When the fringe frays – update from the Superannuation Complaints Tribunal

28 February 2014

The Superannuation Complaints Tribunal (the Tribunal) is an independent dispute resolution body which deals with a diverse range of superannuation-related complaints and offers a free user-friendly alternative to the court system.

The Tribunal is required to provide mechanisms that are 'fair, economical, informal and quick' for the purposes of inquiring into, conciliating and reviewing complaints.

2014 marks 20 years since the Tribunal commenced operations. This paper includes the Tribunal's most recent statistics, the types of complaints resolved and the method of resolution.

It also covers recent legislative amendments (part of the Stronger Super package of reforms) which impact on the Tribunal and trustees.

The paper provides examples of recent cases of interest and discusses the methodology adopted by the Tribunal in the resolution of complaints about the administration of members' accounts and benefits.

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* The views expressed in this paper are the personal views of the author. They do not represent the views of the Superannuation Complaints Tribunal or of any member of the Tribunal. The fixed term appointment of the current chair of the Tribunal ends on 3 June 2014.

Update on statistics and activity

Complaints received

In 2012-13, the Tribunal received 2,444 written complaints. Of these, 59.6% (1,457) complaints were within jurisdiction and 40.4% (987) were outside jurisdiction.

The types of complaints received within the Tribunal's jurisdiction changed during the year. Disability complaints increased by 22.2% to 237, and complaints in relation to the distribution of death benefits decreased by 13.6% to 445.

Complaints relating to 'administration' of member's accounts and benefits continued to be the major area of the Tribunal's work and 775 complaints of this nature were received. Within this broad category, complaints about insurance premiums rose by 54.6% to 133, but complaints about delays in benefit payments or switches decreased by 38.2%. The Tribunal received 32 complaints against trustees relating to reporting of contributions to the Tax Office. Although the overall number of complaints received declined, the complexity of issues complained about continues to increase.

Table: Nature of written complaints within jurisdiction

Nature of complaint	Number of complaints within jurisdiction			
	No.	%	No.	%
Death			445	30.5
Distribution	390	87.6		
Other	55	12.4		
Disability			237	16.3
Medical	72	30.4		
Other	165	69.6		
Administration			775	53.2
Disclosure/misrepresentation	39	5.0		
Fees & charges	53	6.8		

Insurance premiums	133	17.2		
Delay	84	10.8		
Account balance	66	8.5		
Early release	69	8.9		
Error	31	4.0		
Failure to provide information on request	34	4.4		
Misallocated contributions	27	3.5		
Exit fee	33	4.2		
Insurance cover	35	4.5		
Tax on excess contributions	32	4.2		
Administration – all other	139	18.0		
Total	1,457	100.0	1,457	100.0

Complaints resolved

This reporting year, a total of 1,264 written complaints within jurisdiction were resolved or withdrawn (last year – 1,253).

10.5% were withdrawn by the complainant, 46.3% were withdrawn by the Tribunal, 32.7% were resolved by formal and informal conciliation, and 10.5% went to review. 133 complaints were resolved at review in 2012-13 – the trustee/insurer decision was affirmed in 76% of cases.

Table: Complaints resolved/withdrawn

Withdrawn by the Tribunal	Number of complaints	%
s.22(1) (the complainant does not proceed with the complaint)	249	
s.22(3)(a),(b) (the complaint is misconceived, lacking in substance, trivial or vexatious)	327	

s.22(3)(c),(d),(e) (dealt with or better dealt with by another statutory authority)	8		
s.22A (referred to another complaint handling body)	1		
		585	46.3
Withdrawn by the complainant			
pre-conciliation conference	203		
post-conciliation conference	204		
after listing for review	7		
		414	32.7
without resolution	132		
		132	10.5
Resolved by the Tribunal at review			
decision affirmed	101		
decision remitted	2		
decision varied	1		
decision set aside/substituted	29		
		133	10.5
Total		1,264	100.0

The long term average percentage of decisions affirmed is between 66.6% and 70%.

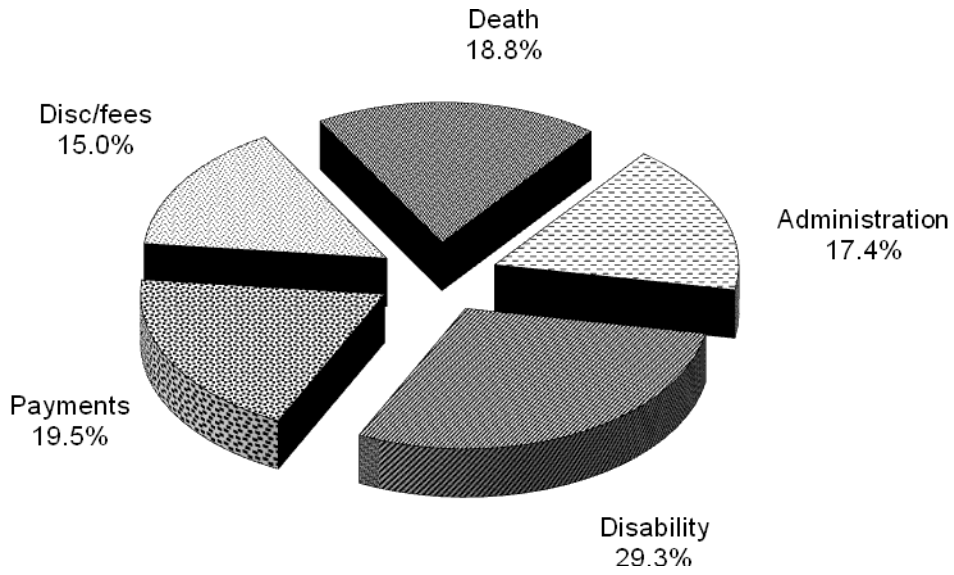
Review

Since 1 July 1994, the Tribunal has issued 2,751 review determinations.

The number of matters progressing to review during 2012-13 increased from 2011-12 by 27.8% to 133. This represented 10% of all complaints resolved by the Tribunal during the year, 90% of complaints being resolved without the necessity of a formal determination.

The largest category of complaints determined at review was disability complaints – 39 (29.3%). Complaints about payments made up the second largest category – 26 (19.5%). Comparatively, in the 2011–12 reporting year 33.6% of complaints determined at review were death distribution cases, and 27% were disability benefit matters.

Nature of review determinations



Appeals

Since commencement of operations in 1994, the Tribunal has been the subject of appeal on approximately 180 occasions, including applications for judicial review.

There were 4 appeals to the Federal Court from determinations in 2012-13; and 1 application for judicial review.

Greig William Cross v Superannuation Complaints Tribunal & Board of Trustees of the State Public Sector Superannuation Scheme (QUD 370/2012) – discontinued.

Thomas Eric Mills v Superannuation Complaints Tribunal & Government Employees Superannuation Board (WAD 241/2012) – appeal allowed, determination set aside and matter remitted to the Tribunal to be determined in accordance with law. However no further detail was provided in the order and no errors of law were identified in the orders.

Christopher James Larter v Hanover Life Re of Australasia & OnePath Custodians Pty Ltd (SAD 59/2012) – settled.

Kurt Kristofferson v The Superannuation Complaints Tribunal & Colonial Mutual Life Assurance Society Pty Ltd & Colonial Mutual Superannuation Pty Ltd (QUD 176/2013) - appeal dismissed.

Judicial review application filed:

Patricia Anne Ludowyk v Superannuation Complaints Tribunal (ACT 70/2012) – appeal dismissed.

Since 1 July 2013 the following appeals have been lodged:

Joanne Maree Scott v REI Superannuation Fund Pty Ltd & Metlife Insurance Ltd [VID733/2013].

Adrian Ghibu v AMP Superannuation Ltd [NSD828/2013]

Patricia Anne Ludowyk v Superannuation Complaints Tribunal [ACD84/2013] – application for an extension of time to appeal to the Full Federal Court dismissed

Jose Manuel Gomes v United Super Pty Ltd & Anor [NSD1806/2013]

Tatjana Vitor v AON Superannuation Pty Limited & Anor [SAD287/2013]

Kurt Michael Kristoffersen v Superannuation Complaints Tribunal & Ors [QUD673/2013] - appeal to the full Federal Court.

Hannover Life Re of Australasia Ltd v Paula Irene Wright & Anor [NSD2199/2013]

Rosalie Elizabeth Austin v Rosemary Hardistry [VID1192/2013]

The larger number of appeals is reflective of the larger numbers of determinations issued by the Tribunal since 1 July 2013 – 113 to 31 January 2014, compared with 133 for the 2012/13 year.

Stronger Super reforms

New time limits for TPD complaints

On 26 June 2013 the *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Act 2013* (known as tranche four of Stronger Super) was passed into law. This Act amended the *Superannuation (Resolution of Complaints) Act 1993*, extending the time limits for total and permanent disability complaints.

The overall effect of the new arrangements, with the substituted s14(6A) and with the previous s14(6A), are summarised below.

Trustee decisions made **before** 1 July 2013 – previous time limits remain

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

If the trustee's decision was made before 1 July 2013, the Tribunal will still only be able to deal with a complaint about a decision of a trustee of a fund relating to the payment of a disability benefit because of total and permanent disablement (TPD) in the following circumstances:

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

Trustee decisions made **on or after** 1 July 2013 – new time limits apply

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

- if the member permanently ceased employment because of the physical or mental condition that gave rise to the claim for the TPD benefit, then both the claim for the payment of a TPD benefit was made to the trustee within 2 years of permanently ceasing employment and the complaint is made to the Tribunal within 4 years of the trustee's decision about the claim
- if the member did not permanently cease employment because of the physical or mental condition that gave rise to the claim for the TPD benefit, the complaint is made to the Tribunal within 6 years after the making of the trustee's decision about the claim.

Trustee reasons for decisions on complaints

Tranche four of Stronger Super also expands s101 of the *Superannuation Industry (Supervision) Act 1993* in relation to complaints handling by fund trustees:

Trustees are required to give written reasons at the time they give notice of a decision in relation to a complaint about the payment of a death benefit.

In relation to other complaints, trustees are required to give reasons on request and within 28 days. Trustees are also required to give written reasons for a failure to make a decision on any complaint within 90 days, on request (also within 28 days).

The *Superannuation Legislation Amendment (MySuper Measures) Regulations 2013* also make related changes:

- Corps Reg 7.9.48 has been amended in relation to the notification a trustee must give when it makes a decision on a complaint,
- trustees now must, within 30 days of making its decision on non-death complaint, advise the complainant of their right to request reasons, and
- trustees now must, within 45 days of the making of the non-death complaint, advise the complainant of their right to request reasons if trustee fails to make a decision within 90 days.

While ASIC has the administration of SIS s101, this change interacts with the Tribunal's provisions and procedures.

Reasons for complaints on death benefit decisions

The context of the new requirements is decisions made by Trustees in relation to complaints made to them.

The cases *Re Vegara* [1999] QSC 50 and *Webb v Teeling* [2009] FCA 1094 have characterised:

- a trustee's proposal as to the payment of the death benefit, given for the purposes of s15(2) of the *Superannuation (Resolution of Complaints) Act 1993* (Complaints Act), as a trustee decision, and
- a person's objection to that proposal, also for the purposes of s15(2) of the Complaints Act, as a complaint to the trustee for the purposes of SIS s101.

When the trustee gives its decision in relation to the objection, this will therefore raise the giving of reasons under the new provisions.

Giving reasons in relation to death benefit complaints at the time of giving the decision in relation to the complaint (as opposed to only on request) recognises that under the Complaints Act there is a strict 28 day time limit to make a complaint to the Tribunal (s14(3) of the Complaints Act). A requirement for reasons at the time of the decision ensures that the long standing policy of the strict 28 day time limit can remain in place, i.e. that policy did not need be to be revisited in the light of whether a person has requested reasons or has not yet been given them.

The Tribunal does not consider that this extra requirement in SIS s101 in any way alters the nature of the written notice in s14(3) of the Complaints Act for the purposes of commencing the 28 day time limit.

That time limit starts by satisfaction of the elements of s14(3) of the Complaints Act – being written notice of the trustee's decision and notice of the correct prescribed period (28 days) in which to make a complaint to the Tribunal.

The policy of the 28 day limit in s14(3) of the Complaints Act was developed in 1995 and has operated for well over 15 years in an environment where the giving of reasons for decisions on complaints was not mandated. The Tribunal does not see that SIS Act concerns as to whether or not reasons are given, or whether those reasons are considered sufficient, has any affect the operation of s14(3) of the Complaints Act and what it takes for the 28 day period to commence.

Interplay between s64 of the Complaints Act and the requirement to give reasons

Section 64 of the Complaints Act provides as follows:

> *If, in connection with a complaint made to the Tribunal under this Act, a Tribunal member becomes aware that a contravention of any law or of the governing rules of a fund may have occurred, the Tribunal member:*
>
> *(a) if he or she is not the Tribunal Chairperson--must give particulars of the contravention to the Tribunal Chairperson; or*
>
> *(b) if he or she is the Tribunal Chairperson:*
>
> *(i) in the case of a contravention of a law that is administered by APRA--must give particulars of the contravention to APRA and, if he or she thinks it appropriate to do so, may also give particulars of the contravention to ASIC; or*

(ii) in any other case--must give particulars of the contravention to ASIC and, if he or she thinks it appropriate to do so, may also give particulars of the contravention to APRA.

If a trustee did not appear to give any reasons for its decision then the Tribunal may well be required to refer this under s64 of the Complaints Act as a possible contravention of law.

Under the SIS Act, ASIC has the administration of SIS s101. Until ASIC guidance in relation to compliance with SIS s101(1)(c)(i) is available, to fulfill its obligations under s64 of the Complaints Act, the Tribunal will be obliged to refer matters to ASIC where it appears that the Trustee has made no attempt to provide reasons for its decision in relation to the person's objection/complaint.

Reasons for trustee decisions on other (ie non- death benefit) complaints

In relation to decisions on non-death benefit complaints, as noted, reasons need only be given on request. There are no time limits on this right such as that the request for reasons could only be made within, say, one year of the trustee's decision.

This appears consistent with there being no time limit on the ability to make a non-death complaint to the Tribunal. Under s15 of the Complaints Act, non-death complaints are open to 'former members' and someone can be a former member for a very long time. A complaint can also be made by a person acting for the estate of a former member.

Trustee reasons and the Tribunal

A number of issues for the Tribunal arise in relation to the existence of a right to request reasons. These include:

- if the complaint as made by the complainant does not indicate that the complainant has requested reasons, should it be Tribunal policy to suggest/request that they do so and provide this to the Tribunal?
    - This could be good from the perspective that trustee reasons may help facilitate an early resolution of the dispute between the complainant and trustee.
    - Of course, any unwillingness to do so should not inadvertently count against a complainant.
- should the Tribunal's inquiry be effectively 'suspended' pending the receipt by the complainant of reasons and a further contact from them?
- should the Tribunal's s17 notice to the trustee specifically identify a copy of any reasons given to the complainant as a document relevant to the decision under review for s24 (whether already provided by the complainant or not)?

- could the s17 notice ask the Trustee for reasons akin to those that would have to be provided if the complainant had requested reasons?

For any type of matter (death or otherwise), the issues include:

- ensuring that the performance of the Tribunal's statutory function to inquire into the complaint is not affected by any reasons given. The Courts have confirmed that the Tribunal not confined by how parties have addressed subject matter - *Crocker (2001)*, *Dexter (2004)*

- ensuring conciliations are not dominated by the trustee's reasons at the expense of exploring all settlement options

- ensuring the presence of trustee reasons in the package of materials provided to panel members for the review of the decision does not lead to the inadvertent assessment of and weight given to the reasons for the trustee's decision – the Full Federal Court in *Edington v QSuper* (2011) confirmed that a review under s 7 of the Complaints Act, of the fairness and reasonableness of the operation of the trustee's decision in relation to the complainant in the circumstances, does not involve a focus on the trustee's reasons.

To the extent reason are given by the trustee, they will add another dimension to the review of the decision by the Tribunal.

The Tribunal's methodology and administration case studies

Section 37(6) of the Complaints Act provides:

> *The Tribunal must affirm a decision referred to under subsection (3) if it is satisfied that the decision, in its operation in relation to:*
>
> *(a) the complainant; and*
>
> *(b) so far as concerns a complaint regarding the payment of a death benefit--any person (other than the complainant, a trustee, insurer or decision-maker) who:*
>
> *(i) has become a party to the complaint; and*
>
> *(ii) has an interest in the death benefit or claims to be, or to be entitled to benefits through, a person having an interest in the death benefit;*
>
> *was fair and reasonable in the circumstances.*

The Tribunal's interpretation of s37 has been supported by the Federal Court, including in the recent *Ludowyk* case, where His Honour stated:

> *95. In developing her submissions, Ms Ludowyk refined the first error of law upon which she relies. She submitted that, in carrying out its statutory duty pursuant to s 37 of the Complaints Act, the Tribunal was required to substitute its own view of what was **the** fair and reasonable decision according to its own value judgments. She submitted that the Tribunal's task was not to assess the fairness and reasonableness of the decision made by the decision maker in question but rather to consider all of the material in front of the decision maker and possibly even additional material and come to its own view as to what **the** reasonable decision should be in all the circumstances of the case.*
>
> *96. I do not agree that the relevant authorities support such an interpretation of s 37 of the Complaints Act. In particular, see Lykogiannis v Retail Employees Superannuation Pty Ltd (2000) 97 FCR 361 at 372–373 [47]–[50] per Mansfield J; National Mutual Life Association of Australasia Ltd v Campbell (2000) 99 FCR 562 at 570–571 [32]–[34] per Black CJ, Emmett and Hely JJ; Retail Employees Superannuation Pty Ltd v Crocker (2001) 48 ATR 359 at 367 per Allsop J (as his Honour then was); and Cameron v Board of Trustees of the State Public Sector Superannuation Scheme (2003) 130 FCR 122 at 129 [25] per Whitlam, Kiefel and Dowsett JJ. The correct approach is captured in the observations by Allsop J in Crocker where his Honour said (48 ATR at 367 [31]):*
>
> > The tribunal's task is not to engage in ascertaining generally the rights of the parties, nor is it to engage in some form of judicial review of the decision of the trustee or insurer. Rather it is to form a view, from the perspective of the trustee or insurer, as to whether the decision of either was (recognising the overriding framework given by the governing rules and policy terms, respectively) unfair or unreasonable.
>
> *97. It is only if the Tribunal is not satisfied that the decision made by the relevant decision maker was fair and reasonable in the circumstances that the Tribunal is required to consider its options pursuant to subsections (3), (4) and (5) of s 37.*

As noted above, more than half of the complaints received by the Tribunal relate to 'administration' matters, delays in processing transactions, inaccurate benefit statements, disputes about deduction of insurance premiums, excess contribution issues etc.

The Tribunal has developed a methodology for dealing with these types of complaints.

Take as an example a member who applies to transfer to another fund. The transaction takes longer than he expected and he complains to the trustee and subsequently to the Tribunal seeking compensation for the amount that his investment declined during the time of the delay.

The Tribunal in its investigation focuses on identifying the complainant's actual complaint. In some instances the trustee's response does not address the member's real complaint. In this example the trustee might respond and state that they have complied with the governing rules of the fund concerned and with superannuation law in carrying out the transaction. - this is ***not*** the member's complaint.

The Tribunal's role is to establish whether the trustee's decision or conduct was fair and reasonable in the circumstances – the Tribunal is rarely required to consider whether a trustee's decision was legal.

If the matter progresses to review, the identification of the decision under review becomes critical. While in this example the complaint was that the transaction took too long, the decision of the trustee that is the subject of review by the Tribunal in this type of case is the refusal of the trustee to compensate the complainant for the amount of loss claimed him.

The Tribunal's resolution of these types of complaints will broadly include the following investigations:

- The Tribunal will ask the complainant for information about why he/she formed the expectation he/she had in relation to the transaction i.e. why there was a "mismatch" between the complainant's expectations and the outcome that eventuated.
- The complainant may point to a misrepresentation or non-disclosure that he/she stated he/she relied on in deciding to transfer to another fund or cash his/her benefit.
- The complainant is then asked what he/she would have done differently had he/she known the true situation (for example that the transaction would take 2 weeks and not 2 days). The purpose of this enquiry is to establish whether the actions taken by the complainant were in reliance on the incorrect or misleading information (if any) or whether the complainant would have undertaken the transaction anyway and is disappointed by the decline in his/her account value.
- The Tribunal will ask the complainant to quantify his/her loss. This gives the Tribunal information as to what the complainant's expectations were.
- Some trustees are reluctant to provide "hypothetical" calculations of what the complainant's account balance would have been had the transaction taken place in the time expected by the complainant, but the Tribunal requires this information to be able to establish the amount in dispute. The only information initially available to the Tribunal is the amount stated by the complainant to be the loss. Further, in some cases it may transpire that the complainant has not in fact suffered a loss, in which case no compromise or compensation should be expected from the trustee.

- In rare cases a trustee will argue that it has no power to resolve the complaint because it has no compromise power or because the fund does not have reserves from which to pay a settlement amount.
- In relation to the first argument, most trust deeds give the trustee power to compromise a claim and relevant State and Territory legislation confers that power on trustees.
- In relation to the second argument, the Tribunal's current view is that an absence of reserves does not prevent the trustee from making a commercial decision in the circumstances, like any other commercial decision made in the course of running the superannuation fund.

Case study 1

Under the rules of the Fund, the Complainant, who turned 60 on 27 July 2008, was entitled to the highest of three benefits: his accumulation benefit, his retirement benefit or his leaving service benefit. The highest was his accumulation benefit – $584,771.

In October 2008 he discovered that the benefit was subject to market fluctuations. On 14 January 2009 it was worth $480,378, around $103,000 less. On this date, the Complainant commenced a transition to retirement arrangement by transferring $390,944 to his allocated pension.

On 9 February 2009 the Complainant lodged a complaint with the Tribunal that the decision of the Trustee to refuse to guarantee his benefit at his sixtieth birthday was unfair or unreasonable.

There was no dispute that the Complainant's benefit amounts were calculated in accordance with the rules of the Fund. The Complainant's complaint was that he was not adequately advised that his benefit would be subject to market fluctuations after he turned 60.

The Tribunal carefully considered the information provided to the Complainant about his benefit entitlements. The annual report for the Fund for the year ended 30 June 2008 stated that defined benefits are not affected by investment performance. No mention was made of defined benefits becoming subject to investment fluctuations after a member turned 60 years of age.

The Trustee submitted that annual statements issued to the Complainant after he turned 60 refer to the 'late retirement sub-account' which is described as the formula benefit at age 60 credited with interest.

The Complainant provided the Tribunal with a copy of correspondence to other members dated 30 October 2009 from the Trustee outlining the calculation of superannuation benefits for members aged 60 or over and submitted that the confusion surrounding the loss of members'

defined benefits at age 60 was the reason for the Trustee issuing this letter to all affected members. However, the Trustee stated that the reason for issuing the letter was to make an offer to members to transfer to a new category which offered investment choice and rejected any suggestion that the offer to transfer to a new category was made because of any disadvantage, perceived or otherwise.

The letter started:

> *Following a number of member enquiries we are writing to clarify how your superannuation benefits are calculated within the [Fund] once you have turned 60.*

The Tribunal agreed with the Complainant that on the face of the letter it appeared to be clarifying the issue that the Complainant had complained about to the Trustee.

While the Tribunal was of the view that the Complainant was informed that his benefit would be subject to market fluctuations after age 60 because of the notes in the 31 August 2008 benefit statement (noting that this was after he turned 60), it agreed with the Complainant that the disclosure was not as clear as it could have been.

The issue for the Tribunal, however, was the fairness and reasonableness of the Trustee's refusal to guarantee the Complainant's benefit amount at his sixtieth birthday and whether the Complainant relied on the unclear disclosure to his detriment to make it unfair or unreasonable for the Trustee not to compensate the Complainant for the detriment.

The Complainant was not able to quantify his loss and the Tribunal noted that, despite the Complainant becoming aware of the fluctuations in his benefit amount in October 2008, he did not commence his transition to retirement pension until January 2009. The Tribunal also noted the information provided by the Trustee that the crediting rate applied to the amount of the Complainant's benefit for the 2008 reporting period was -7.54% and the rate used when he commenced his transition to retirement pension was 3.83%. It further appeared to the Tribunal that the amount used to commence the Complainant's pension was not his total benefit, so the amount of any difference between the Complainant's accumulation benefit calculation at age 60 and the total benefit had not been determined.

The Trustee advised that the Complainant was unable to elect to receive his benefit or exercise investment choice in relation to where the benefit was invested, so the Complainant could not have taken any action (other than commencing his pension) to prevent the benefit from being subject to market fluctuations even had he been aware at the time he turned 60 that his benefit would be subject to those fluctuations.

On balance therefore, while the Tribunal was of the view that the Complainant had a point in relation to the quality of the disclosure provided by the Trustee about his benefit after age 60, the Tribunal was not satisfied that the Complainant relied on the information to a quantifiable detriment and, in any event, he was not able to prevent the benefit from being subject to market

fluctuations from his sixtieth birthday under the rules of the Fund. The Tribunal therefore affirmed the Trustee's decision.

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Case study 2

The Complainant joined a predecessor fund of the fund in 1975 as a defined benefit member.

A portion of his benefits are also in an accumulation account which is invested in the Growth investment option.

On November 2000 investment choice was introduced to the Fund. Members who invested in the Growth option were entitled to a minimum return of 4% p.a. as long as they remained in the Growth option.

A letter to the Complainant dated 1 May 2006 stated:

> *This letter confirms that you continue to qualify for this minimum crediting rate for the balance of your accumulation or deferred account as at 1 May 2006 plus interest if your account is invested in the Growth investment option on that date. The minimum crediting rate will continue to apply for as long as your account remains in the Growth investment option.*

On 20 August 2009 the Complainant's employer wrote to the Trustee requesting an amendment to the Fund's trust deed to remove the guaranteed 4% p.a. minimum return.

The reasons for the request provided by the Employer were that:

- The cost to the Employer was substantial and growing.
- Originally the guaranteed return related only to mandatory employee contributions but its scope has extended over time as packages and legislation had changed.
- Defined benefits were now converted to accumulation benefits on leaving employment so the minimum return applied to the whole of the benefit for ex-employees.
- Only 2% of current employees are entitled to this benefit and 90% of the value of the minimum return for the 30 June 2009 year related to ex-employees of the Employer.

On 9 October 2009 the Trustee decided to consent to the Employer's request to amend the Fund's trust deed to remove the 4% p.a. minimum return and the Fund's trust deed was amended to this effect on 17 December 2009.

On 29 December 2009 the Trustee wrote to the Complainant:

> *We are writing to you because you are a defined benefit member with a 4% p.a. minimum interest rate applying to your Additional Benefit (accumulation-style account) – providing it remains invested in the Growth investment option.*
>
> ***Future of the 4% minimum interest rate***
>
> *The Fund's Trustee has agreed, at the request of the Company, that the 4% p.a. minimum interest rate will be discontinued with effect from 1 July 2010. As a result, the 4% p.a. minimum interest rate will continue to apply to your Additional Benefit only up until the financial year ending 30 June 2010.*
>
> *Therefore, from 1 July 2010 your Additional Benefit in the Fund that is presently subject to the 4% p.a. minimum interest rate will, unless you elect otherwise, continue to be invested in the Growth investment option but without the 4% p.a. minimum applying. In addition, your Additional Benefit will at that time become 'unitised' (i.e. subject to daily unit pricing valuations in the same way as all other Fund members' accumulation-style benefits). ... Accordingly, from 1 July 2010 any Additional Benefit in the Growth option will be credited or debited with the investment earnings on that option. ...*
>
> *Effective 1 July 2010, you are able to exercise investment choice for your Additional Benefit without losing the benefit of the 4% minimum return for the year ending 30 June 2010.*

The amount of the Complainant's accumulation account as at 30 June 2012 was $175,499.93.

The Complainant advised that he crystallised a loss of $5,344.34 as at 30 June 2012 being the difference between the 0.9% p.a. interest earned by the Growth option for that year and the 4% p.a. minimum interest rate when applied to his accumulation account.

The Complainant submitted that the information provided to him was – defined benefit members who continuously remain in the Growth investment option are entitled to an annual minimum earning rate of 4%.

He also submitted that:

- the removal of the minimum earning rate is in contravention of the meaning and spirit of the Trust Deed.
- the 4% p.a. minimum interest rate has been replaced by an earning rate that may be positive or negative.

- if the earning rate is negative it may reduce the benefit to below that accrued at the time of execution of the Deed of Amendment and this is in contravention of the actuarial certificate which stated that the Amendment would not:

  > *Reduce the amount of benefits presently or prospectively payable in respect of any Member to the extent that such benefits have accrued prior to the date on which the Trust Deed is executed.*

- the removal of his right to the 4% p.a. minimum earning rate which was pledged to him for as long as his account remained in the Growth investment option was in breach of the actuarial certificate which stated that the Amendment would not:

  > *Substantially prejudice the value of the rights secured for or in respect of any member contributions paid to the Fund prior to the date on which the Deed is executed.*

- wording in various pieces of correspondence over the Complainant's Fund membership has been clear and unambiguous that the minimum crediting rate would continue to apply as long as investment was maintained in the Growth investment option.

- it is difficult to understand the Trustee's position that such statements were never meant to infer that the 4% p.a. minimum interest rate would continue forever.

The Complainant requested the Tribunal to require the Employer and the Fund to reinstate the 4% p.a. minimum interest rate and restate his Fund balance as if the minimum rate had never been removed.

The Trustee submitted that the validity of the Trust Deed amendment which had the effect of removing the 4% p.a. minimum crediting rate guarantee from 1 July 2010, falls outside the jurisdiction of the Tribunal.

The Trustee also submitted:

- the relevant amendment constituted a carefully considered benefit design change which was requested by the Employer and consented to by the Trustee.

- the decision to apply a crediting rate of less than 4% to the Complainant's account for the year ended 30 June 2012 cannot be unfair or unreasonable to the Complainant as the Trustee properly applied the terms of the Trust Deed as they applied at that time.

- it would have been improper for the Trustee to exercise any power to augment or compromise in the Trust Deed to reinstate a benefit entitlement that had been validly removed from the Trust Deed.

- the Tribunal considers the relevant decision of the Trustee in relation to the Complainant was the decision to apply a crediting rate that could be less than 4% p.a. to the Complainant's accumulation accounts for each year ending after 30 June 2010.

- an assessment of the validity of the relevant Trust Deed amendment is clearly outside the jurisdiction of the Tribunal. The relevant Trust Deed amendment was properly entered into as it was within the powers of the Trustee under the Trust Deed and in compliance with the *Superannuation Industry (Supervision) Act 1993* (Cth)

In its deliberations, the Tribunal observed the following:

30. The Complainant has submitted that the removal of the minimum interest rate is unfair and unreasonable because it was never mentioned in any Fund or Employer publication that this benefit could change and he has made investment decisions on the basis that it would continue to apply until he withdrew his benefit from the Fund.

31. The Tribunal considered the various pieces of communication referred to by the Complainant. The Tribunal agreed with the Complainant that there was no indication given by either the Trustee or Employer specifically stating that the 4% p.a. minimum interest rate was not guaranteed for the future. The Tribunal noted that there were a number of references to the minimum rate applying as long as the Complainant remained invested in the Growth option.

32. The Trustee has submitted that neither the Trustee nor the Employer provided any guarantees that the minimum interest rate would continue indefinitely because this is not the case with any prospective benefit. It further submitted that communication material is designed to explain Fund benefits as they exist at a point in time.

33. The Tribunal noted that there were no guarantees mentioned in any of the communication material concerning any of the Complainant's benefits, not only the minimum interest rate. The Tribunal considered that trustees have to have the flexibility to alter future benefits should legislation or circumstances change while not diminishing accrued benefits. As such, communication is generally effective at the date it is produced and cannot be seen as providing indefinite guarantees.

34. The Tribunal considered it fair and reasonable of the Trustee to have Fund communication material that did not state that benefits could change in the future.

...

40. The Tribunal was satisfied that it was fair and reasonable of the Trustee to consider the Employer's request to remove the 4% p.a. minimum interest rate.

41. The Tribunal considered the clauses of the Trust Deed relevant to the power to make amendments to the Trust Deed. The Tribunal was satisfied that the wording of Clause 32 was not changed by the amendment dated 17 December 2009. Under Clause 32(2), any part of the deed may be amended by the Employer with the consent of the Trustee. Under Clause 32(3), the Trustee is required to obtain certification from an actuary that any amendment does not reduce the accrued benefits of members or substantially prejudice any rights secured by contributions paid prior to the execution date.

42. The Tribunal noted that the Trustee obtained the necessary certification from the Fund actuary for the amendment dated 17 December 2009...

43. The Tribunal noted that the Fund actuary had been appointed in accordance with the Trust Deed. The Tribunal was therefore satisfied that it was fair and reasonable of the Trustee to rely on the Fund actuary's certification that the amendment complied with the relevant requirements.

...

46. The Tribunal was satisfied that it was fair and reasonable of the Trustee to accede to the Employer's request to remove the 4% p.a. minimum interest rate which applied to certain Fund members."

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February 2014

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