



Superannuation (Resolution of Complaints) Act 1993

No. 80 of 1993

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Superannuation (Resolution of Complaints) Act 1993

No. 80 of 1993

An Act relating to the resolution of complaints about decisions of trustees of superannuation funds and approved deposit funds

[Assented to 30 November 1993]

The Parliament of Australia enacts:

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the *Superannuation (Resolution of Complaints) Act 1993*.

Commencement

2.(1) Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.

(2) If this Act does not commence under subsection (1) before 1 July 1994, it commences on that day.

Interpretation

3.(1) Unless the contrary intention appears, an expression used in this Act has the same meaning as in the Supervision Act.

(2) In this Act, unless the contrary intention appears:

“complainant” means a person who has made a complaint under section 14;

“complaint” means a complaint that has been made under section 14;

“disability”, in relation to a person, has the same meaning as in the *Disability Discrimination Act 1992*;

“excluded complaint” means:

(a) a complaint about a decision of the trustee of a fund that is declared by the regulations to be a fund to which this Act does not apply; or

(b) a complaint about a matter declared by the regulations to be a matter about which complaints may not be made under this Act;

“excluded subject matter”, in relation to a complaint, means that is declared by the regulations to be excluded subject matter for the purposes of this Act;

“Federal Court” means the Federal Court of Australia;

“fund” means a regulated superannuation fund or an approved deposit fund;

“party”, in relation to a complaint, has the meaning given by section 18;

“party’s representative” means an officer or agent who is representing a party in accordance with section 23;

“review meeting” means a meeting under Part 6 to review the decision of the trustee to which the complaint relates;

“Supervision Act” means the *Superannuation Industry (Supervision) Act 1993*;

“Tribunal” means the Superannuation Complaints Tribunal established by section 6;

“Tribunal Chairperson” means the Chairperson of the Tribunal;

“Tribunal member” means a member of the Tribunal and includes the Tribunal Chairperson.

“trustee”, in relation to a complaint, means the trustee of the fund to which the complaint relates;

Note 1: In relation to the definition of “trustee” see also the definition of “trustee” in section 10 of the Supervision Act.

Note 2: For definitions of “approved deposit fund”, “Commissioner”, “excluded approved deposit fund”, “excluded fund”, “excluded superannuation fund”, “function” and “regulated superannuation fund” see section 10 of the Supervision Act.

Definition of “decision” made by a trustee

4. For the purposes of this Act, a trustee makes a decision if:

(a) the trustee or a person acting for the trustee makes or fails to make a decision; or

- (b) the trustee or a person acting for the trustee engages in any conduct, or fails to engage in any conduct, in relation to making a decision.

Act does not apply to an excluded fund

- 5. This Act does not apply to an excluded fund.

Note: For the definition of “excluded fund” see section 10 of the Supervision Act.

PART 2—ESTABLISHMENT AND CONSTITUTION OF THE SUPERANNUATION COMPLAINTS TRIBUNAL

Establishment

- 6. A Superannuation Complaints Tribunal is established.

Membership

7.(1) The Tribunal consists of a Chairperson and not fewer than 5 nor more than 8 other members.

(2) The Tribunal Chairperson is to be appointed by the Governor-General and holds office on a full-time basis.

(3) The Tribunal members, other than the Tribunal Chairperson, are to be appointed by the Minister and hold office on a part-time basis.

Eligibility for appointment

8.(1) A person who has reached 65 years of age cannot hold office as Tribunal Chairperson.

(2) A person who is:

- (a) a trustee of a fund; or
- (b) a director or employee of a constitutional corporation that is a trustee of a fund;

is not eligible to be appointed as Tribunal Chairperson.

(3) A person may be appointed as a Tribunal member only if:

- (a) in the case of the Tribunal Chairperson—the Governor-General is of the opinion; or
- (b) in any other case—the Minister is of the opinion;

that the person is qualified for appointment because of his or her knowledge of, or experience in, matters of kinds in respect of which complaints may be made to the Tribunal.

(4) Two of the Tribunal members, other than the Tribunal Chairperson, are to be appointed after the Minister has consulted the Minister for Consumer Affairs about their appointment.

Constitution of Tribunal

9.(1) Subject to section 10, for the purposes of the performance or exercise of its functions or powers under this Act in relation to a particular complaint, the Tribunal is to be constituted by the Tribunal Chairperson and 2 other Tribunal members selected by the Tribunal Chairperson.

(2) In selecting the other Tribunal members, the Tribunal Chairperson is to take into account their qualifications, experience and suitability having regard to the nature of that complaint.

(3) The Tribunal Chairperson is to preside at all meetings of the members constituting the Tribunal.

(4) The procedure at any such meeting is to be determined by the Tribunal Chairperson.

(5) If the members constituting the Tribunal disagree on a determination to be made by the Tribunal, a decision of the majority is taken to be a decision of all of them.

Disclosure of interests

10.(1) The Tribunal Chairperson must give written notice to the Minister of all direct or indirect financial interests that the Tribunal Chairperson has or acquires in:

- (a)** a fund; or
- (b)** a constitutional corporation that is a trustee of a fund; or
- (c)** any other business.

(2) If a notice given by the Tribunal Chairperson under subsection (1) discloses a direct or indirect financial interest in relation to a particular complaint, an acting Tribunal Chairperson is to replace the Tribunal Chairperson in relation to that complaint.

(3) If a Tribunal member who is selected by the Tribunal Chairperson to be one of the members constituting the Tribunal in relation to a particular matter has a direct or indirect financial interest in that matter, the member must give written notice to the Tribunal Chairperson of the fact that the Tribunal member has an interest as soon as practicable after becoming aware of the relevant facts.

(4) If such a notice is given by a Tribunal member, the Tribunal Chairperson must reconstitute the Tribunal and select another Tribunal member to replace the member who gave the notice.

PART 3—OBJECTIVES AND FUNCTIONS OF THE TRIBUNAL

Tribunal objectives

11. The Tribunal must, in carrying out its functions or exercising its powers under this Act, pursue the objectives of providing mechanisms for:

- (a) the conciliation of complaints; and
- (b) if complaints cannot be resolved by conciliation—the review of the decisions of the trustees to which the complaints relate;

that are fair, economical, informal and quick.

Functions

12. The functions of the Tribunal are:

- (a) subject to paragraph (b), to inquire into a complaint and to try to resolve it by conciliation; and
- (b) if the complaint cannot be resolved by conciliation—to review the decision of the trustee to which the complaint relates; and
- (c) any functions conferred on the Tribunal by or under any other Act.

Tribunal to issue a memorandum explaining how complaints are to be dealt with

13.(1) The Tribunal must prepare a memorandum explaining how:

- (a) complaints may be made to the Tribunal; and
- (b) the Tribunal is to try to resolve complaints by conciliation; and
- (c) the Tribunal is to determine complaints that cannot be so resolved.

(2) The Tribunal must arrange for the memorandum to be made reasonably available to members of regulated superannuation funds and beneficiaries of approved deposit funds.

PART 4—COMPLAINTS, PROCEDURAL MATTERS RELATING TO COMPLAINTS AND COMPLAINTS THE TRIBUNAL CANNOT DEAL WITH

Complaints

14.(1) This section applies if the trustee of a fund has made a decision (whether before or after the commencement of this Act) in relation to:

- (a) a particular member or a particular former member of a regulated superannuation fund; or
- (b) a particular beneficiary or a particular former beneficiary of an approved deposit fund.

(2) Subject to subsection (3) and section 15, a person may make a complaint (other than an excluded complaint) to the Tribunal, that the decision:

- (a) was in excess of the powers of the trustee; or
- (b) was an improper exercise of the powers of the trustee; or
- (c) is unfair or unreasonable.

(3) If a person has been given a written notice by the trustee of a fund setting out:

- (a) the trustee's decision in relation to the person's objection to the payment of a benefit; and
- (b) the prescribed period within which the person must complain to the Tribunal about the decision;

the person may only make a complaint to the Tribunal within that period.

(4) The Tribunal cannot deal with a complaint about a trustee's decision that must be made within the prescribed period referred to in subsection (3) if the complaint is not made within that period.

(5) The Tribunal cannot deal with a complaint to the extent that it relates to excluded subject matter.

(6) The Tribunal cannot deal with a complaint that relates to the management of a fund as a whole.

(7) A complaint under subsection (2) is to be made by sending or delivering a written complaint to the office of the Tribunal.

Note: See section 3 for definitions of "complaint", "complainant", "excluded complaint" and "excluded subject matter".

Who may make a complaint

15.(1) A person may make a complaint only if:

- (a) in the case of a decision that relates to the payment of a benefit:
 - (i) the person has an interest in the benefit; or
 - (ii) the person claims to be, or to be entitled to benefits through, a person referred to in subparagraph (i); or
 - (iii) the person is acting for a person referred to in subparagraph (i) or (ii); or
- (b) in the case of a decision that does not relate to the payment of a benefit—the person is:
 - (i) a member or former member of the regulated superannuation fund; or
 - (ii) a beneficiary or former beneficiary of the approved deposit fund; or
 - (iii) a person acting for a person referred to in subparagraph (i) or (ii) or for the estate of such a person.

(2) A person does not have an interest in a benefit for the purposes of paragraph (1)(a) unless:

- (a) the person:
 - (i) has been given written notice by the trustee of the proposed payment of the benefit; and
 - (ii) has been given written notice by the trustee of the prescribed period within which the person may object; and
 - (iii) has objected to the trustee within the prescribed period; or

- (b) the person has not been notified by the trustee of the proposed payment of the benefit and the failure to notify was unreasonable; or
- (c) the person has been notified by the trustee of the proposed payment of the benefit but was not notified of the prescribed period to object to the payment; or
- (d) the person has been notified by the trustee of the proposed payment of the benefit but was notified of a period less than the prescribed period for the purposes of subparagraph (a)(ii).

Note: See section 10 of the Supervision Act for definitions of “approved deposit fund” and “superannuation fund”.

Tribunal to help complainants to make complaints

16. If the Tribunal thinks that:

- (a) a complainant wishes to make a complaint; and
- (b) the complainant needs help to make the complaint or to put it in writing;

the Tribunal must take reasonable steps to help the complainant.

Procedure on receipt of complaint

17.(1) If the complainant sends or delivers a complaint to an office of the Tribunal, the Tribunal must cause a written notice to be given to both the complainant and the trustee advising that a complaint has been made to the Tribunal by the complainant.

(2) The notice to the trustee must:

- (a) provide details of the complaint; and
- (b) advise the trustee of the trustee’s obligations under section 24.

Parties to a complaint

18. The parties to a complaint are:

- (a) the complainant; and
- (b) the trustee; and
- (c) any other person who has applied to the Tribunal to be made a party and who the Tribunal believes ought to be made a party to the complaint.

Tribunal not to deal with complaint unless complaint not settled within 90 days or such longer period as Tribunal allows

19. The Tribunal cannot deal with a complaint unless the complainant satisfies the Tribunal that:

- (a) a complaint about the same subject matter was previously made to an appropriate person under arrangements for dealing with such complaints made under section 101 of the Supervision Act; and

- (b) the complaint so made was not settled to the satisfaction of the complainant within 90 days or such longer period as the Tribunal allows.

Tribunal not to deal with complaint if subject matter of complaint is subject of court proceedings

20.(1) The Tribunal cannot deal with a complaint if a proceeding has been begun in a court about the subject matter of the complaint and the proceeding has not been finally disposed of.

(2) If, after a complaint has been made to the Tribunal, a proceeding is begun in a court about the subject matter of the complaint, the Tribunal cannot deal with the complaint until the proceeding is finally disposed of.

Withdrawal of complaint

21. A complainant may withdraw a complaint at any time.

Power to treat a complaint as having been withdrawn

22.(1) If:

- (a) a complainant makes a complaint; and
- (b) the Tribunal is satisfied, either after having communicated with the complainant, or having made reasonable attempts to contact the complainant and having failed to do so, that the complainant does not intend to proceed with the complaint;

the Tribunal must deal with the complaint as if it had been withdrawn by the complainant under section 21.

(2) If the Tribunal decides to treat a complaint as withdrawn under subsection (1), the Tribunal must give notice in writing to:

- (a) if the Tribunal communicated with the complainant—the complainant; and
- (b) the trustee;

of that decision and the reasons for that decision.

(3) The Tribunal may also decide to treat a complaint as if it had been withdrawn under section 21, in the following cases:

- (a) if the complaint has been made to the Tribunal—more than 12 months have elapsed since the trustee has made the decision to which the complaint relates;
- (b) if the complaint has been made to the Tribunal—the Tribunal thinks that the complaint is trivial, vexatious, misconceived or lacking in substance;
- (c) if some other remedy has been sought in relation to the subject matter of the complaint—the Tribunal thinks that the subject matter of the complaint has been, or is likely to be, adequately dealt with;

- (d) if the subject matter of the complaint has already been dealt with by the Tribunal or by another statutory authority—the Tribunal thinks that the subject matter of the complaint has been adequately dealt with;
- (e) if the Tribunal thinks that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority.

(4) If the Tribunal decides to treat a complaint as withdrawn under subsection (3), the Tribunal must give notice in writing to the complainant and the trustee of that decision and the reasons for that decision.

Right to representation in relation to a complaint

23.(1) Subject to subsection (2), a party in relation to a complaint:

- (a) if he or she has a disability—may be represented by an agent; and
- (b) if the party is a body corporate or unincorporate—may be represented by a responsible officer or an agent of the body; and
- (c) in any other case—must act on his or her own behalf.

(2) The Tribunal may allow a party to a complaint to be represented by an agent if the Tribunal considers it necessary in all the circumstances.

Lodging of material documents with Tribunal

24.(1) Subject to subsection (2), a trustee who has been given a notice under section 17 must, within 28 days after receiving the notice or such longer period as the Tribunal allows, lodge with the Tribunal a copy of all documents or parts of documents that are in the trustee's possession or under the control of the trustee and are considered by the trustee to be relevant to the complaint.

(2) The Tribunal may, on a request being made by the trustee, allow the trustee to lodge a summary of all documents or relevant parts of documents referred to in subsection (1) within a period specified by the Tribunal.

(3) A request under subsection (2) must be made within 28 days of the trustee receiving the notice or such longer period as the Tribunal allows under subsection (1).

(4) The trustee must not intentionally or recklessly refuse or fail to comply with subsection (1) or (2).

Penalty: 30 penalty units.

Power to obtain information and documents

25.(1) The Tribunal may, by written notice to the trustee signed by the Tribunal Chairperson, require the trustee at such place, and within such period or on such date and at such time, as are stated in the notice to produce to the Tribunal the original documents from which the copies or summaries referred to in section 24 were made.

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(2) If the Tribunal has reason to believe that the trustee is capable of giving information or producing additional documents relevant to a complaint made under this Act, the Tribunal may, by written notice to the trustee signed by the Tribunal Chairperson, require the trustee at such place, and within such period or on such date and at such time, as are stated in the notice:

- (a) to give to the Tribunal, by writing signed by the trustee or, if the trustee is a constitutional corporation, by an officer of the constitutional corporation, any such information; or
- (b) to produce to the Tribunal such documents or copies of such documents as are stated in the notice.

(3) If the Tribunal has reason to believe that a person (other than the trustee) is capable of giving information or producing documents relevant to a complaint made under this Act, the Tribunal may, by written notice to the person signed by the Tribunal Chairperson, require the person, at such place, and within such period or on such date and at such time, as are stated in the notice:

- (a) to give to the Tribunal, by writing signed by the person or, in the case of a body corporate, by an officer of the body corporate, any such information; or
- (b) to produce to the Tribunal such documents or copies of such documents as are stated in the notice.

(4) If documents (whether originals or copies) are so produced the Tribunal:

- (a) may take possession of, and may make copies of, or take extracts from, the documents; and
- (b) may keep the documents for as long as is necessary for the purpose of dealing with the complaint; and
- (c) while it is keeping the documents the Tribunal must permit a person who would be entitled to inspect any one or more of them if they were not in the possession of the Tribunal to inspect at all reasonable times such of the documents as that person would be so entitled to inspect.

(5) A person must not, without reasonable excuse, refuse or fail to comply with a requirement made by the Tribunal under subsection (1), (2) or (3).

Penalty: 30 penalty units.

Operation and implementation of a decision that is subject to a complaint

26.(1) Subject to this section, making a complaint to the Tribunal does not affect the operation of the decision to which the complaint relates or prevent the taking of action to implement the decision.

(2) The Tribunal may, on a request being made by a complainant, if the Tribunal thinks that it is desirable to do so after taking into account the interest of any persons who may be affected by the request, make such order or orders staying or otherwise affecting the operation or implementation of the whole or part of the decision to which the complaint relates.

(3) If an order is in force under subsection (2) (including an order that has previously been varied on one or more occasions under this subsection), the Tribunal may, on a request being made by a party to the complaint make an order varying or revoking the first-mentioned order.

(4) The Tribunal must not:

- (a) make an order under subsection (2) unless the trustee has been given a reasonable opportunity to make a submission to the Tribunal in relation to the matter; or
- (b) make an order varying or revoking an order in force under subsection (2) (including an order that has previously been varied on one or more occasions under subsection (3)) unless:
 - (i) the complainant; and
 - (ii) the trustee; and
 - (iii) if the order under subsection (2) has previously been varied by an order or orders under subsection (3)—the person or persons who requested the making of the last-mentioned order or orders;

have been given a reasonable opportunity to make submissions to the Tribunal in relation to the matter.

(5) An order that is in force under subsection (2) (including an order that has previously been varied on one or more occasions under subsection (3)):

- (a) is subject to such conditions as are specified in the order; and
- (b) has effect until:
 - (i) if a period for the operation of the order is specified in the order—the end of that period or, if the complaint is determined by the Tribunal before the end of that period, the determination of the Tribunal in relation to the complaint comes into operation; or
 - (ii) if no period is so specified—the determination of the Tribunal in relation to the complaint comes into operation.

PART 5—CONCILIATION OF COMPLAINTS

Inquiries by Tribunal

27. If:

- (a) a complaint has been made to the Tribunal; and

- (b) the complaint has not been withdrawn; and
- (c) the Tribunal is satisfied that the Tribunal can deal with the complaint under this Act;

the Tribunal must inquire into the complaint and try to settle it by conciliation.

Requests to attend conciliation conferences

28.(1) For the purposes of trying to settle a complaint in accordance with section 27, the Tribunal may, if it thinks it desirable to do so after considering any documents given to the Tribunal, by notice in writing, request the persons referred to in subsections (3) and (4) to attend a conciliation conference.

(2) The notice must also fix the date, time and place for the conference.

(3) A request under subsection (1) to attend a conference must be given to each party to the complaint.

(4) A request may be given to any person who, in the opinion of the Tribunal, is likely to be able to provide information relevant to the settlement of the complaint or whose presence at the conference is, in the opinion of the Tribunal, likely to be conducive to settling the complaint.

(5) If a party attending a conference is not proficient in English, the Tribunal may recommend that communication with the party at the conference proceed through an interpreter.

Conferences may be conducted by telephone or other means of communication

29. The Tribunal may determine that a conciliation conference is to be conducted by:

- (a) telephone; or
- (b) closed-circuit television; or
- (c) any other means of communication.

Statements at conference to be privileged

30. At a review meeting in relation to the complaint, unless the parties otherwise agree, evidence must not be given and statements must not be made about any word spoken or act done at a conciliation conference if the word or act related to a question to be determined by the Tribunal.

Tribunal to implement settlements

31.(1) If:

- (a) a conciliation conference is held; and
- (b) at or after the conference, the parties agree as to the terms of a settlement of the complaint that would be acceptable to the parties; and

(c) the terms of the agreement are put in writing signed by or for the parties and lodged with the Tribunal;
the Tribunal must treat the complaint as withdrawn under section 21.

(2) The Tribunal may give details of a settlement to the Commissioner that it thinks may require investigation by the Commissioner.

PART 6—REVIEW OF DECISIONS

Division 1—Preliminary procedures

Arrangements for review meetings

32.(1) If the Tribunal has tried to settle a complaint by conciliation under Part 5 but has not been successful, the Tribunal Chairperson must fix the date, time and place for a review meeting.

(2) The Tribunal Chairperson must write to the parties inviting written submissions by the date specified in the notice.

(3) The date specified for the meeting must be such as to allow a reasonable period for the parties to make written submissions.

Division 2—How the Tribunal informs itself about the decision under review

Submissions to Tribunal

33. A party to the review meeting may make written submissions to the Tribunal for the purposes of the review meeting.

Tribunal meetings

34.(1) Subject to subsection (2), the Tribunal must conduct a review meeting without oral submissions from the parties.

(2) The Tribunal may, if it thinks necessary, make an order allowing the parties to make oral submissions to the Tribunal at the review meeting.

(3) If the Tribunal makes an order under subsection (2), the Tribunal must give the parties written notice of the date, time and place fixed for making the oral submissions.

(4) If a party or the party's representative has advised the Tribunal that the party does not intend to make oral submissions in accordance with an order made under subsection (2), the Tribunal may conduct the review meeting without oral submissions from the party.

(5) If a party or the party's representative does not attend the review meeting at the time fixed for the meeting, the Tribunal may conduct the review meeting without oral submissions from the party or the party's representative.

(6) If a party attending the review meeting is not proficient in English, the Tribunal may direct the use of an interpreter.

Tribunal may allow telephone and other submissions

35. The Tribunal may determine that oral submissions to the Tribunal by a party or the party's representative may be made by:

- (a) telephone; or
- (b) closed-circuit television; or
- (c) any other means of communication.

Division 3—The review meeting

Meeting procedure

36. The Tribunal, in reviewing a decision:

- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) is to act as speedily as a proper consideration of the review allows, having regard to the objectives laid down by section 11 and the interests of all the members of the fund to which the complaint relates; and
- (c) may inform itself of any matter relevant to a review of a decision in any way it thinks appropriate.

Review of decisions by Tribunal

37.(1) Subject to subsection (2), for the purpose of reviewing a decision of the trustee of a fund, the Tribunal has all the powers, obligations and discretions that are conferred on the trustee by law or under the governing rules of the fund or otherwise and is to make a determination in writing:

- (a) affirming the trustee's decision; or
- (b) remitting the matter to which the trustee's decision relates to the trustee for reconsideration in accordance with the directions of the Tribunal; or
- (c) varying the trustee's decision; or
- (d) setting aside the trustee's decision and substituting a decision for the decision so set aside.

(2) The Tribunal must affirm the decision if it is satisfied that the decision, in its operation in relation to the complainant, was fair and reasonable in all the circumstances.

(3) The Tribunal must not do anything under subsection (1) that would be contrary to law or to the governing rules of the fund.

Meeting to be private

38.(1) A review meeting of the Tribunal is to be in private.

(2) The Tribunal may give directions as to the persons who may be present at any review meeting.

(3) The Tribunal may give directions prohibiting or restricting the disclosure of documents or information relating to a review meeting.

(4) In giving directions, the Tribunal must have regard to the wishes of the parties in relation to the complaint and the need to protect their privacy.

(5) Directions may be made in writing or orally.

(6) A person must not intentionally or recklessly refuse or fail to comply with a direction of the Tribunal.

Penalty: 30 penalty units.

Reference of questions of law to Federal Court

39.(1) The Tribunal may, on its own initiative or on the request of a party, refer a question of law arising in relation to a complaint to the Federal Court for decision.

(2) The Federal Court has jurisdiction to hear and determine a question of law referred to it under this section.

(3) If a question of law in relation to a complaint has been so referred to the Federal Court, the Tribunal must not:

- (a) make a determination to which the question is relevant while the reference is pending; or
- (b) do anything that is inconsistent with the opinion of the Federal Court on the question.

Tribunal to give reasons

40. The Tribunal must give written reasons for its determination.

Operation of determination

41.(1) Subject to subsection (2), a determination of the Tribunal comes into operation immediately upon the making of the determination.

(2) The Tribunal may specify in a determination that the determination is not to come into operation until a later date specified in the determination and, if a later date is so specified, the determination comes into operation on that date.

(3) A decision of a trustee as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a trustee, is, for all purposes (other than the purpose of the making of a complaint about that decision) taken to be a decision of the trustee and, upon the coming into operation of the determination of the Tribunal, unless the Tribunal otherwise orders, has effect, or is taken to have had effect, on and from the day on which the decision under review has or had effect.

Division 4—Other procedural matters

Adjournment of review meetings

42. The Tribunal may adjourn a review meeting from time to time.

Evidence of determination

43. Without prejudice to any other method available by law for the proof of determinations of the Tribunal, a document purporting to be a copy of such a determination, and purporting to be certified by the Tribunal Chairperson to be a true copy of the determination, is, in any proceeding, *prima facie* evidence of the determination.

Division 5—Notification of determination and appeal rights

Notification of determination

44.(1) If the Tribunal determines a review, the Tribunal must cause a copy of its determination and of the reasons for the determination, to be given to each party to the complaint.

(2) The Tribunal may direct the trustee to inform:

- (a) if the Tribunal's determination was in relation to a particular member or a particular former member of a superannuation fund—all or any of the other members or all or any of the former members of the superannuation fund; or
- (b) if the Tribunal's determination was in relation to a particular beneficiary or a particular former beneficiary of an approved deposit fund—all or any of the other beneficiaries or all or any of the former beneficiaries of the approved deposit fund;

of the Tribunal's determination.

(3) The trustee must not intentionally or recklessly refuse or fail to comply with a direction under subsection (2).

Penalty: 30 penalty units.

Notification of appeal rights

45. If the Tribunal determines a review, the Tribunal must give each party a written notice that includes a statement to the effect that, if the party is dissatisfied with the decision of the Tribunal on a question of law, the party may appeal to the Federal Court under section 46.

PART 7—APPEALS

Appeals to Federal Court of Australia from determinations of the Tribunal

46.(1) A party may appeal to the Federal Court, on a question of law, from the determination of the Tribunal.

(2) An appeal by a person under subsection (1) is to be instituted:

- (a) not later than the 28th day after the day on which a copy of the determination of the Tribunal is given to the person or within such further period as the Federal Court (whether before or after the end of that day) allows; and

(b) in accordance with rules of court made under the *Federal Court of Australia Act 1976*.

(3) The Federal Court is to hear and determine the appeal and may make such order as it thinks appropriate.

(4) Without limiting by implication the generality of subsection (3), the orders that may be made by the Federal Court on an appeal include an order affirming or setting aside the determination of the Tribunal and an order remitting the matter to be determined again by the Tribunal in accordance with the directions of the Court.

(5) The Federal Court must not make an order awarding costs against a complainant if the complainant does not defend an appeal instituted by another party to the complaint.

Operation and implementation of a determination that is subject to appeal

47.(1) Subject to this section, the institution of an appeal to the Federal Court from a determination of the Tribunal does not affect the operation of the determination or prevent the taking of action to implement the determination.

(2) If an appeal is brought to the Federal Court from a determination of the Tribunal, the Court or a Judge of the Court may make such order or orders staying or otherwise affecting the operation or implementation of either or both of the following:

- (a) the determination of the Tribunal or a part of that determination;
- (b) the whole or part of the decision of the trustee to which the complaint to the Tribunal related;

as the Court or Judge thinks appropriate to secure the effectiveness of the hearing and determination of the appeal.

(3) If an order is in force under subsection (2) (including an order that has previously been varied on one or more occasions under this subsection), the Court or a Judge of the Court may make an order varying or revoking the first-mentioned order.

(4) An order in force under subsection (2) (including an order that has previously been varied on one or more occasions under subsection (3)):

- (a) is subject to such conditions as are specified in the order; and
- (b) has effect until:
 - (i) if a period for the operation of the order is specified in the order—the end of that period or, if a decision is given on the appeal before the end of that period, the giving of the decision;
 - or

- (ii) if no period is so specified—the giving of a decision on the appeal.

Sending of documents to, and disclosure of documents by, the Federal Court

48. If an appeal is instituted in the Federal Court:

- (a) the Tribunal must send to the Court all documents that were before the Tribunal in connection with the consideration of the matter to which the appeal relates; and
- (b) at the conclusion of the proceeding before the Court in relation to the appeal, the Court must return the documents to the Tribunal.

PART 8—ADMINISTRATIVE PROVISIONS

Division 1—Administrative provisions relating to Tribunal Chairperson

Terms and conditions of appointment

49.(1) The Tribunal Chairperson holds office, subject to this Division, for such period, not exceeding 5 years, as is specified in the instrument of appointment.

(2) The Tribunal Chairperson holds office on such terms and conditions (if any) in respect of matters not provided for by this Division as are determined by the Governor-General.

Remuneration and allowances

50.(1) Subject to the *Remuneration Tribunal Act 1973*, the Tribunal Chairperson is to be paid:

- (a) such remuneration as is determined by the Remuneration Tribunal; and
- (b) such allowances as are prescribed.

(2) If there is no determination in force, the Tribunal Chairperson is to be paid such remuneration as is prescribed.

Leave of absence

51.(1) Subject to section 87E of the *Public Service Act 1922*, the Tribunal Chairperson has such recreation leave entitlements as are determined by the Remuneration Tribunal.

(2) The Minister may grant the Tribunal Chairperson leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Minister determines.

Resignation

52. The Tribunal Chairperson may resign from office by delivering to the Governor-General a signed notice of resignation.

Termination of appointment

53.(1) The Governor-General may terminate the appointment of the Tribunal Chairperson for misbehaviour or physical or mental incapacity.

(2) The Governor-General must terminate the appointment of the Tribunal Chairperson if the Tribunal Chairperson:

- (a)** becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit; or
- (b)** is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
- (c)** becomes:
 - (i)** a director or employee of a constitutional corporation of a kind referred to in paragraph 8(2)(b); or
 - (ii)** a trustee of a fund; or
- (d)** engages in paid employment outside the duties of the office without the approval of the Minister; or
- (e)** contravenes subsection 10(1) without reasonable excuse.

Acting Tribunal Chairperson

54.(1) The Minister may appoint a person who is eligible to be appointed as Tribunal Chairperson to act as Tribunal Chairperson:

- (a)** during a vacancy in the office of Tribunal Chairperson (whether or not an appointment has previously been made to the office); or
- (b)** during any period, or during all periods, when the Tribunal Chairperson is absent from duty or from Australia or is, for any other reason, unable to perform the duties of the office of Tribunal Chairperson.

(2) The Minister may appoint a person who is eligible to be appointed as Tribunal Chairperson to act as Tribunal Chairperson in relation to a particular complaint where the Tribunal Chairperson has given a notice under subsection 10(1).

(3) Anything done by or in relation to a person purporting to act under subsection (1) or (2) is not invalid on the ground that:

- (a)** the occasion for the person's appointment has not arisen; or
- (b)** there is a defect or irregularity in connection with the person's appointment; or
- (c)** the person's appointment had ceased to have effect; or
- (d)** the occasion for the person to act had not arisen or had ceased.

Division 2—Administrative provisions relating to other Tribunal members

Terms and conditions of appointment

55.(1) A Tribunal member, other than the Tribunal Chairperson, holds office, subject to this Division, for such period, not exceeding 5 years, as is specified in the instrument of appointment.

(2) A Tribunal member, other than the Tribunal Chairperson, holds office on such terms and conditions (if any) in respect of matters not provided for by this Division as are determined by the Minister.

Remuneration and allowances

56.(1) The Tribunal members, other than the Tribunal Chairperson, who, together with the Tribunal Chairperson, constitute the Tribunal in relation to a complaint, are each to be paid, in respect of performing functions in respect of that complaint, such fees and allowances as are determined by the Remuneration Tribunal.

(2) If no determination is in force, the Tribunal members are to be paid such fees and allowances as are prescribed.

(3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

Resignation

57. A Tribunal member, other than the Tribunal Chairperson, may resign from office by delivering to the Minister a signed notice of resignation.

Termination of appointment

58.(1) The Minister may terminate the appointment of a Tribunal member, other than the Tribunal Chairperson, for misbehaviour or physical or mental incapacity.

(2) The Minister must terminate the appointment of a Tribunal member, other than the Tribunal Chairperson, if the member:

- (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit; or
- (b) contravenes subsection 10(3) without reasonable excuse.

PART 9—MISCELLANEOUS

Certain powers of the Tribunal to be exercised by Tribunal Chairperson or staff member

59.(1) Despite subsection 9(1), the powers of the Tribunal under paragraphs 12(a) and 18(c), subsections 23(2), 24(1) and (2), 25(1), (2) and (3) and 31(1) and sections 13, 16, 17, 19, 22, 27, 28 and 29 are to be exercised

on behalf of the Tribunal by the Tribunal Chairperson or by a member of the staff of the Tribunal who is made available to the Tribunal under subsection 62(2) and is authorised by the Tribunal Chairperson to exercise the powers concerned.

(2) Despite subsection 9(1), the powers of the Tribunal under paragraph 48(a), subsections 26(2), (3) and (4), 31(2), 34(2), (3) and (6), 38(2) and 44(1) and sections 35 and 45 are to be exercised on behalf of the Tribunal by the Tribunal Chairperson.

Legal professional privilege

60.(1) This section applies if:

- (a) under section 25, a person requires a lawyer:
 - (i) to give information; or
 - (ii) to produce a document; and
- (b) giving the information would involve disclosing, or the document contains, as the case may be, a privileged communication made by, on behalf of or to the lawyer in his or her capacity as a lawyer.

(2) The lawyer is entitled to refuse to comply with the requirement unless:

- (a) if the person to whom, or by or on behalf of whom, the communication was made is a body corporate that is under official management or being wound up—the official manager or liquidator of the body; or
- (b) otherwise—the person to whom, or by or on behalf of whom, the communication was made;

consents to the lawyer complying with the requirement.

(3) If the lawyer so refuses, he or she must, as soon as practicable, give to the Tribunal a written notice setting out:

- (a) if the lawyer knows the name and address of the person to whom, or by or on behalf of whom, the communication was made—that name and address; and
- (b) if subparagraph (1)(a)(i) applies and the communication was made in writing—sufficient particulars to identify the document containing the communication; and
- (c) if subparagraph (1)(a)(ii) applies—sufficient particulars to identify the document, or the part of the document, containing the communication.

(4) A person must not intentionally or recklessly refuse or fail to comply with subsection (3).

Penalty: 30 penalty units.

Liability for damages

61. Neither a Tribunal member nor a member of the staff of the Commissioner who is made available to the Tribunal under subsection 62(2) is liable to an action or other proceeding for damages for or in relation to an act done or omitted to be done in good faith in the performance or purported performance of any function, or in the exercise or purported exercise of any power, conferred by this Act.

Staff and facilities

62.(1) The staff required to assist the Tribunal in the performance of its functions are to be persons appointed or employed under the *Public Service Act 1922*.

(2) The Commissioner must make available to the Tribunal such staff and facilities as are necessary or desirable to enable the Tribunal to perform its functions.

Secrecy

63.(1) This section applies to a person who is or has been:

- (a) a Tribunal member; or
- (b) a member of the staff of the Commissioner who is made available to the Tribunal under subsection 62(2).

(2) Subject to subsection (3), and to sections 64 and 65, the person must not, except for the purposes of this Act, directly or indirectly:

- (a) make a record of, or disclose to any person or court, any information acquired by the first-mentioned person in connection with a complaint made to the Tribunal under this Act or the review under this Act of a decision of the trustee of a fund in respect of which such a complaint was made; or
- (b) produce to any person or court a document so acquired.

(3) Subsection (2) does not prohibit the Tribunal from disclosing information or producing a document:

- (a) to the Commissioner if requested by the Commissioner to do so; or
- (b) to the trustee concerned if the person who made the complaint consents in writing to the disclosure or production.

(4) Subsection (2) does not prevent the Tribunal from disclosing information in a way that does not enable the identification of the parties to a complaint.

(5) In this section:

“**court**” includes any tribunal, authority or person having power to require the production of documents or the answering of questions;

“**produce**” includes permit access to, and “**production**” has a corresponding meaning.

Penalty: 10 penalty units.

Tribunal Chairperson to refer contraventions of the law or of the governing rules of a fund to the Commissioner

64. 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, he or she must, as soon as practicable:

- (a) if he or she is a Tribunal member other than the Tribunal Chairperson—give particulars of the contravention to the Tribunal Chairperson; or
- (b) if he or she is the Tribunal Chairperson—give particulars of the contravention to the Commissioner.

Failure of a trustee to comply with a determination or direction by the Tribunal

65.(1) If a Tribunal member becomes aware that a trustee of a fund has refused or failed to give effect to a determination made by the Tribunal, he or she must, as soon as practicable:

- (a) if he or she is a Tribunal member other than the Tribunal Chairperson—give particulars of the refusal or failure to the Tribunal Chairperson; or
- (b) if he or she is the Tribunal Chairperson—give particulars of the refusal or failure to the Commissioner.

(2) If the Tribunal remits a matter to the trustee for reconsideration in accordance with the directions of the Tribunal, the trustee must reconsider the matter in accordance with those directions as soon as practicable.

Conduct by directors, servants and agents

66.(1) If, in proceedings for an offence against this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:

- (a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and
- (b) that the director, servant or agent had the state of mind.

(2) Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority is taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the body corporate unless the body corporate establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.

(3) If, in proceedings for an offence against this Act, it is necessary to establish the state of mind of an individual in relation to particular conduct, it is sufficient to show:

- (a) that the conduct was engaged in by a servant or agent of the individual within the scope of his or her actual or apparent authority; and
- (b) that the servant or agent had the state of mind.

(4) Any conduct engaged in on behalf of an individual by a servant or agent of the individual within the scope of his or her actual or apparent authority is taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the individual unless the individual establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

(5) A reference in subsection (1) or (3) to the state of mind of a person includes a reference to:

- (a) the knowledge, intention, opinion, belief or purpose of the person; and
- (b) the person's reasons for the intention, opinion, belief or purpose.

(6) A reference in this section to a director of a body corporate includes a reference to a constituent member of, or to a member of a board or other group of persons administering or managing the affairs of, a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory.

(7) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.

(8) A reference in this section to an offence against this Act includes a reference to an offence created by section 5, 6, 7 or 7A or subsection 86(1), of the *Crimes Act 1914*, being an offence that relates to this Act.

Annual report

67.(1) The Tribunal Chairperson must, on behalf of the Tribunal, within 3 months after each year ending on 30 June, give to the Minister a report on the working of this Act during that year.

(2) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the report.

Regulations

68. The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or

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- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

[*Minister's second reading speech made in—
House of Representatives on 27 May 1993
Senate on 6 October 1993*]