Superannuation Complaints Tribunal

SCT Quarterly Bulletin

Issue No. 60
1 April 2010 – 30 June 2010

Chairperson's Report

New telephone number and mailing address

Since 1 July 2005, the Tribunal has shared a common 1 300 telephone number with the Financial Ombudsman Service ('FOS').

Recently however, the Tribunal has received increasing feedback from consumers and superannuation fund members that they are finding the arrangement confusing and frustrating. We are told that awareness of superannuation has increased to the extent that those who have an issue with their superannuation or wish to make a complaint about their superannuation are aware that they wish to contact the Tribunal about their complaint.

In addition, people who have contacted the superannuation regulators (the Australian Securities and Investments Commission and/or the Australian Prudential Regulation Authority) and have been referred by them to the Tribunal can be frustrated when they then have to be transferred via the common 1 300 number to the Tribunal.

Accordingly, we formed the view that it is in the best interests of consumers that, in addition to continuing to participate in the common call centre number operated by FOS, the Tribunal has its own number. This ensures:

- those who wish to call the Tribunal are able to do so directly, and
- those who have a complaint about a financial product, but are unsure as to the appropriate body to deal with the complaint, can call the common number and be directed to the relevant area.

The retention of both numbers will mean that superannuation funds will be able to include the dedicated Tribunal number in publications at a time convenient to the fund, (for example commensurately with other changes).

The Tribunal's new number is:

1300 884 114

In addition, the Tribunal has been notified by Australia Post that the Tribunal's mailing address has been amended to delete "GPO". The updated address is:

Locked Bag 3060
Melbourne Vic 3001

Farewell

One of the Tribunal's part-time members, David Thomas, resigned from the Tribunal with effect from 30 June. David was a valued member of the Tribunal since he was first appointed on 1 December 2005. His contribution to the Tribunal's deliberations has always been thoughtful, considered, articulate and respectful of all the parties involved. We are very sorry to lose him, but wish him all the very best in his future plans which I understand involve travel and family time. The Tribunal is grateful for David's contribution while he was a member.

Quarterly Statistics

During the quarter, the total number of written complaints received by the Tribunal increased by 13.6% compared to the previous quarter. The number of telephone enquiries increased by 10.8%.

The number of complaints within jurisdiction relating to fund administration as a percentage of total complaints rose slightly to 51.3% (last quarter 48.2%) of all complaints during the quarter. Complaints about death benefit distributions decreased slightly to 35.5% (last quarter 37.1%) of all complaints. Complaints about disability benefits remained static, at 10.4% of total complaints.

The Tribunal finalised 527 complaints in the quarter. At conciliation, the Tribunal achieved a settlement rate of 65.1% (previous quarter 58.5%). Whilst 70.4% of death benefit complaints and 65.9% of administration complaints were settled at conciliation, only 38.5% of disability complaints were successfully conciliated.

The Tribunal determined 28 cases during the quarter (previous quarter 18 cases). Overall, the Trustee's decision was affirmed in 64.3% of these cases.

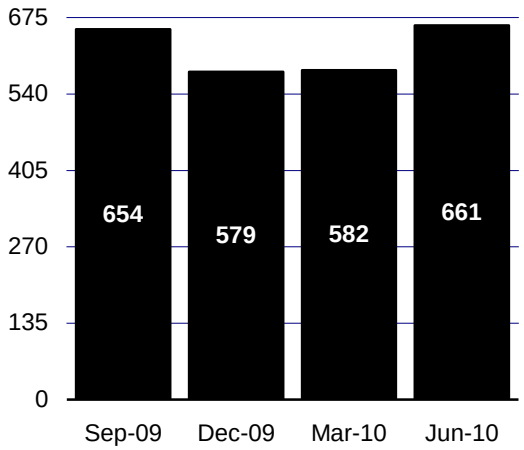
Jocelyn Furlan
Chairperson

Performance

Statistical Overview

Written Complaints

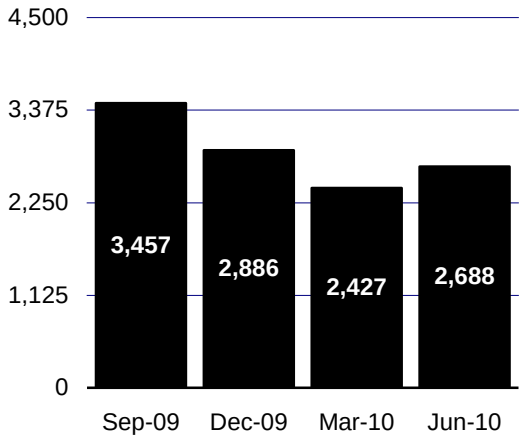
This quarter, the Tribunal received 661 written complaints (last quarter – 582), which is an increase of 13.6% compared with the previous quarter.



Telephone Enquiries

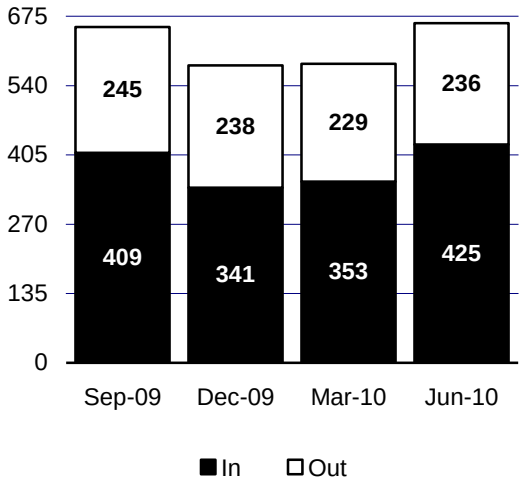
The Tribunal received 2,688 telephone calls this quarter (last quarter – 2, 427), which is an increase of 10.8% compared with the previous quarter.

The Tribunal dealt with a wide range of enquiries, the most popular questions were complaint related enquiries (22.0%), followed by fund administration enquiries (17.1%) and death benefit enquiries (7.6%).



Jurisdiction

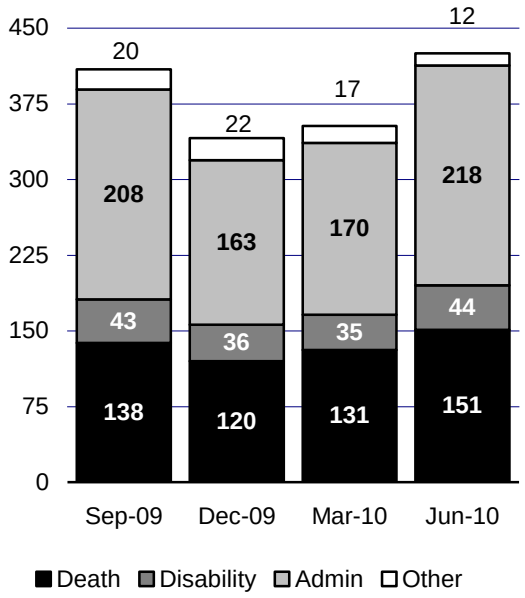
Of the 661 written complaints received this quarter, 425 (64.3%) complaints were within jurisdiction (previous quarter – 60.7%). Of the 236 complaints closed as outside jurisdiction, 132 (55.9%) were closed pursuant to s.19 of the SRC Act because the complainant had failed to lodge a complaint with the Trustee or the 90 day time limit had not passed from the date of complaint to the Trustee, (last quarter – 65.9%).



Nature of Written Complaints Within Jurisdiction

Complaints fall into four major categories – 'Death', 'Disability', 'Administration' and the 'catch-all' category of 'Other'.

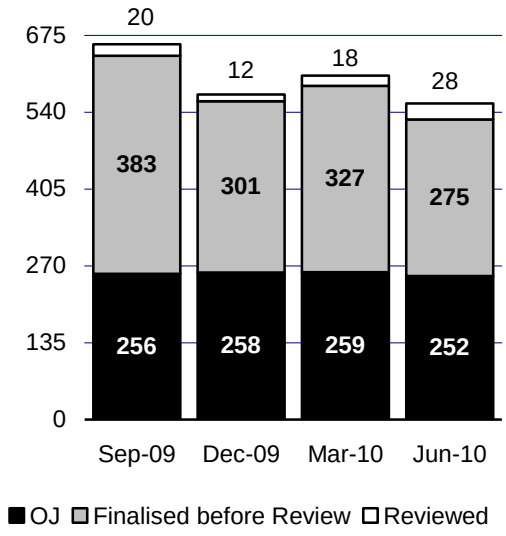
Leaving aside the 'Other' category, 'Administration' complaints comprised the largest category of all written complaints received within jurisdiction – 51.3% (last quarter – 48.2%). 'Death' complaints made up the second-largest category at 35.5% (last quarter – 37.1%), followed by 'Disability' at 10.4% (last quarter – 9.9%).



Complaints Finalised

The Tribunal finalised 527 written complaints this quarter, down from 604, or 12.7%, in the last quarter, including some complaints carried over from the previous quarter.

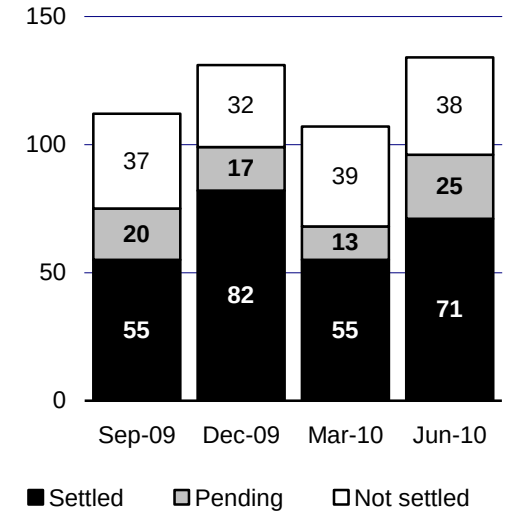
Of the 527 finalised complaints, 5.3% were finalised at review (last quarter – 3.0%), 46.9% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 54.1%) and 47.8% were outside jurisdiction (last quarter – 42.9%).



Conciliation Conferences

The Tribunal conciliated 134 cases in the quarter, an increase of 25.2% on last quarter's 107.

Of the 109 cases concluded, settlement was achieved in 71, resulting in a settlement rate of 65.1% (last quarter – 58.5%). The outcome is pending in 25 cases (18.7%) compared to 13 cases (12.1%) for last quarter.



Nature of Conciliation Cases

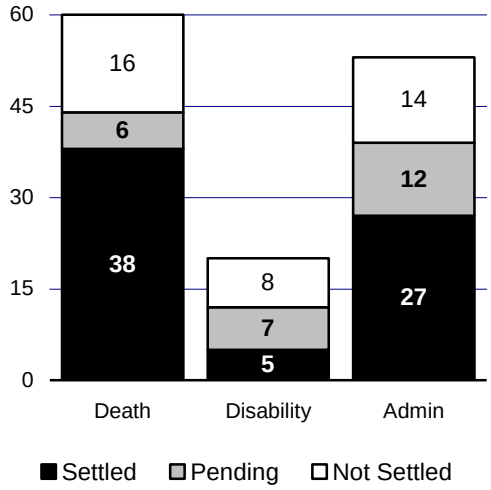
The categories of note in the quarter are as follows:

Death Benefits – Of the 54 concluded cases, 38 (70.4%) were settled.

Disability – Of the 13 concluded cases, 5 (38.5%) were settled.

Administration – Of the 41 concluded cases, 27 (65.9%) were settled.

Other – one matter was settled at conciliation.



Review Determination Outcomes for the Quarter

The Tribunal determined 28 cases this quarter (last quarter – 18 cases).

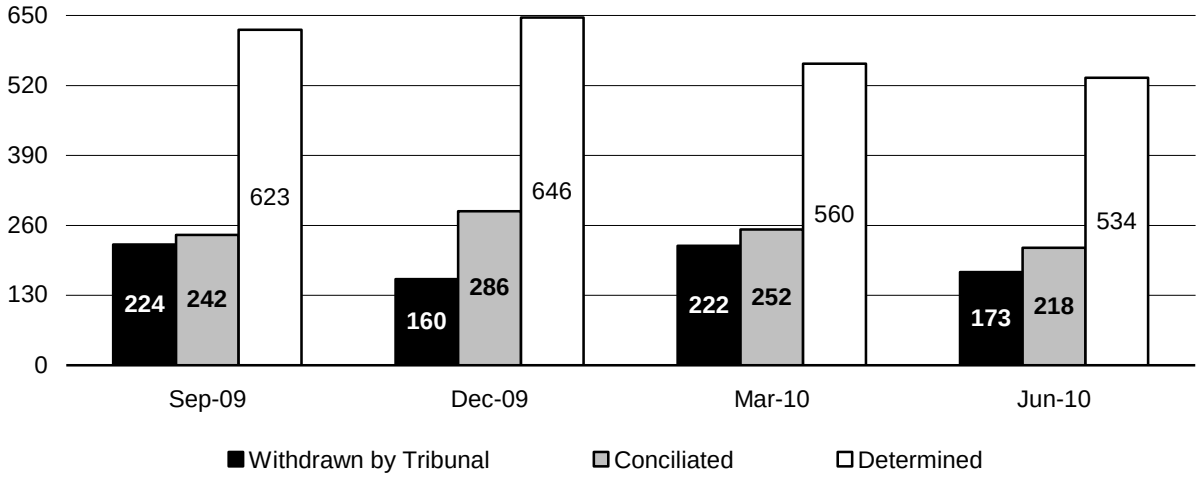
The largest category of complaints determined at review was disability complaints – 12 (42.9%). Death complaints made up the second largest category - 10 (35.7%), followed by administration complaints – 6 (21.4%).

	Death		Disability		Admin		Other		**Total**		
	Qtr	YTD	Qtr	YTD	Qtr	YTD	Qtr	YTD	**Qtr**	**YTD**	**YTD %**
Affirmed	6	25	8	20	4	9	0	0	18	54	69.2
Remitted	0	0	1	1	0	0	0	0	1	1	1.3
Varied	0	1	0	0	0	0	0	0	0	1	1.3
Set aside	4	7	3	10	2	5	0	0	9	22	28.2
Total	10	33	12	31	6	14	0	0	28	78	100.0

64.3% of Trustee decisions were affirmed during the quarter, compared with 72.2% in the March quarter and 75.0% in the December quarter.

Efficiency

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



Recent Determinations of Interest

Failure to process retirement benefit within reasonable timeframe: D09-10\044

The decision under review was the alleged failure of the Trustee to process the Complainant's retirement benefit either within a timeframe experienced by other Fund members who left employment at the same time or within a reasonable time. The Complainant also complained of the Trustee's decision to reject her claim for re-calculation of her retirement benefit and to affirm the existing date and calculation of the benefit. On 25 May 2007 the Complainant, together with several other employees, had her employment terminated as a result of retrenchment. Prior to this, on 4 May 2007, she had sent an email to the Trustee advising of her impending redundancy and asking about where her benefit would be transferred and the tax payable. On 7 May 2007 the Trustee responded stating that the benefit would be transferred to the personal division of the fund on receipt of a termination of employment advice from the employer.

The Trustee also advised that transfers normally take about 4 weeks from the date of termination of employment due to the need to wait for notification from the employer

On 28 May 2007 the Trustee received the exit notification in respect of the Complainant (and eighteen others) from the employer. It was accompanied by an email saying there would not be any further contributions after the exit dates.

By letter of 4 June 2007, the Trustee informed the Complainant that it had received an employer ETP benefit on her behalf and that it had been credited to her account.

On 15 June 2007, the Trustee received the employer payroll file following termination of the complainant's employment.

The Trustee suspended benefit payments for the period from 1 July 2007 to 23 July 2007.

On 23 August 2007 the Trustee notified the Complainant that it processed her benefit. The benefit was calculated at the date of retrenchment 25 May 2007, and had then earned negative interest at -5.45% until the date of transfer on 23 August 2007. The largest loss was between 16 August 2007 and 23 August 2007

The Complainant complained about the delay in transfer of her benefit. The resolution sought by the Complainant was that the transfer of her retirement benefit to the personal division be re-calculated at a transfer date of 27 June 2007 and that the number of units in the personal division of the Fund issued to her be adjusted accordingly. This would have given her an interest rate of 16.2%.

The Complainant argued that:

- she had notified the fund of her impending retrenchment;
- the Trustee had said that the transfer would take four weeks;
- the Trustee was adequately notified of her termination of employment by the exit notification and did not need to wait for the employer payroll file;
- other employees in identical circumstances had their benefits transferred on 27 June 2007;
- she was not advised of the suspension in benefit payments, but, in any event, the delay between 23 July 2007 and 23 August 2007 was excessive

The Trustee argued:

- there is a 5% chance that members will receive a further contribution from the employer after the termination of their employment so it is appropriate to wait for the next

payroll file. Further, because the complainant was one of nineteen exits on the 28 May 2007 payroll file, processing of that file was delayed "in accordance with normal policy";

- the next payroll file and associated contributions was received on 18 June 2007. The terminations could therefore not be processed until after 30 June, which merged into the suspension period;

- at that time, markets were still buoyant, so there was no urgency in processing the benefit;

- the Complainant had pre-30 June 2003 service, which involved additional steps as a result of the "Simple Super" changes; and

- the Complainant should not have relied on the four week period mentioned by the trustee – the period stated was not 'four weeks' but 'at least four weeks'. There was no legislative or governing rules requirement that the benefit be transferred within a particular time frame.

The Tribunal observed that it was clear that the Complainant was fully engaged in relation to the transfer of her benefit from a date prior to her retrenchment. She had communicated with the Trustee on 4 May 2007 asking questions about the transfer, and on 22 May 2007, still 3 days before her retrenchment, the Complainant again emailed the Trustee with respect to her benefit. On the same day the Trustee responded that, after the Complainant had left employment, her account would be transferred to the Personal Division and "[t]his usually takes at least 4 weeks as we need to wait for your employer to notify us that you have left as part of their usual processing. It is enough to simply nominate [Fund] as your fund on the ETP pre payment statement. We may receive your ETP before or after your transfer to the Personal Division".

The Tribunal stated that what could be gleaned from these emails was that the Complainant was alert to the issues regarding payment of her benefit, was at pains to provide the Trustee with as much information as she could and sought information to enable her to efficiently perform any steps required of her in relation to the benefit transfer. In other words, she was anxious to do all she could to expedite the process.

The Trustee received from the Employer by email on 28 May 2007 the member exit files relating to the Complainant and two other members, stating "These members probably still active on your system, however they wont (sic) have any contributions since their exit dates". By letter dated 4 June 2007 the Trustee informed the Complainant that it had received and credited to her account the sum of $62,967.64, the amount the Complainant had previously advised the Trustee would be her employer retirement benefit.

The Tribunal observed that, from the member exit file email and payment, it might have been reasonable to assume that no further contribution would be forthcoming. In addition, the Trustee received the next payroll file from the Employer on 15 June 2007, which would have confirmed, to the extent necessary, that no further contribution relating to the Complainant was outstanding.

The Trustee had an administration policy, which it conceded is not always followed, of awaiting the second payroll file after termination before processing a benefit. The Tribunal acknowledged this as a reasonable policy which is adopted by many trustees but noted that this policy was not mentioned by the Trustee, as it reasonably might have been, in providing a timeframe estimate to the Complainant.

The Trustee stated in its submission that, in the case of what it described as a "plain vanilla" accumulation or defined contribution fund, where the quality of the payroll leads to a reasonable expectation that there will be no further contribution, the practice is to process

a benefit after receipt of the first payroll file. The Trustee pointed out, however, in relation to the Complainant's case, that she was a defined benefit member and the payroll data from her Employer was "inconsistent at best".

The Trustee stated in relation to the Employer's payroll data that further contributions in relation to terminating members were "the rule rather than the exception" and illustrated this by stating that approximately 5% of cases would see a further contribution at the next payroll cycle. The Tribunal observed that this hardly fits the description "the rule rather than the exception".

The Trustee had said that, as the next payroll file was received on 15 June 2007, the benefit could not reasonably have been processed until after 30 June, which postponed this until after the July processing suspension period. The Tribunal did not regard this argument as persuasive for the following reasons: -

- the Trustee had received on 28 May 2007 an exit file relating to the Complainant;
- the exit file was accompanied by the Employer's confirmation that there would be no further contribution; and
- the Trustee had received the employer benefit payment prior to 4 June 2007.

The Tribunal noted the Trustee's mindset in relation to processing of benefits as illustrated by another comment where it pointed out that, up until the end of June 2007 and for a period afterwards, equity markets were stable and earnings positive. It stated that "during such a time, the urgency associated with processing benefit payments is not as pronounced as it is when markets are trending downwards".

The Tribunal found this an extraordinary statement when made in the context of a delay in processing what was, in effect, a transfer to a cash investment option.

The Complainant referred to the case of a fellow worker, retrenched at the same time as the Complainant, whose benefit was processed prior to the end of June.

The Trustee pointed out that this member's employer data was in a payroll file with two other members whilst the Complainant's data was in a file with 19 other members. The Trustee stated that, as the other member rang and requested an early payout, a "risk management decision" was made to process his benefit, and those of the others referred to in his payroll file, prior to the end of June.

The Tribunal observed that this advantage was not extended to the Complainant and others referred to in her payroll file and the fact that some of the retrenched fellow workers of the Complainant had their benefits processed in June indicates that, despite the contentions of the Trustee to the contrary, this was possible. The Tribunal noted that, although the Complainant had not contacted the Trustee to specifically request an early payout, her file should have indicated, by reference to the email correspondence in May, that she was anxious to expedite processing of her benefit.

The Tribunal observed that, ultimately, processing of benefits after the July processing suspension was to resume (and presumably resumed) during the week commencing 23 July 2007. Nevertheless, despite the information received by the Trustee during May and June, it was not until 23 August that the Complainant's benefit was processed and the funds transferred to her chosen option.

The Tribunal noted that, whatever may be the arguments in support of the delay to June 30, there seemed no reasonable argument for a further delay of a month after 23 July. The Trustee conceded that, but for the processing suspension, the benefit should have been processed by 4 July 2007.

The Tribunal found that the Trustee's delay in processing the Complainant's benefit and

transferring the proceeds to the option of her choice in the personal division was unreasonable. It followed that the Trustee's decision to reject the Complainant's claim for re-calculation of the benefit at an earlier date was not fair and reasonable in its operation in relation to the Complainant.

It was the view of the Tribunal that the appropriate date at which the benefit should be recalculated was that on which the Trustee processed the benefits of those in the three member data file, which the Tribunal understood to be 27 June 2007.

Death benefit – validity of "binding" nomination: D09-10\052

The de facto spouse of a deceased member complained about the decision of the trustee to treat a nomination of beneficiaries made by the Deceased Member as a non-binding nomination pay the whole of the death benefit to the legal personal representative ('LPR') of the Deceased Member.

The de facto spouse sought to have the nomination treated as binding, in which case the death benefit would be payable to her.

On 25 January 2007 the Deceased Member attended the offices of an agent of the Trustee and completed a "Nomination of beneficiaries" form. The form contained instructions on how to make a valid binding nomination of beneficiaries.

The nomination form included the following statement:

> Please note: Witnesses must witness at the same time and on the same date as this form is signed. If these dates are not the same or are not provided, the nomination will not be valid.

The Deceased Member and two eligible witnesses completed and signed the form. The witnesses dated the form 25 January 2007 but the Deceased Member inserted his date of birth instead of the date of making the nomination.

By letter dated 1 February 2007 the Trustee wrote to the Deceased Member and advised him that his nomination form was not valid and could only be processed as a non-binding nomination. A new nomination form and a reply paid envelope were enclosed with the letter with a request that the form be completed and returned to the Trustee.

The Deceased Member did not complete the form and died on 1 April 2008. The Trustee advised the Complainant that it had decided to pay 100% of the death benefit arising on the death of the Deceased Member to the Deceased Member's legal personal representative.

The Deceased Member had left a Will dated 2 March 2008 which appointed his sister as his executrix and which purported to bequeath his house (already owned with the Complainant as joint tenants), and also bequeathed his mower, tractors, tools, his pension and any balance in any bank accounts after expenses to the Complainant. He also purported to bequeath his superannuation as follows:

> "I GIVE to my sons, [named] any and all superannuation held in my name to be divided into equal shares".

The Complainant stated that her complaint related solely to the decision by the Trustee to treat the death benefit nomination as not binding.

The Tribunal observed that the nomination form was incorrectly dated by the Deceased Member and agreed with the Trustee that this made the form invalid as a binding death nomination. The issue for the Tribunal was whether the decision of the Trustee not to treat the Nomination form as valid, and therefore binding, was fair and reasonable in the circumstances.

The Tribunal was of the view that the decision was fair and reasonable for the following reasons:

1. the Trust Deed did not give the Trustee a discretion to treat an invalid

binding nomination as valid and, further, explicitly set out the powers of the Trustee in the event that a binding nomination was invalid at the date of death. If the Trust Deed prevented the Trustee from treating an invalid nomination as a valid nomination the Tribunal, standing in the shoes of the Trustee, was similarly prevented from so doing;

2. the Trustee complied with the requirement in the Trust Deed to check the validity of the nomination and wrote to the Deceased Member on 1 February 2007 alerting him to the error in his nomination and requesting him to complete a new form and return it in the reply paid envelope provided. Further, the Trustee informed the Deceased Member that it was only able to process his request as a non-binding nomination. In the Tribunal's opinion, the Deceased Member was informed that his nomination was invalid and was given an opportunity to make a valid binding nomination, which he failed to do prior to his death fourteen months later.

In these circumstances the Tribunal's view was that it was fair and reasonable for the Trustee to decline to treat the invalid nomination as a valid binding nomination, given that the Deceased Member had been advised of its invalidity and the consequences thereof.

TPD claim – Complainant retired on ill health; employment prospects: D09-10\054

The Complainant sought a TPD benefit.

On 6 August 1997 the Complainant sustained an injury to his left wrist. On 9 July 2001 the Complainant commenced employment with the Employer and on 14 July 2001 he joined the Fund.

In November 2004 the Complainant sustained a needle stick injury in his arm leading to psychiatric illness. He last physically worked in November 2006. In August 2007 information was sought by the Employer on the entitlements of the Complainant if he were retired on medical grounds. On 9 November 2007 the Complainant's employment ceased.

The definition of TPD in the Trust Deed required the Trustee to obtain the advice of not fewer than 2 medical practitioners before reaching an opinion on whether a member was TPD.

The Tribunal noted that the Trustee had requested reports from two psychiatrists, Dr MW and Dr HW. In addition it had before it reports from those same psychiatrists from earlier dates prepared for the Employer, together with a later report from Dr MW prepared for the Complainant. Further, the Trustee had a report from a third psychiatrist, Dr PM, prepared for the Complainant, and a report relating to the Complainant's earlier injury to his wrist from an orthopaedic surgeon, Dr DW. The Tribunal observed that the Trustee had also obtained a report from a clinical and consulting psychologist, Mr BJ.

In relation to the reports from the three psychiatrists, the Tribunal observed that the first report was dated 15 May 2006 (prepared for the Employer) and the last report was dated 28 August 2009 (prepared for the Trustee). The psychiatric medical reports therefore spanned a period of some three years.

The Tribunal noted that, in order to satisfy the definition of TPD, in the opinion of the Trustee the member's disablement must be of 'a degree which is such as to render the member unlikely ever to be able to work again in a job for which the member is reasonably qualified by education, training or experience.'

The Tribunal examined the reports from the three psychiatrists and the psychologist, all of which concluded that the Complainant had a

Major Depressive Disorder. The Tribunal observed that there was also agreement in the reports from the psychiatrists and the psychologist that the Complainant would never be able to return to the occupation from which he was retired on the grounds of ill health.

Accordingly, the relevant question became whether the Complainant was unlikely ever to be able to work again in a job for which he was reasonably qualified by education, training or experience.

The Tribunal observed there was evidence in the reports that the Complainant's psychiatric condition had worsened over the period covered or had not improved.

Dr HW had noted on 27 September 2006 that the Complainant's 'ongoing symptoms will be present for the foreseeable future' but he considered permanent psychiatric disability unlikely. On 28 August 2009 he considered that 'at this stage it appears unlikely that the Complainant will return to work in the foreseeable future.' The Tribunal noted that, three years later, Dr HW still saw a return to work as unlikely.

However, Dr HW also stated that depression is usually treatable or, if it does not respond to treatment, there is often a natural remission and concluded 'given [the Complainant's] relatively young age, the absence of any psychiatric symptoms before 2004 and the removal of workplace stressors which triggered the onset it is expected his condition should improve.' He stated that 'it would be unusual for a person to be completely disabled for the rest of their life as a result of a depressive disorder in these circumstances.'

Nevertheless Dr HW set four significant conditions that would need to be met for the Complainant's likely recovery and return to the paid workforce in some capacity, viz:

> Once the stress of the litigation, the marital difficulties and financial difficulties are alleviated and if regular treatment is provided it is probable that he would be able to work at some time in the future. The type of work [the Complainant] would be able to undertake in the future is dependent on his recovery.

Even if all four conditions were met, Dr HW was not certain that the Complainant would work or when this may occur.

Dr MW, on 11 June 2009, concluded that:

> Notwithstanding the fact that [the Complainant] is commencing new treatment, compared to last year his current circumstances are far more difficult … I believe that the prognosis for his depression is poor.

Dr PM, who examined the Complainant in September 2007, concluded that the Complainant was not capable of working for the Employer at the present time and would not be so unless or until some or all of his issues with the Employer were resolved. Looking to possible work in the future he noted that the Complainant's psychiatric state would have to improve for him to return to work as a carpenter or builder. Dr PM also noted the impact of the Complainant's left wrist injury upon any possible return to work as a carpenter or builder.

In the Tribunal's view the evidence presented in the medical reports indicated that the Complainant's return to work was dependent on his recovery from a Major Depressive Disorder and that no evidence was available as to when this might happen. The Complainant's recovery from his psychiatric disorder appeared to depend on the removal of current stressors listed by Dr HW and on undergoing regular treatment. In summary, the Tribunal concluded that it was unlikely that the Complainant would return to work in the foreseeable future.

The Tribunal then turned to the question of the type of work the Complainant could undertake if and when he recovered from his depressive disorder.

The Tribunal observed that there was agreement in the reports that he could not return to work with the Employer and that the Trustee had also stated this.

The Tribunal examined the Complainant's education and work history and noted that he had completed year 10 at school and that, apart from his training and work for the Employer, the Complainant had trained and worked as a carpenter. He was also a professional water-skier and had very brief periods in real estate, excavation and client management.

The Tribunal noted the report from Dr DW, Orthopaedic Surgeon, who examined the Complainant with respect to a wrist fracture he had suffered in August 1997 when he was working as a professional water-skier. Dr DW noted that the Complainant suffered 'sufficient symptoms to disable him from effectively performing his usual occupation' and that the condition would, over time, likely worsen, noting that the actual extent or rate at which degenerative change would occur would depend to a large degree on the use to which the wrist was put and would be 'accelerated by performing his professional skiing or his alternative trade of carpentry.'

Dr MW, Dr PM and Mr BJ made reference to this condition as an issue when considering alternative employment. The Tribunal observed that there was agreement amongst the doctors that it was unlikely that the Complainant could ever return to work as a carpenter/builder or as a professional water-skier as the injury had resulted in him being unable to cope with the physical demands of that employment.

The Tribunal observed that Mr BJ, on 16 June 2008, had ventured a number of alternative occupations for the Complainant and that the Trustee had relied heavily for its opinion on Mr BJ, quoting from his report for over 2 pages of its 9 page submission. However, in the Tribunal's view, the opinion of Mr BJ should carry lesser weight because:

- some of the occupations suggested as suitable for the Complainant (tradesman, water-skier, water craft operator) were inconsistent with Mr BJ's acceptance that the Complainant could not cope with the physical demands of employment in the building or entertainment industry due to his wrist injury;

- the other occupations suggested as suitable for the Complainant (supervisory role in the building industry, ski show manager/ designer/ choreographer) were inconsistent with the education, training and experience of the Complainant; and

- there was no evidence before the Tribunal that Mr BJ was qualified to suggest occupations the Complainant could undertake or the likelihood that he would recover and be able to undertake these occupations.

In accordance with Mr BJ's report, the Trustee had concluded that the Complainant 'is reasonably qualified by his education, training and experience to work in alternative jobs which include, but are not limited to, clerical/administrative jobs or managerial/ supervisory roles in the building or entertainment industries.'

The Tribunal was not convinced that the alternative employment suggested in the report of Mr BJ was realistic. It considered it was unlikely that the Complainant would find employment in supervisory roles in areas where he had previously worked, when he was physically unable to do that work himself. The Tribunal noted that he had no qualifications, training or experience in roles such as 'ski show manager/designer/ choreographer' as suggested.

In the Tribunal's view a method for considering a wider view of the definition in respect of the likelihood of the Complainant ever being able 'to work again in a job for which the member is reasonably qualified by education, training or experience' was to consider whether, and to what extent, the Complainant's skills and experience were transferable. It concluded that it was not likely that those skills related to carpentry and

water skiing were able to be used, or transferred to other areas of employment, without aggravating the injury to his wrist.

The Tribunal observed that there was conflicting evidence presented as to whether the Complainant's employment with the Employer provided him with transferable skills. Mr BJ stated that the Complainant had 'basic clerical skills, basic computer skills, conflict resolution, and general people management skills' and suggested occupations requiring 'investigative or forensic skills.' The submission from the Trustee noted that 'his reported interpersonal difficulties are likely to result in frequent conflict (perhaps even physical assault) with workmates or members of the public who he finds irritating, or he perceives to be critical of him in any way.' The Tribunal observed that there was no evidence whether this related purely to work with the Employer, whether it related to similar occupations, or whether it was a temporary situation. It was, however, very unlikely, in the Tribunal's view, that he had 'general people management skills' which could be transferred into other areas of employment. It was also highly unlikely, in the Tribunal's view, that organisations similar to the Employer would offer him employment, or that he could be employed in such organisations, without risking a recurrence of his psychiatric illness.

In the Tribunal's view it was unlikely that the Complainant would be able to be employed in clerical, managerial or supervisory roles without additional training in the future.

Overall, it seemed to the Tribunal that the Complainant had few transferable skills and this placed considerable doubt on the Complainant's capacity to work in a job for which he was reasonably qualified by education, training or experience.

In summary, while the Tribunal acknowledged that the Complainant was only 36 years old and potentially had many working years ahead of him, he had now been out of the workforce for over three years and had limited skills on which to draw. From the evidence submitted it appeared that the Complainant was suffering from a Major Depressive Disorder which had not improved since 2006 but indeed had become worse and would not improve over the short term. The Tribunal concluded that the Complainant was unlikely to return to employment in the foreseeable future.

The Tribunal concluded that, given:

- the large number of difficulties which must be overcome for the Complainant to be in a position to return to the workforce, and

- the lack of jobs for which the Complainant was qualified based on his education, training and experience,

the Complainant was disabled to a degree that made it unlikely that he would ever be able to work again in a job for which he was reasonably qualified by education, training or experience. The Tribunal therefore concluded that the decision of the Trustee that the Complainant was not TPD pursuant to the Trust Deed was unfair and unreasonable.

Accordingly, the Tribunal determined to set aside the decision under review and substituted its own decision that the Complainant was entitled to payment of a TPD benefit from the Fund.

Restoration of units: D09-10\055

On 18 March 2008 the Trustee allocated the Complainant's direct debit deposit of $145,000 to his Money Market Investment Account and his Cash account in accordance with the Complainant's instructions. After being informed that the Complainant's direct debit had been dishonoured, on 26 March 2008, the Trustee reversed the earlier transaction by selling units across the Complainant's investment portfolio of

managed funds in proportion to the amount held in each option.

On 24 June 2008 the Trustee acknowledged its "oversight" in not taking the money from the Money Market Investment Account. The Trustee determined that the Complainant had suffered a loss of $1,537.80 as a result of its actions and credited the Complainant's Cash account with $1,809.18 ($1,537.80 plus tax adjustment of $271.38).

The Complainant accepted the level of compensation provided but sought to have the number of units taken from each investment option restored rather than having his Cash account credited.

The Complainant lodged a complaint with the Tribunal, stating that:

- the Trustee had not restored to each investment option the number of units it had sold in error. The Trustee's decision to rectify the error by way of crediting a sum of $1,809.18 to the Complainant's Cash account, rather than the restoration of the exact number of units the Trustee had sold, was in error; and

- the Trustee had not communicated with the Complainant about the complaint over the period from March 2008 to November 2008.

The Tribunal first considered the features of the Fund. Its main features were that it allowed the Complainant to invest in a number of managed investment options within the Fund, with the Complainant able to choose which investment fund options he wanted to invest in from a range of funds selected by the Trustee. The Complainant could also set the percentage of his funds which would be allocated to each chosen option. The Product Disclose Statement (PDS) stated that the chosen managed investments and the percentage allocated to each "is known as your investment profile".

The Tribunal noted that the PDS provided information on "rebalancing" to restore the investment percentages to the levels the Complainant had chosen in his investment profile, changing the investment profile, and switching. All such adjustments required authorisation from the Complainant.

The Tribunal noted that the Trustee had acknowledged that it made an error on 26 March 2008 when, in reversing the transaction, it had sold units across the Complainant's investment portfolio of managed funds in proportion to the amount held in each, rather than from the Money Market Investment Account and Cash account which had received the original deposit.

The Tribunal noted the Trustee's statement in relation to the actions it took to rectify the error. In summary, the Trustee determined the overall dollar value difference between the value of the Complainant's account had the reversal been undertaken correctly and the actual value of the account at the time of calculation and then placed the amount determined, $1,809.18, into the Complainant's Cash account. The following day a portion of the Cash account purchased investments in accordance to the percentages set by the Complainant in his 'profile'.

The Tribunal also noted that the Trustee's action was in line with what it said was its stated policy; namely that it 'is the [Trustee's] policy to calculate the financial effect on a client's account when it is clear that we have not provided the level of service that is expected of us'. It was not entirely clear to the Tribunal why the Trustee was unable to restore the exact number of units as the Complainant had requested 'because of the nature of the Account'. The Tribunal did, however, accept that such an adjustment might involve manual intervention which the Trustee might reasonably seek to avoid or that the administration system is not programmed to allow this type of correction.

The Tribunal noted that the Complainant agreed with the calculated dollar amount of the compensation paid by the Trustee.

The Tribunal also noted the Complainant's statements that "the value in a managed fund is vested both in number of units held and their price on a day of any transaction" and "The restoration the trustee conducted did distort capacities of the funds in my *Profile* to earn, changing as it did the number of units I held in each of them". In essence, the Complainant was concerned with any distortion to his profile caused by the Trustee's action.

The Tribunal therefore considered the extent of the distortion to the Complainant's investment profile caused by the actions of the Trustee. The Tribunal did this taking into account the extent to which the Complainant had been happy for his portfolio to move away from his investment profile prior to the error occurring. A comparison of the Complainant's target percentages determined for the investment options in his profile and the actual percentages in those options at the time his financial planner submitted the original $145,000 deposit did not support a view that the Complainant was meticulous in maintaining the balance in his investment options at the proportions dictated by his investment profile.

In the Tribunal's view the distortions to the Complainant's profile as a result of the Trustee's actions, and subsequent adjustment method, were not significant when compared with the distortions the Complainant had allowed to develop in his portfolio at the time of the original transaction. For each investment option the adjusted number of units required to correct the error was considerably lower than the adjusted number of units required, just before the original transaction, to bring each of the Complainant's options into line with his investment profile. This was before the allocation on 25 June 2008 - after the allocation the adjusted number of units to correct the error was even smaller.

On this test the Tribunal did not believe the Complainant had suffered any material loss.

Even without this test of reasonableness, the $1,809.18 compensation was less than 1% of the Complainant's total investment portfolio at the time. The difference in returns that may be achieved on a slightly different allocation of $1,809.18 between the investment options, as the Complainant desires, is not materially significant.

Because the Complainant suffered no material disadvantage or loss as a result of the Trustee's actions in rectifying its error, the Tribunal did not believe that it was unfair or unreasonable in the circumstances for the Trustee to determine that the Complainant had suffered a loss of $1,809.18 and to credit his Cash account with this amount of money which was then applied to the portfolio according to the rules of the Fund.

The Tribunal considered the issues raised by the Complainant in regard to the lack of communication from the Trustee about his complaint. While the Tribunal agreed with the Complainant that the communication was less than satisfactory it could find no loss suffered by the Complainant because of this.

Accordingly, the Tribunal determined to affirm the Trustee's decision.

The Tribunal also made some further observations. It was the Tribunal's view that:

- a phone call from the Trustee to the Complainant or his adviser alerting him that his bank was not able to release the $145,000 may have prevented any of the later action, errors and complaints; and

- the Trustee should make clear to investors and potential investors any policy for dealing with errors it has made and its method of rectification.

Death benefit paid as non-dependants – parents and interdependency: D09-10\056

The Trustee decided to split equally the death benefit arising on the death of the Deceased Member between her parents and that, as in the ordinary course of events a parental relationship did not meet the criteria for an interdependency relationship, it would be paid to them as non-dependants.

The parents lodged complaints with the Tribunal that the decision of the Trustee to pay them the death benefit as non-dependants was unfair or unreasonable because they believed they qualified as dependants through having had an interdependency relationship with their daughter.

The Deceased Member had not nominated any beneficiaries for her death benefit while a member of the Fund. She also had not made a Will.

The decision of the Trustee to pay the death benefit of the Deceased Member in equal shares to the Complainants was not disputed by any party. The issue was whether the Complainants qualified as dependants under the Trust Deed and therefore would receive more favourable tax treatment on the payments.

The Tribunal considered the main elements of the statutory definition of interdependency relationship and found that:

- there was no reason to dispute that the Complainants and the Deceased Member had enjoyed a close personal relationship;
- the Complainants and the Deceased Member had been living together at the time of her death;
- the Deceased Member had contributed financially to the household and the Complainants had provided the Deceased Member with ongoing financial support; and
- by virtue of being part of a close family, the Complainants and the Deceased Member had provided each other with domestic support and personal care.

The Tribunal noted, however, the Trustee's submission that it had referred to the Explanatory Statement, SLI No 261 of 2005 ("the Statement") for the SIS Regulations concerning interdependency relationships, issued to provide guidance when applying the legislation governing interdependency relationships. The Tribunal believed it was fair and reasonable for the Trustee to seek clarification from this document.

The Statement outlines an example of an adult child living with his parents who died at age 23. It notes that most of the matters listed in the SIS Regulations to be taken into account in determining whether two people had an interdependency relationship are inapplicable for a parent-child relationship.

In relation to applicable matters, the Deceased Member and the Complainants had obviously known each other for the duration of the Deceased Member's lifetime. The Tribunal considered, however, that it was fair and reasonable for the Trustee to find that there was no intention of the Deceased Member to live with the Complainants permanently or to commit to a shared life. In this regard the Tribunal noted that the Deceased Member had a boyfriend whom she was visiting at the time of the accident leading to her death and that it was likely that, in the normal course of events, the Deceased Member may eventually have moved out of the family home and commenced an independent life.

The Statement further notes that "Generally speaking, it is not expected that children will be in an interdependency relationship with their parents". The Statement also suggests that some unusual or exceptional circumstances need to exist before an interdependency relationship is established in these circumstances. The Tribunal therefore found that the Trustee's decision that the

Complainants were not in an interdependency relationship with the Deceased Member was a decision which was open to the Trustee and was fair and reasonable given the circumstances that existed for it to make that decision.

Accordingly, the Tribunal affirmed the Trustee's decision.

Insurance cover ceasing on cessation of employment: D09-10\062

The Complainant lodged a complaint with the Tribunal, as the legal personal representative of her late son's estate, that the decision of the Trustee to deny payment of the insured death benefit in respect of her son, the Deceased Member, was unfair or unreasonable.

On 1 January 1999 the Deceased Member commenced employment with the Employer and joined the Fund as an accumulation member. On 5 November 2001 the Deceased Member resigned from the Employer.

On 1 January 2002 the Deceased Member re-commenced employment with the Employer and on 18 July 2003 the Deceased Member joined the defined benefit division ('DBD') of the Fund, becoming entitled to compulsory death cover, which was a feature of the DBD. On 21 September 2007 the Deceased Member ceased employment with the Employer.

On 24 September 2007 the Deceased Member commenced employment with an employer which did not participate in the Fund ('the Non-participating Employer') and in November 2007 the Non-participating Employer commenced paying superannuation contributions on behalf of the Deceased Member to the Fund. The Deceased Member's Benefit Statement for the period ending 31 December 2007 showed death cover of $209,698.08 and included a disclaimer to the effect that changes in Fund membership or employment arrangements may affect eligibility for, and the amount of, the benefit.

In May 2008 the Deceased Member died and on 24 May 2008 the Fund changed the Deceased Member's membership status from the DBD to the accumulation division, effective 21 September 2007. By letter dated 21 October 2008 the Trustee notified the Complainant that the Deceased Member's benefit comprised his account balance and that his insurance cover had ceased on the termination of his employment with the Employer on 21 September 2007.

The Complainant made a complaint to the Trustee about the refusal to pay the insured benefit, alleging non-disclosure and misrepresentation. The Complainant did not dispute the decision to pay the Fund benefit to the estate of the Deceased Member.

The Tribunal's role was to determine whether the decision of the Trustee to reject the Complainant's claim for insured death benefits in respect of the Deceased Member was fair and reasonable in its operation in relation to the Complainant, as the legal personal representative of the Deceased Member, in the circumstances.

The Tribunal distilled the Complainant's arguments into four main points:

1. the Complainant had stated that the Deceased Member was not adequately advised that his death cover ceased as a result of his leaving the Employer and commencing employment with the Non-participating Employer. It was not in dispute that the Deceased Member's Member Benefit Statement as at 31 December 2007 (incorrectly) showed the (disputed) death cover. The Complainant argued that the Fund should have known that the Deceased Member's death cover had ceased under its rules because that statement also records the Non-participating Employer as the Deceased Member's employer, and the contributions received from the Non-participating Employer;

2. the Complainant argued that, had the Deceased Member been informed by the Trustee that his cover had ceased on his termination of employment with the Employer, the Deceased Member would not have elected to have his superannuation contributions from the Non-participating Employer paid into the Fund. He would not have exercised choice, in which event the Non-participating Employer's contributions would have been paid into its default fund which would have provided default death cover of $300,000 to the Deceased Member;

3. the Complainant complained that the Deceased Member was not advised of his right to optional cover in the accumulation division of the Fund. All members who join the accumulation division are automatically provided with one unit of cover and have a period of 90 days within which to apply for additional cover. As the Fund did not write to the Deceased Member at the time he joined the Non-participating Employer, because it erroneously regarded the Non-participating Employer as a participating employer, the Complainant argued that the Deceased Member should at least receive the one unit of automatic cover. She stated, further, that he had not had the opportunity to apply for additional cover. She submitted that he would have done so;

4. the Complainant complained about the manner in which the Fund behaved during the course of her dealings with it in relation to the Deceased Member's benefit.

The relevant disclosure statement at the time the Deceased Member joined the Fund stated that DBD cover ceased when a member was no longer employed by a participating employer. The Deceased Member left the Employer on 21 September 2007 to commence employment with the Non-participating Employer on 24 September 2007 and the effect of that change of employment was that his DBD cover ceased. He was not informed of the cessation of the cover, however, because the Fund erroneously treated the Non-participating Employer as a participating employer and this error was not corrected until after the Deceased Member's death. The 31 December 2007 benefit statement provided to the Deceased Member showed death insurance cover, but also included a disclaimer that benefits are only payable in accordance with the Trust Deed.

The Tribunal agreed with the Trustee that, pursuant to the Trust Deed, the Deceased Member's cover ceased with effect from 21 September 2007 and his estate was not entitled to an insured death benefit.

The Tribunal noted, however, that the Trustee had the power under the Trust Deed to compromise a claim, and the issue for the Tribunal was whether it was fair and reasonable in the circumstances of this complaint for the Trustee to refuse so to do.

In considering this issue the Tribunal had regard to the following aspects of the complaint:

- the Trustee erroneously recorded the Non-participating Employer as a participating employer and this error was not corrected until after the Deceased Member's death. Accordingly, he was not on notice during his lifetime that his cover had ceased and, therefore, he had no opportunity to replace the cover;

- the Deceased Member was sufficiently aware of his superannuation arrangements to provide the Non-participating Employer with details of his Fund membership so his superannuation contributions would continue to be paid into the Fund. If he had done nothing the Non-participating Employer would have

contributed on his behalf to its default fund which would have entitled the Deceased Member to automatic death cover, stated by the Complainant to be $300,000;

- the Tribunal noted that the Deceased Member had never opted for additional insurance cover while he was alive. Accordingly, there was no evidence that the Deceased Member would have opted for additional cover had he been aware that his cover had ceased in the DBD. The Tribunal was satisfied, however, that it was reasonable to assume that the Deceased Member elected to have his Non-participating Employer contributions paid into the Fund to preserve his entitlements in the Fund, which included the insurance cover; and

- accordingly, in relation to whether there was reliance by the Deceased Member on the incorrect information provided by the Fund that led to detriment, the Tribunal believed it was fair and reasonable to give the Deceased Member the benefit of the doubt and assume that he may have made enquiries about his insurance options had he been advised that his cover in the DBD had ceased.

Therefore it was the view of the Tribunal, having regard to all the circumstances of the complaint, that a trustee acting fairly and reasonably would not have refused to compromise the complaint.

Having determined that the operation of the Trustee's decision was unfair and unreasonable in the circumstances in relation to the Complainant as the Deceased Member's legal personal representative, the Tribunal determined to set aside the decision under review and substitute its own decision to compromise the complaint.

In relation to the amount of the compromise, the Tribunal was of the view that a fair and reasonable compromise of the complaint would be the payment of an amount equivalent to the death cover that the Deceased Member would have had at the date of his death had he still been a contributing member of the DBD.

The Trustee was directed to pay the amount of death cover to the Complainant in her capacity as the legal personal representative of the Deceased Member.

Registration Form

If you wish to be included on the Tribunal's regular mailing list for receipt of the Quarterly Bulletin, please complete the form below and send to:

Superannuation Complaints Tribunal
Locked Bag 3060
MELBOURNE 3001

Telephone 03 8635 5500
Facsimile 03 8635 5588

or email details to the Tribunal at **subscriptions@sct.gov.au**.

If you would like to receive a copy of the Quarterly Bulletin by email please provide your email address below.

Name

Address

Telephone

Email

Feedback and Registration Form

We welcome any information you can provide for the improvement of this Bulletin.

The information provided from this feedback and your suggestions will be valuable for the production of future editions.

How useful do you find the information provided in the Bulletin?

☐ Very useful ☐ Quite useful ☐ Not useful ☐ Not useful at all

Comments

Do you want to continue receiving the Bulletin? ☐ Yes ☐ No

Do you have any suggestions for improving the Bulletin (design, content etc)?

Please provide any further comments or suggestions you may have regarding the Tribunal's operations:

Please provide your email address:

Thank you for taking the time to complete this form. The information you have provided will be taken into consideration in the production of future Bulletins.

This form can be faxed to 03 8635 5588 or mailed to:

Bulletin Feedback
Superannuation Complaints Tribunal
Locked Bag 3060
MELBOURNE VIC 3001