Number of written complaints received per financial year




*NB: The Tribunal has received 1,869 written complaints to date this financial year (as of 31 March 2011).*

### Changes in complaints by type




## January - March 2011

### Telephone inquiries

The Tribunal received 3,227 telephone calls this quarter (last quarter – 3,402), which is a decrease of 5.1% compared with the previous quarter.

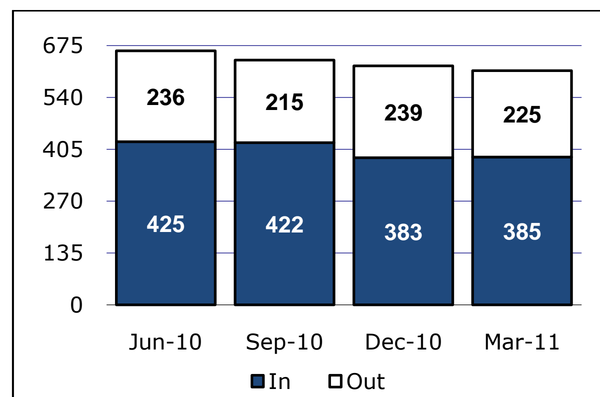
The Tribunal dealt with a wide range of inquiries, the most popular were complaints related inquiries (29.0%), followed by fund administration inquiries (17.9%) and questions about the Tribunal itself (13.5%).

### Written complaints

This quarter, the Tribunal received 610 written complaints (last quarter – 622), which is a decrease of 1.9% compared with the previous quarter.

### Jurisdiction

Of the 610 written complaints received this quarter, 385 (63.1%) complaints were within jurisdiction (previous quarter – 61.6%). Of the 225 (36.9%) complaints closed as outside jurisdiction, 157 (69.7%) 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 – 67.8%).

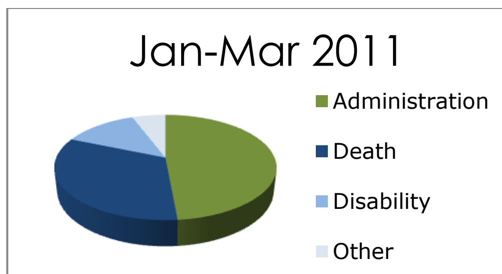



Complaints within jurisdiction

## Nature of written complaints within jurisdiction

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

Leaving aside the other category, administration complaints comprised the largest category of all written complaints received within jurisdiction – 48.5% (last quarter – 50.9%). Death complaints made up the second-largest category at 32.7% (last quarter – 32.4%), followed by disability at 12.9% (last quarter – 13.3%).




Nature of written complaints within jurisdiction

# Performance

## Complaints finalised

The Tribunal finalised 611 written complaints this quarter, up from 568, or 7.0%, in the last quarter, including some complaints carried over from the previous quarter.

Of the 611 finalised complaints, 3.6% were finalised at review (last quarter – 7.4%), 58.4% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 45.2%) and 38.0% were outside jurisdiction (last quarter – 47.4%).

## Conciliation conferences

The Tribunal conciliated 152 cases in the quarter, a decrease of 1.3% on last quarter's 154.

Of the 113 cases concluded, settlement was achieved in 73, resulting in a settlement rate of 64.6% (last quarter – 78.1%). The outcome is pending in 39 cases (25.6%) compared to 17 cases (11.0%) for last quarter.

## Nature of conciliation cases

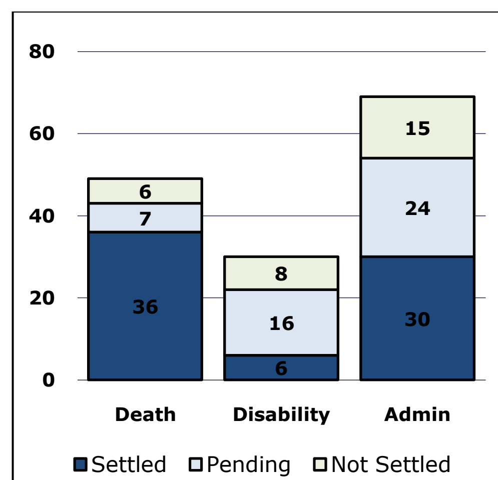
The categories of note in the quarter are as follows:

Death benefits – Of the 42 concluded cases, 36 (85.7%) were settled.

Disability – Of the 20 concluded cases, 5 (25%) were settled.

Administration – Of the 49 concluded cases, 31 (63.2%) were settled.

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




Settlement by conciliation

## Review determination outcomes for the quarter

The Tribunal determined 22 cases this quarter (last quarter – 42 cases).

The largest category of complaints determined at review was death benefit complaints: 14 (63.6%).

| Death | Qtr | YTD |
|---|---|---|
| Affirmed | 12 | 38 |
| Remitted | 0 | 0 |
| Varied | 0 | 0 |
| Set aside | 2 | 14 |
| **Total** | 14 | 52 |

Disability complaints made up the second largest category: 5 (22.7%)

| Disability | Qtr | YTD |
|---|---|---|
| Affirmed | 2 | 12 |
| Remitted | 1 | 2 |
| Varied | 0 | 0 |
| Set aside | 2 | 3 |
| **Total** | 5 | 17 |

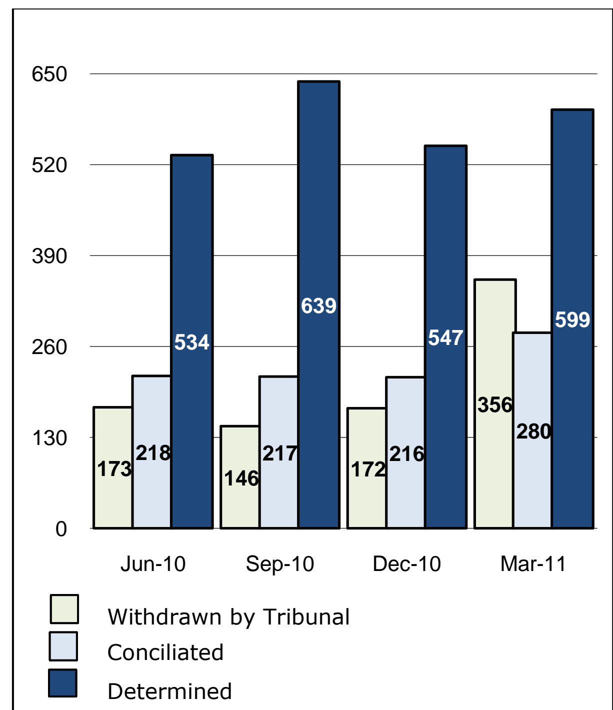
Followed by administration complaints:
3 (13.6%)

| Admin | Qtr | YTD |
|---|---|---|
| Affirmed | 1 | 8 |
| Remitted | 0 | 0 |
| Varied | 0 | 0 |
| Set aside | 2 | 6 |
| **Total** | 3 | 14 |

63.6% of trustee decisions were affirmed during the quarter, compared with 61.9% in the December quarter, 85.7% in September quarter and 64.3% in June quarter.

## Efficiency

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



# Recent determinations of interest

### Death benefit distribution: D10-11\067

*The complainant (the deceased member's father) lodged a complaint with the Tribunal regarding the trustee's decision to pay the death benefit to the joined party (the deceased member's mother) as an interdependent. As the complaint was not lodged within the prescribed period, the determination of the Tribunal was that, under sub-sections 14(3) and 14(4) of the Superannuation (Resolution of Complaints) Act 1993, it did not have jurisdiction to deal with the complaint.*

The complainant and the mother are the parents of the deceased member. On 5 January 2009 the complainant lodged a complaint with the Tribunal dated 23 December 2008 that the decision of the trustee to pay the whole of the death benefit to the mother as an interdependent was unfair or unreasonable. The resolution sought by the complainant was that the benefit be split equally between the complainant and the mother.

The issue which arose in relation to this complaint was whether the Tribunal had jurisdiction to hear it. Sub-sections 14(3) and 14(4) of the *Superannuation (Resolution of Complaints) Act 1993* (Complaints Act) state that the Tribunal cannot deal with a complaint under section 14 about a decision of a trustee relating to the payment of a death benefit if the complaint is not lodged within the period prescribed. The prescribed period is 28 days after the person has been given written notice of the trustee's decision.

The trustee wrote to the complainant and the mother on 21 August 2008 advising that it proposed to pay the benefit to the mother as an interdependent. By letter dated 11 September 2008, the complainant's representatives advised the trustee that they acted for the complainant, and also advised the trustee that the complainant objected to the proposed payment of the benefit. The trustee wrote to the complainant's representative on 17 September 2008 seeking further information, which was provided by the representative by letter dated 26 September 2008. By letters dated 13 October 2008 to the mother and to the complainant's representative, the trustee gave notice that it affirmed its earlier decision. Having not received any further objections, the trustee paid the benefit to the mother on 24 November 2008. The complainant's complaint about the trustee's decision was lodged on 5 January 2009, outside the prescribed period of 28 days.

In its review of the complaint, the Tribunal noted that the first issue for determination was whether the complainant or his representative received the trustee's letter. The trustee stated that it sent the letter to the complainant's representative and the mother, and the mother provided the Tribunal with her copy of the letter in support of this. Section 29 of the *Acts*

*Interpretation Act 1901* deals with the meaning of service by post and provides as follows:

> (1) Where an Act authorises or requires any document to be served by post, whether the expression "serve" or the expression "give" or "send" or any other expression is used, then unless the contrary intention appears the service shall be deemed to be effected by properly addressing prepaying and posting the document as a letter, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

The effect of this provision is that if the letter to the complainant's representative was properly addressed and the letter was prepaid (i.e. stamped) and posted as a letter, it is deemed to have been delivered unless the contrary is proved.

The complainant's representative submitted that the contrary should be considered to have occurred because the trustee did not have a procedure for recording outgoing mail, and the representative did have a procedure for recording incoming mail, and there was no record of receipt of the letter. However, the letter was correctly addressed, as evidenced by a copy of the letter which was emailed to the representative on 10 December 2008; and a letter identically addressed dated 17 September 2008 was received by the complainant's representative. The letter dated 13 October 2008 was not returned to the trustee, as would have been likely had the letter not been delivered. Accordingly, the trustee was not on notice of the possibility that the letter might not have been received. Further, the Tribunal was satisfied (by her provision to the Tribunal of her copy of the 13 October 2008 letter) that the mother received the letter. Therefore, on balance, the Tribunal was not persuaded that the deemed delivery should be rebutted and accordingly, the letter of 13 October 2008 was deemed to have been delivered to the complainant's representative on or about 16 October 2008.

For the Tribunal to have jurisdiction to hear the complaint, the complainant had to lodge his complaint with the Tribunal within 28 days of the date of receipt by him or his representative. The complainant's complaint about the decision was lodged on 5 January 2009, well outside the prescribed period. As the complainant's complaint was not lodged within the prescribed period, the determination of the Tribunal was that, under sub-sections 14(3) and 14(4) of the Complaints Act, it did not have jurisdiction to deal with the complaint.

In reaching this determination, the Tribunal observed that a simple way for trustees to avoid complaints of this type was to send all notices relating to disputed death benefit distributions to potential beneficiaries by registered mail. As the prescribed period of 28 days is calculated from the date of receipt of the notice, there will be probative evidence to support the receipt date of the notices.

**Total and permanent disability complaint: D10-11\056**

*The complainant lodged a complaint with the Tribunal that the refusal or failure of the trustee and the insurer to pay her a total and permanent disability (TPD) benefit was unfair or unreasonable. The complainant sought declarations that she was TPD and entitled to the benefit together with payment of interest pursuant to section 57 of the Insurance Contracts Act 1984. The Tribunal set aside the trustee and insurer decisions and substituted its own that the complainant was TPD as at 30 September 2006 and, accordingly, interest was payable from this date.*

The complainant is 55 years old and was employed as a membership administration consultant. She was initially employed on a full time basis but, towards the end of 2002, she reduced to a four day, 30 hour week, from Monday to Thursday. The complainant went on annual leave on 24 December 2002 and did not return to work with the employer. On 3 January 2003, while on leave, she was involved in an accident in which the chairlift carrying her and others collapsed. She suffered a spinal fracture, pelvic fracture and injury to her spinal cord.

The complainant received salary continuance benefits from the previous fund and the salary continuance insurer from May 2003 until June 2005. Towards the end of her salary continuance period, in May 2005, she lodged a TPD claim with the fund. The insurer rejected this claim on several grounds. Firstly, the insurer argued that it was not liable under the policy because the complainant did not make a claim until more than a year after the accident. The insurer claimed that this constituted a breach of clauses 6 and 7 of the policy.

In early May 2003, the complainant completed a form entitled 'Group Claims Initial Claim Form Group Insurance', which had been provided to her by the trustee. It is clear from these documents that the complainant notified the trustee of the accident and that the trustee was aware, from early 2003, that the complainant had not returned to work and was continuing to receive medical treatment. The Tribunal noted that the trustee, although having knowledge of the accident by virtue of the salary continuance claim, did not inform the insurer of a potential TPD claim by the complainant before May 2005. It also noted that the trustee did not inform the complainant of any obligation to lodge a separate TPD claim within a specific timeframe. The Tribunal put forward that the trustee, as the primary insured, acting prudently might have taken steps to remind the complainant of the obligation arising under clauses 6 and 7 of the policy.

In regards to the insurer's claim that the complainant's late notification constituted a breach under the policy, the Tribunal noted that if the failure to comply with the notification requirements of clauses 6 and 7 of the policy gave rise to a right of the insurer to reject or reduce the complainant's claim, this right was qualified by section 54 of *the Insurance Contracts Act*

*1984* (IC Act). It stated that it was necessary for the insurer to demonstrate that it had suffered prejudice as a result of the late notification and the extent of that prejudice. The Tribunal did not find that the insurer was able to do so. The Tribunal considered that the insurer had a reasonable opportunity to assess the complainant's injuries and her capacity to return to work by reference to the policy definition of TPD and, accordingly, that there had been no prejudice brought about by any failure to comply with clauses 6 and 7 of the policy.

The Tribunal then went on to consider how the definition of TPD should operate. The insurer contended that the use of the expression 'unable' imposed a higher standard than the expression 'unlikely'. It said that the 'possibility' of work would mean that the complainant was not TPD; and

> "the word 'unable' in the definition of TPD permits it to confine its assessment to material relating to the complainant's physical capacity to carry out the important duties of any relevant occupation. It argued that it did not need to take into account material relating to the availability of any such occupation on the job market or factors such as the complainant's age or general employability."

The insurer's final definitional argument was that, as the complainant was a part time employee at the time of the accident, it is her ability to undertake part time work which is relevant. It said that if the complainant was able to return to part time work, even on a limited basis, she was not 'totally' disabled.

The Tribunal acknowledged that there is a difference in meaning between the expression 'unlikely' and 'unable' with 'unable' setting the bar higher than 'unlikely'. Consequently, the Tribunal concluded that the ultimate question for the insurer was whether the complainant is "unable ever to engage in or work for reward in any occupation or work in which she was… reasonably capable of engaging." Notably, the focus of the definition of TPD is on the ability of the member to work for reward. In these circumstances, the extent of the pre-accident employment was relevant but not determinative. The Tribunal stated that its task was therefore to determine whether the insurer's conclusion in relation to the ultimate question was fair and reasonable in its operation in relation to the complainant in the circumstances. This, in turn depended upon an analysis of the available medical evidence.

The Tribunal stated that it was clear from the evidence that the complainant suffered catastrophic injuries as a result of the accident which required treatment over a lengthy period and that she continued to suffer from significant ongoing pain and disability and will continue to do so. The insurer, however, submitted that it was reasonably open to it to form the opinion that she did not meet the policy TPD definition because, on its view, only one of

four doctors considered that the complainant had no work capacity. The insurer observed that the medical evidence as to her work capacity was split with Mr JH concluding that the complainant had no work capacity and Prof TK and Mr DM regarding her as having capacity for modified part time work.

The Tribunal noted that the insurer in its assessment had largely dismissed the opinion of the complainant's general practitioner, Dr LLT, due to the doctor having changed her mind, in the insurer's view, three times. While the Tribunal agreed that there was some variance of view over a period of several years, the Tribunal did not regard the opinion of Dr LLT as of limited value. As the complainant's general practitioner, she had seen the complainant regularly over a lengthy period and it was apparent from other comments that, over this period, the complainant maintained a positive attitude and had done everything possible to rehabilitate herself. Moreover, it was reasonable to assume that she had tried to achieve a situation where some part time work might be possible. Accordingly, the Tribunal found the slight variations in the view expressed by Dr LLT over this period both fair and understandable. The Tribunal also accepted the complainant's own evidence, prepared with the assistance of her husband, which demonstrated the immense difficulty she has in undertaking the activities of normal life. This evidence, they found, was consistent with and supported the qualifications as to her work capacity expressed by Dr LLT, Mr JH and Mr DM.

Accordingly, the Tribunal considered that the complainant's physical limitations would, on any reasonable and fair view, prevent her in the future from undertaking her previous employment or any similar employment or, in other words, from engaging in or working for reward. In doing so, it acknowledged that some medical practitioners asserted that the complainant might be able to carry out part time work. The Tribunal held the view, however, that even if this were correct, it appears that the complainant could only perform modified duties for a very short period of time and would have significant difficulties travelling to and from such employment. The Tribunal stated that it was also relevant that prior to the accident, the complainant had been working only marginally less than full time. Therefore, the Tribunal did not consider that the theoretical possibility of limited work was a fair or reasonable basis to conclude that the complainant was not TPD.

The Tribunal considered that it was unreasonable for the insurer to have concluded that the complainant was not TPD as at 30 September 2006. This date was approximately a month after receipt by the insurer of the last of the medical reports on the basis of which it made its decision to reject the complainant's claim and the time by which, in the Tribunal's

opinion, it had sufficient evidence on the basis of which to accept the claim. The Tribunal also concluded that, in accordance with section 57 of the IC Act, interest should be paid from that date.

The Tribunal then turned to the issue of whether there was a failure or refusal by the trustee to determine whether the complainant was TPD and, if so, was this, in the circumstances, fair and reasonable in its operation in relation to the complainant. The Tribunal observed that the trustee had an obligation, in dealing with a TPD claim, to exercise its discretion independently of the insurer. The trustee clearly considered that the complainant was TPD. It notified the insurer of its view about the complainant's TPD claim and endeavoured to persuade the insurer to adopt its position. However, it does not appear to have separately made a formal decision about her TPD status. The insurer's rejection of the claim did not relieve the trustee of this obligation.

Therefore, in all the circumstances, the Tribunal considered that the failure of the trustee to make a decision that the complainant was TPD was unfair and unreasonable in its operation in relation to the complainant. It stated that the decision constituted by the failure of the trustee to accept the complainant’s claim should be set aside and the decision of the Tribunal to accept the claim be substituted. It noted, however, that as the complainant had suffered no loss as a result of the trustee's decision, no interest was payable by the trustee.

## Death benefit distribution: D10-11\065

*The complainant (the de facto spouse of the deceased member) complained to the Tribunal that the trustee's decision to pay all of the benefit to her in her capacity as the legal personal representative of the deceased member’s estate was not fair or reasonable. The complainant sought to have the benefit paid to her in her capacity as a financial dependant of the deceased member. On review, the Tribunal joined the deceased member's three sons (aged 19, 17 and 10 at the date of the deceased member's death) to the complaint as potential beneficiaries. In its determination, the Tribunal set aside the trustee's decision and substituted its own decision that one-third of the death benefit be paid to the third son as a minor dependant and two-thirds be paid to the complainant.*

The Tribunal noted that relevant to this determination were the wishes of the deceased member, the financial circumstances and needs of the potential beneficiaries and the nature of the relationship between the beneficiaries and the deceased member. The Tribunal agreed with the trustee that the complainant and the sons were all potential beneficiaries. It also agreed that it was open to the trustee to determine that the benefit be paid to the legal personal representative of the estate.

However, while it agreed that the trustee had clearly considered the wishes of the deceased member, it was not evident to the Tribunal, that the trustee had taken enough cognisance of the financial circumstances of the potential beneficiaries.

The Tribunal also had a general concern about the payment of a benefit to the legal personal representative when it was open to the trustee, after careful analysis of the circumstances, to pay the benefit directly to dependants. Payment directly to dependants, in the Tribunal's opinion, protects the benefit from any liabilities that the estate might face and may also result in a greater benefit due to anti-detriment provisions.

The trustee placed significant weight on the wishes of the deceased member in reaching its decision. The deceased member lodged a form with the fund on 22 April 2002 and nominated the former spouse as his preferred beneficiary. The deceased member also left a will dated 2 October 2009 in which he appointed the complainant as executrix. The will provided for $100,000 to be shared equally between the sons on each attaining the age of 25 years. It also provided for the proceeds of the fund, if paid to the estate, to be similarly shared. After making provision for the distribution of some goods and chattels, the balance of the estate was to be paid to the complainant. The will also requested the trustee to distribute the benefit from the fund in equal shares to the sons in the event that the estate was not entitled to the benefit and for the trustee to ignore any previous instructions or requests it may have had.

In assessing the trustee's decision, the Tribunal sought an adjournment for additional information about the ownership of the house. The complainant advised that in order for the deceased member to meet the property settlement with the former spouse a further mortgage was taken out. When this was done, the title was then registered with the deceased member holding a 5/8th interest and the complainant a 3/8th interest as tenants in common. From that time until the date of death of the deceased member the complainant paid 50 per cent of the mortgage repayments and the deceased member 50 per cent. After the death of the deceased member, the complainant has paid all the repayments.

The Tribunal considered this additional information significant because it showed the house as an asset of the estate and the mortgages as liabilities. This was despite the general flavour of the information suggesting that the complainant would retain the house. This is evidenced in the will where the deceased member expresses the wish that the complainant, if she sells the house, provide the sons with the first option to buy it. What appears to be the position is that the complainant would only retain 3/8ths of the value of the house and the deceased member’s share would be an asset of the estate.

In addition, the Tribunal noted, the complainant could well find herself liable for the mortgages of approximately $280,000. If the superannuation benefit is paid to the estate and distributed according to the will,

then the complainant would be placed in a position where she would have to further increase her mortgage by at least $100,000 (to pay the bequest to the sons) if she wished to retain the house. The complainant would not receive any of the superannuation benefit which would be fully distributed to the sons under the terms of the will. This level of debt would most likely be unacceptable to a bank and she would probably be unable to afford the loan repayments. The complainant would therefore be forced to sell the house. Given this analysis, the Tribunal was of the view that the decision of the trustee to pay the whole of the benefit to the complainant in her capacity as the legal personal representative of the deceased member was not fair and reasonable in its operation in relation to the parties in the circumstances.

The Tribunal affirmed the view that, where possible, the benefit should be paid directly to any beneficiaries. The Tribunal stated that, in making its determination as to the distribution of the benefit, it was fair and reasonable for the trustee to have regard to the nature of superannuation. Superannuation normally involves the parties to a relationship sacrificing income while working in order to provide greater income in retirement for that couple. In the case of an insured component, this is to compensate for the diminution of the anticipated benefit due to a shortened working life. The objective and purpose remains to provide for the member or the member and his or her partner in retirement. In the event that one of those parties dies then, in the absence of some significant circumstances, the benefit should remain with the surviving party for the purpose of providing ongoing support.

Application of some of the benefit to children of the deceased member is appropriate where they were relying on support from the deceased member at the date of death. The magnitude of that benefit is then a function of the level of support and the years that it might reasonably be expected to continue. While the first and second sons received some financial support from the deceased member, they were both employed and close to or over 18 respectively. Only the third son could expect to be financially supported by the deceased member for at least a further eight years.

The Tribunal stated that while due consideration must be given to the expressed wishes of the deceased member; the trustee must look beyond such indication and carefully analyse the circumstances of the potential beneficiaries. Accordingly, the Tribunal determined that the trustee, acting fairly and reasonably would have made better provision for the complainant in the allocation of the benefit, while also recognising the ongoing financial dependence of the third son. For these reasons, the Tribunal determined that provision should be made for the third son based on his dependency on the deceased

member and the balance should be paid to the complainant.

## Death benefit distribution: D10-11\068

*The complainants (the deceased member's adult children) complained to the Tribunal about the trustee's decision to pay the entire death benefit to the joined party as an interdependent. On review of the complaint, the Tribunal affirmed the trustee's decision.*

In its review of the complaint, the Tribunal agreed with the trustee that the complainants and the joined party were potential beneficiaries. Complainant 1 (the adult daughter of the deceased member), and complainant 2 (the adult son of the deceased member) both fall within the definition of 'dependant' under the trust deed. The joined party was initially considered by the trustee to have been the de facto spouse of the deceased member at the time of his death, however, the trustee later changed its view and determined that the joined party fell within clause (d) of the trust deed definition of 'dependant' under the category of interdependency as prescribed by section 10 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

The Tribunal accepted the following facts. The complainants (aged 20 and 22 respectively) are the adult children of the deceased member born as a result of the deceased member's former marriage which ended in late 1988. In about 1988 or 1989 the deceased member commenced a relationship with the joined party and commenced cohabitation with her at her home. Both were then members of the Armed Forces. Due to various postings they then lived variously together or apart for several years. Following discharge from the Armed Forces they again commenced residence together at the joined party's home during 1999. Late in 1999 the deceased member suffered serious injury as a result of a workplace accident. This left him severely disabled and in significant pain. During his lengthy recuperation he developed an alcohol addiction. As a result, he eventually moved from the joined party's home to a nearby boarding house. Although the deceased member continued to reside at the boarding house until his death, he and the joined party appear to have regularly spent time at each others' residences including frequent overnight stays together. It also appears that he left most of his papers and possessions at her residence and that they continued to share expenses.

Relevant to this determination were the wishes of the deceased member, the financial circumstances and needs of the potential beneficiaries and the nature of the relationship between the beneficiaries and the deceased member. The deceased member made no nomination in relation to the death benefit and there was no evidence that he left a will. Accordingly, there was no evidence as to wish or intention.

Complainant 1 is employed as a customer service officer. In her 'Statement of Financial Circumstances' provided to the Tribunal she disclosed annual income at the date of death of the deceased member totalling a little over $15,000 which has since increased to $20,000. She has an outstanding HECS debt of approximately $20,000. Complainant 2 disclosed in his 'Statement of Financial Circumstances' that he is employed as an IT administrator and receives an income of $47,000 per annum. He owns a home valued at $245,000 subject to a mortgage of slightly below $200,000. The evidence indicated that both complainants were financially and residentially independent of the deceased member at the time of his death and had been so for some time. Although complainant 1 asserted that the deceased member either would have or should have provided financial assistance in relation to her ongoing education there is no evidence that he would have done so.

The joined party receives an income of approximately $50,000. She stated that she and the deceased member were 'co-dependent financially' and that 'what was mine was his and what was his was mine.' After his death she received approval for a spouse's benefit under legislation. Notwithstanding their separate residential arrangements there was evidence that the joined party and the deceased member maintained many of the aspects of their relationship prior to 2004-05. There appeared to the Tribunal to be frequent contact between them including days spent at each other's respective residences and overnight stays on weekends by him at their former joint home. Their arrangement involved continued mutual emotional support.

The criteria for establishment of an interdependency relationship set out in section 10A (1) of the SIS Act are fourfold:

- that the persons concerned have a close personal relationship
- that they live together
- that one or each of them provides the other with financial support, and
- that one or each of them provides the other with domestic support and personal care.

Nevertheless, under section 10A(2), an interdependency relationship can exist if the first of the above criteria is satisfied but the other criteria are not able to be satisfied by virtue of either or both suffering from a physical, intellectual or psychiatric disability. The Tribunal was satisfied, as apparently was the trustee, that the primary factor leading to the separation in about 2004 was the complainant's alcoholism, which, in turn had previously been a factor in the breakdown of his earlier marriage. It seems clear that this problem had been aggravated following his serious workplace accident in 1999 and that the significant physical disability he suffered through this accident remained a substantial factor in his alcoholism and consequent behaviour.

The Tribunal believed it reasonable to treat the deceased member's alcoholism combined with the ongoing effects of his physical injury as a disability which would satisfy section 10A(2) of the SIS Act. It stated that there was persuasive evidence that the joined party and the deceased member continued to enjoy a close personal relationship at the time of his death and, in these circumstances, the Tribunal considered that it was reasonable for the trustee to have concluded that an interdependency relationship existed within the terms of that sub-section.

As a separate issue, the trust deed includes amongst the category of dependants a person "who, in the opinion of the trustee, was wholly or partially dependent on the Member …at the time of the Member's death …" In this case the trustee appears not to have been satisfied that such financial dependency existed. Nevertheless, the Tribunal found that the joined party had provided a detailed account, with some supporting documentation, in relation to the financial relationship which existed between the date on which the deceased member took up separate residence and the date of his death. The Tribunal stated it had no reason to doubt the veracity of the joined party's statements in this regard and there was support for her contentions in the financial documents which she provided.

Taking into account the relative claims of the complainants and the joined party, the Tribunal considered that it was reasonable for the trustee to have given priority to that of the joined party. Although their residential arrangement at the time of his death was unusual, the other aspects of the previous de facto relationship between the joined party and the deceased member remained intact. The evidence indicated to the Tribunal that she was a person who would have looked to the deceased member for continuing support had he not died. The Tribunal considered, therefore, that the joined party was a 'beneficiary' to whom the death benefit might properly have been paid by the trustee.

The trustee decided to pay the entire benefit to the joined party. The Tribunal affirmed that this distribution was fair and reasonable in its operation in relation to the interested parties in the circumstances.

### Administration complaint: D10-11\061

*The decision under review was the refusal of the trustee to pay the complainant the amount of compensation sought by her. The trustee originally advised the complainant that it was prepared to offer $1,113.07 in compensation to the complainant for its error in establishment of her allocated pension, but declined to pay any further amount. On review, the trustee increased the offer to $1,612.83 but affirmed its decision not to pay the complainant the amount sought by her. The Tribunal affirmed the trustee's decision.*

The complainant was a member of the fund with an accumulation account invested in the fund's 'balanced' investment option with a balance of approximately $13,000

('account A'). In December 2007 the complainant decided to retire and establish an allocated pension and she advised the fund of her intention to rollover funds into the fund to establish the allocated pension.

On 21 January 2008 the fund received a rollover from one fund ('other fund 1') of approximately $274,600, together with the complainant's instruction to invest the rollover 97 per cent 'cash' / 3 per cent 'balanced'. The fund invested the rollover in account A in accordance with the complainant's investment instructions. On 29 January 2008 the complainant wrote to the fund requesting that all her balance and future rollovers to account A be invested in 100 per cent cash. By letter dated 31 January 2008 the fund responded to the complainant advising that it was unable to act on her letter and enclosed the correct form to be completed.

On 1 February 2008 the trustee (erroneously) transferred the balance of account A into a new account for the purpose of establishing an allocated pension. On 6 February 2008 the fund received a further rollover of approximately $257,700 from another fund ('other fund 2'). The trustee established a new account for these funds ('account B') and deposited them into this account. The complainant did not provide any investment instructions for this rollover, because she completed the other fund 2's documentation to affect the rollover and there was no opportunity on other fund 2's form to specify investment instructions for investments in the fund. Accordingly, the rollover in account B was invested in the fund's default strategy, the balanced option. Following receipt of the further rollover, in order to effect the establishment of the allocated pension correctly, the fund reversed the previously established allocated pension and deposited the reversed amount into account B. The fund then established an allocated pension with the total amounts on 20 February 2008.

The complainant complained about investment losses incurred as a result of her rollover from other fund 2 being invested in the balanced option and the incorrect closure of account A and establishment of account B. She claimed compensation of losses of earnings of approximately $6,300, and $5,000 compensation for interest and her time and expense in pursuing the matter. By letter dated 16 May 2008 the trustee acknowledged that it had made an error in establishing the allocated pension prior to receipt of the rollover from other fund 2, and that the reversal of the allocated pension should not have been into account B and therefore invested in the balanced option, but should have been into account A and invested 97 per cent cash / 3 per cent balanced. The trustee offered compensation of $1,113.07 (later increased to $1,612.83) representing the difference between the amount earned in account A on the reversed amount and the amount that would have been earned in account B.

The complainant rejected the offer, also claiming compensation for the loss earned while the rollover from other fund 2 was invested in the balanced option in account B, arguing that the rollover should never have been invested in the balanced option, given her instructions in relation to her other investments and the allocated pension. The issue in dispute, therefore, was the investment of the complainant's rollover from other fund 2 in the balanced option from the date it was received by the fund (6 February 2008) to when the complainant's allocated pension commenced (20 February 2008).

In her fund account (account A) the existing future contributions strategy (also used for her salary sacrifice contributions) was the balanced option. The complainant did not nominate an investment strategy for her rollover from other fund 2. The trustee submitted that it did not have discretion to invest the rollover from other fund 2 in cash because the complainant had not completed a valid instruction to do so. Similarly, the trustee could not have changed the complainant's instruction about future contributions without an appropriate and valid instruction. The complainant acknowledged that the instruction in her letter of 29 January 2008 was not a valid investment switch instruction. Nevertheless, the complainant argued that because she was 'not a default strategy member', any further contributions or rollovers should not be invested in the default strategy.

As noted above, the complainant actually had elected three different strategies – 100 per cent cash for the allocated pension, 97 per cent cash / 3 per cent balanced for the rollover from other fund 1, and balanced for salary sacrifice contributions into her existing accumulation account (account A). Therefore, even if the effect of the statement that a member, upon exercising investment choice, is no longer a default strategy member for all his or her accounts, in the absence of a valid instruction, the Tribunal found that it was not reasonable for the trustee to choose which of the options selected by the complainant is the option into which a new contribution/rollover be invested.

In reaching its determination, the Tribunal stated that it understood the complainant's position. It was clear from the investment choices she made that her overall intention was for her investments to be in cash. However, it noted that she had received correspondence from the trustee indicating that it could not act on her letter to that effect, and she did not elect an investment strategy in relation to the rollover from other fund 2. The trustee erroneously invested the rollover from other fund 2 into (the new) account B, and should have invested the rollover into account A, but even if it had done so, the rollover would have been invested in the balanced option because this was the investment strategy in that account for future contributions. Accordingly, regardless of whether account A or account B was used, the rollover would

have been invested in the balanced option because there was no valid instruction from the complainant as to the investment of the rollover, and the investment option for future contributions into account A was the balanced option.

The complainant stated that she did not see the necessity of completing the investment option form forwarded to her on 31 January 2008 because she assumed that she was already invested in 97 per cent cash / 3 per cent balanced. However, this mistaken assumption in relation to the investment strategy for future contributions in account A did not, in the Tribunal's view, render it unfair or unreasonable for the trustee to invest the rollover from other fund 2 in accordance with the existing strategy for future contributions. It followed therefore, in the Tribunal's view, that the trustee's refusal to compensate the complainant for the investment losses earned on the rollover from other fund 2 while it was invested in the balanced option (some 14 days) was fair and reasonable in its operation in relation to the complainant in the circumstances.

Accordingly, the Tribunal considered that the decision of the trustee to reject the complainant's claim for compensation greater than the amount offered was fair and reasonable in its operation in relation to the complainant in the circumstances. The Tribunal affirmed the trustee's decision.

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