

Superannuation
Complaints
Tribunal

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7 October 2016

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Dear Professor Ramsey

It is with pleasure that the Superannuation Complaints Tribunal (SCT) provides this submission to the Review into the Financial Systems External Dispute Resolution and Complaints Framework.

The Review comes at an important time for consumers of financial services products in Australia. The industry is changing rapidly and it is vital that the dispute resolution and complaints framework is flexible and transparent to ensure consumer complaints are resolved transparently, efficiently and in a timely manner that ensure the highest level of consumer protection.

In this context it is also important to fully understand the differences between the financial services and products covered by External Dispute Resolution (EDR) schemes and, in the case of superannuation, the need for a specific EDR scheme that recognises and can address the 'unique' nature of superannuation products and related complaints.

The SCT submission is a considered and informed response to the issues raised by the Review panel.

We look forward to continue the engagement with the Review Panel on this important process.

Yours sincerely

Helen Davis
Chairperson

Colin Neave
Independent Chairperson
Advisory Council



Submission to the Review into the Financial Systems External Dispute
Resolution and Complaints Framework – 7 October 2016

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1. Executive Summary

The Superannuation Complaints Tribunal (SCT) and the SCT Advisory Council welcome the opportunity to provide a submission to the Review into the Financial Systems External Dispute Resolution and Complaints Framework.

It is essential that consumers have access to a dispute resolution framework that is effective, flexible and transparent in a financial services environment that is dynamic and continually evolving. In this context it is also important to fully understand the differences between the financial services and products covered by External Dispute Resolution (EDR) schemes and, in the case of superannuation, the need for a specific EDR scheme that recognises and can address the 'unique' nature of superannuation products and related complaints.

How is the SCT unique?

The SCT strives to work with the Australian community to ensure accessible, timely and fair resolution of superannuation complaints.¹ The SCT provides a vital and necessary role to resolve superannuation disputes. The Tribunal is a user-friendly 'merits review' alternative to the court system and provides a free service to consumers (complainants).

The dispute resolution framework for superannuation is legislated through the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and the *Superannuation (Resolution of Complaints) Act 1993* (SRC Act). The SIS Act sets out the requirements for internal dispute resolution which must be undertaken and the SRC Act sets out the requirements for external dispute resolution which can only occur when internal dispute resolution has been unsuccessful.

The SCT therefore provides a *unique* dispute resolution service that differs from other external dispute resolution bodies that currently operate in financial services as a condition of holding an Australian financial services license. The unique nature of the Tribunal's work will be an ongoing requirement to be considered in any future EDR framework.

It is important to put this into context. Superannuation is a mandated purchase by all working Australians. This is because of the superannuation guarantee. In addition, many of the consumers that interact with the SCT may not have made a conscious decision to be with the fund or purchase the product they have a complaint with – due to the use of defaults within superannuation. For example, in the case of death benefit distributions it is not the 'consumer' who had the relationship with the fund who raises the complaint; it is one or more individuals who have an interest in the death benefit.

The relationship between a superannuation trustee and the member/consumer is that of a fiduciary with the associated responsibilities and duties. This is in contrast with a contract for sale of a specific product or service between a provider and

¹ SRC Act, s 11

consumer. Further, the nature of group life insurance arrangements in superannuation often limits consumers making informed decisions regarding the terms and conditions of the life insurance product or the cost of the premium.

The SCT's review powers are also tailored to its jurisdiction. The SCT determines whether a decision under review was fair and reasonable in its operation in relation to the complainant in all the circumstances. The determination making power of the SCT is to place the complainant in such a position that the unfairness and/or unreasonableness no longer exists.² The SCT has no financial limit on its determination making power or the complaints it can consider.

The current statutory framework for superannuation complaints therefore provides sound and reliable outcomes for consumers. There is real strength in the statutory authority model and the inherent link with the regulators ASIC and APRA that this structure provides through the mandated reporting and disclosure requirements. This provides a superior level of consumer protection.

Anticipated growth in superannuation complaints

Australia's superannuation industry is currently in excess of \$2 trillion of funds under management, 30 million accounts and just over 1 million people receiving superannuation income³ – it is anticipated that as consumers become more engaged with the superannuation industry, more consumers enter retirement and there is greater awareness of issues around life insurance through group insurance arrangements, the demand for the services of the SCT will continue to increase.

Currently the SCT receives approximately 2,700 written complaints per year and this is continuing to grow. As Australians become increasingly financially literate and informed in relation to superannuation and also their interaction with superannuation increases the number of complaints will continue to rise.

Opportunities for improvement

Appropriate levels of allocated funding for the SCT have been an ongoing issue for the successful management of the SCT. In the 2016/2017 Budget the SCT received an additional non-ongoing appropriation. This was to ensure that the SCT could meet its operational requirements for the 2016/2017 financial year and provided capital expenditure for the SCT to improve systems and processes. This will drive significant efficiency and quicker complaint outcomes for consumers. The increased funding for the SCT is widely supported by the superannuation industry.

Where operational challenges currently exist for the timely resolution of complaints, these relate to improved efficiency of the governance operations of the Tribunal, the need for greater transparency in relation to the allocation of funding to the Tribunal and increased funding.

² SRC Act, s 37

³ ASFA Superannuation Statistics, Sept 2016

These governance issues can be dealt with by Government consideration of reviewing and improving the *Superannuation (Resolution of Complaints) Act 1993*. This would provide the mechanism for improved delegations to the Tribunal itself in terms of management of its resourcing both financial and people and transparency of Tribunal funding. This would enable the Tribunal Chairperson to align resourcing and outcomes with business decisions. Currently this does not occur (with ASIC responsible for Tribunal resourcing) and as a result there is significant disconnect between the resource requirements of the Tribunal and the provision of resources from ASIC.

Consideration should also be given to establishing under the legislation a governance structure which includes a Board. The SCT currently operates with an Advisory Council that was established by the SCT but is not required under the Act.

In the pursuit of greater efficiency in EDR schemes in Australia, the possible alignment of 'back-office' functions of the current EDR schemes is obviously a model that could be explored. However, there is already a very high level of consumer recognition of and interaction with the SCT. Consumers seeking to make a superannuation complaint know how to access the SCT in a timely and efficient manner and the nature of complaints that the Tribunal is able to consider.

Further, in the context of the Tribunal, such an alignment would need to be cognisant of the current external scrutiny afforded over Tribunal operations by administrative law mechanisms and the secrecy protections inherent in the Tribunal, particularly in the context of the proportion of complaints resolved prior to determination. These aspects are also unique to the operation of the SCT.

Conclusion

Consideration by this Review process of moving the superannuation complaints from a statutory model to an industry based model will have a direct impact on consumers. Important consumer protection issues would need to be fully evaluated in the context of the extent, to which, consumer's interests are best served by no longer having the stringent statutory protection provided by the current framework as it relates to superannuation complaints through the SCT.

It is recommended that the Review consider improvements to the SRC Act to modernise governance arrangements to provide improved corporate governance, transparency of funding and improved efficiency.

2. Guiding Principles of the Review

The SCT fully supports the guiding principles of the Review. The Tribunal considers that the ability for EDR schemes to be flexible and adapt to changing circumstances in financial services is paramount in delivering fair outcomes for consumers who have a complaint.

In relation to the guiding principles of the Review, the SCT meets the principles:

Efficiency:

- The SCT has appropriate powers provided under the *Superannuation (Resolution of Complaints) Act 1993* Act (SRC Act) to deal with complaints relating to superannuation, including by conciliation and review.
- As a Statutory Body the SCT affords a higher level of consumer protection than other industry based financial services EDR schemes in Australia.
- SCT has demonstrated the ability to drive efficiencies – however is currently restrained by outdated governance aspects of the SRC Act and under resourcing.

Equity:

- The SCT is easily accessible by consumers and has a high level of consumer awareness.
- The SCT is completely impartial – decisions are made on individual facts and the merits of each complaint through a robust complaint process.
- There is no cost to consumers accessing the dispute resolution services provided by the SCT.

Complexity:

- The SCT provides a user-friendly alternative EDR scheme to the court system.
- Consumers are provided with an end-to-end resolution through the SCT.
- The vast majority 87% of complaints are resolved by the SCT during investigation or conciliation – only 13% by determination.
- Decisions and conduct of the SCT have robust mechanisms for appeal through the judicial system.

Transparency:

- The SCT publishes all determinations.
- The SCT has the power to join other parties to a complaint – this is critical for the robust consideration and resolution of superannuation complaints, particularly those relating to insurance held through a superannuation fund and death benefit disputes.

- The operations of the SCT as an Australian Government Agency are subject to further review and transparency through the Commonwealth Ombudsman (which investigates complaints about Australian Government Agencies) and the *Freedom of Information Act 1982* (legally enforceable rights to access government documents, including those of the SCT).

Accountability:

- The SCT provides clear and transparent reporting and outcomes data on an annual basis.
- Determinations are published.
- The SCT has legislated reporting requirements with ASIC and APRA.
- The SCT has legislated reporting obligations to the Minister and Parliament e.g. annual report.
- Systemic issues in superannuation are often first identified through complaints received by the SCT.

Comparability of outcomes:

- The SCT has powers that provide a remedy in relation to the demonstrated adverse impact of a decision or conduct – this provides a fair and comparable outcome for consumers.
- Judicial review of SCT decisions and conduct provides clear precedent for industry practice to be established – this is unique to the SCT.
- The obligation of the SCT to comply with the law and the right of appeal to the Federal Court operates to impose a level of discipline on the SCT in its decision-making. This is unique to the SCT and provides superior outcomes for consumers.

Regulatory costs:

- The SCT has demonstrated that the governing framework under which it operates dictates a cost effective EDR scheme.
- Effective user outcomes are delivered.
- Governance changes to the SRC Act together with appropriate levels of funding – paid for by the industry – will enable timely dispute resolution.

3. Superannuation is a 'unique consumer purchase'

Superannuation is a mandated purchase by all working Australians. This is because of the Superannuation Guarantee (SG). Many of the consumers that interact with the SCT may not have made a conscious decision to be with their superannuation fund or to have purchased the product they have a complaint with – due to the use of defaults within superannuation.

The relationship between the Trustee and the member/consumer is that of a fiduciary with the associated responsibilities and duties. This is in contrast with a contract for sale of other financial services product(s) or service(s) between a provider and consumer. Further the nature of the pooled life insurance arrangements in superannuation often limits consumers making informed decisions regarding the terms and conditions of the life insurance product or the cost of the premium.

For many people superannuation is or will be their largest asset in retirement.

The majority of consumers/members are currently in the accumulation phase, saving for retirement. Over coming years there will be an increasing proportion of consumers approaching or entering retirement. This is already occurring and the pace will increase rapidly as the Australian population ages.

As consumers enter the drawdown phase there is a direct correlation of an increase in consumer engagement with products and services. Increased consumer engagement with their superannuation also occurs when stressful events, such as death and disability, occur.

Since 2004-05, the number of complaints received by the SCT has increased by approximately 41 per cent (an increase from 1907 complaints in 2004-05 to 2688 complaints in 2014-15). This equates to an annual average growth rate of 3.7 per cent. Complaints will continue to rise into the future.

In addition to increases in the volume of complaints, the nature and complexity of complaints received by the SCT has also evolved. The SCT has been highly successful and flexible in its operations to adapt as new superannuation products and services are introduced to the superannuation industry.

This is because of the 'in built' flexibility in SCT's legislated jurisdiction which covers decisions of a trustee, except in specified circumstances. There are three broad complaint categories:

1. Those relating to administration;
2. Disability benefits; and
3. Death benefits.

The resolution of consumer complaints regarding superannuation requires consideration of the exercise of trustee discretion. The Tribunal can also deal with

complaints where a decision did not involve the exercise of discretion if the decision was contrary to law.

This is in contrast with a dispute involving an elected consumer purchase, often with a contract for the sale of a specific product or service between a provider and consumer, and corporate decisions where there is no fiduciary duty owed to members/consumers.

4. Superannuation Regulatory Framework

In Australia, a superannuation fund is required by law to operate as a trust. The trustee of the fund holds the superannuation fund assets on behalf of the beneficiaries, who are the members of the fund and the dependants of the members. The Trustee must comply with general trust law requirements, as well as statutory and other regulatory requirements.

Superannuation is regulated in Australia by the following key regulators:

- Australian Prudential Regulation Authority (prudential regulation of trustees and funds)
- Australian Securities and Investments Commission (conduct and disclosure of trustees)
- Australian Taxation Office (taxation authority and enforcement of SG obligations)

A superannuation trustee is typically required to hold two licenses in order to operate a superannuation fund:

- Registrable Superannuation Entity Licence (RSE Licence); and
- Australian Financial Services Licence (AFS Licence).

Australian Prudential Regulation Authority (APRA)

APRA is responsible for the prudential supervision of superannuation funds. It does this through the powers granted to it under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and related Regulations. APRA's responsibilities include monitoring a trustee's compliance with the SIS Act and its RSE licence conditions.

The SIS Act sets out the conditions with which regulated superannuation funds must comply to be eligible for taxation concessions.

In particular the SIS Act sets out the duties of trustees in a number of 'covenants'. These covenants are deemed to be included in the fund's governing rules (e.g. trust deed). Accordingly, a breach of these covenants is not only a breach of the SIS Act, but is also a breach of the trust deed.

In addition to the covenants, the SIS Act imposes certain statutory duties on a trustee and a breach of these duties may give rise to a penalty. One of the key additional duties imposed on a trustee under the SIS Act is to establish a system for dealing with formal enquiries and complaints.

From 1 July 2004 trustees operating superannuation funds were required to hold a RSE Licence and also register the fund as a Registrable Superannuation Entity (RSE) with APRA. Therefore, to establish a new fund requires APRA pre-vetting and

approval. APRA also has the power to make binding Prudential Standards. APRA has issued a number of Prudential Standards and it is a condition of the trustee's RSE Licence to comply with APRA's requirements in these Prudential Standards.

APRA conducts an active supervision program of reviews of superannuation funds as its major method of prudential supervision.

Australian Securities and Investments Commission (ASIC)

ASIC is principally responsible for the enforcement of the *Corporations Act 2001* (Corporations Act) which regulates the conduct and disclosure obligations of financial services providers (including superannuation trustees). ASIC's focus is consumer protection and market integrity and it aims to ensure that members of superannuation funds:

- Are provided with sufficient information by trustees to make informed decisions about whether or not to buy, sell, hold or vary a financial product or service; and
- Have sufficient confidence in the integrity of financial product and service providers.

'Public offer' superannuation trustees need to hold an AFS Licence in order to issue superannuation products and provide advice in relation to superannuation products. As an AFS Licensee, a trustee will need to comply with the conditions imposed on the AFS licence. Some licensing conditions are included in the Corporations Act and related regulations and some are set out in the AFS Licence itself.

The general licence conditions include an obligation to have a dispute resolution mechanism that complies with ASIC approved standards and to be a member of an external dispute resolution scheme approved by ASIC.

Regardless of whether an AFS licence is held, superannuation trustees must comply with certain disclosure requirements when a member joins the fund, on an ongoing basis (for example through the provision of annual benefit statements and an annual report) and on exiting the fund.

Australian Tax Office (ATO)

The ATO administers legislation dealing with the taxation of superannuation fund earnings, contributions and benefits.

Key taxation legislation that the ATO is responsible for administering includes the Income Tax Assessment Act 1936 and 1997, Taxation Administration Act 1953, Superannuation (Unclaimed Money and Lost Members) Act 1999 and the Superannuation Guarantee (Administration) Act 1992 (which deals with the minimum SG contribution required to be paid by employers) and the Superannuation Contributions Tax (Assessment and Collection) Act 1997 (which deals with the penalty imposed if the minimum SG contribution is not made).

Role of the Superannuation Complaints Tribunal

The SCT is an administrative tribunal established to provide members of superannuation funds with a low cost and informal forum for resolving complaints about decisions of superannuation trustees (and insurers, who may be joined to a complaint). Members may only make a complaint to the SCT after they have first raised their complaint with the trustee.⁴

For trustees that also hold an AFSL, ASIC has recognised the SCT as an external dispute resolution (EDR) forum for the purpose of compliance with the general licence condition.

The SCT differs from other external dispute resolution mechanisms approved by ASIC because:

- The SCT provides a forum for resolving superannuation complaints regardless of whether the trustee holds an AFSL or not.
- SCT's existence pre-dates AFSL licencing. The SCT was introduced as an integral component of the supervisory enhancement of superannuation introduced by the SIS legislation in 1993, following the introduction of mandatory minimum superannuation contributions through the SG legislation in 1992.
- Other financial service providers become 'members' of an external dispute resolution scheme to fulfil a condition of their AFSL. Compliance with determinations of the EDR scheme is therefore enforceable indirectly, ultimately through ASIC taking action against the provider's licence. By comparison, compliance with determinations made by the SCT is directly enforceable because trustees are required by law to comply with determinations made by the SCT. It is an operating standard under regulation 13.17B that trustees comply with SCT determinations. APRA can therefore enforce failure to comply as an offence.⁵

⁴ SRC Act s 19

⁵ SIS Act, s 34

5. Consumer Awareness

From the operations and experience of the SCT there does not exist significant consumer confusion in identifying and accessing the appropriate EDR scheme for superannuation related complaints.

This is consistent with the legislated requirements regarding the operation of internal dispute resolution for superannuation funds.⁶ The SIS Regulations and Corporations Act require Trustees to provide clear disclosure to superannuation consumers about the role of the SCT in considering complaints and how to contact the Tribunal. Consequently, consumers are provided with such information at key communication points such as in printed materials and on superannuation fund websites.

It is the SCT's observation that where consumers undertake an internet search for where to raise a superannuation complaint, they undertake that search along the lines 'complain about super' or 'complain about superfund name' and the results of these searches prominently display the SCT.

Where consumers contact the SCT with a complaint related to superannuation, the main reason why the SCT is unable to handle their complaint is that it has not firstly been considered by the trustee's internal dispute resolution before being raised with the SCT.⁷

Another example is where consumers contact the SCT in relation to superannuation but it is an enquiry for information rather than a complaint. It is not because the complaint relates to a different type of financial service or product. Approximately 35% of written complaints received by the SCT are outside the Tribunal's jurisdiction (40% in 2014-15). Of these in 65% (2015-16) have not been considered by IDR (70% 2014-15). An additional 11% (2015-16) are of an enquiry nature (11% 2014-15). The SCT made changes to its operational process during 2015-16 to establish an enquiries process to better inform consumers as part of their initial contact with the SCT.

Other reasons that the SCT is unable to consider a consumer's complaint include:

- It is outside the total and permanent disability (TPD) claim time limits set in the SRC Act.
- The complaint is about a death benefit but the complainant does not have an interest in the death benefit.
- The complaint was classified as 'other' and generally relates to a general enquiry such as early release of superannuation or failure of a fund to provide information.

⁶ SIS Act, s 101

⁷ Section 19 of the SRC Act states that the SCT cannot deal with a complaint unless a complaint about the same subject matter was made to an appropriate person under the trustee's arrangements for dealing with such complaints in accordance with section 101 of the SIS Act and the complaint was not settled to the satisfaction of the complainant within 90 days.

- The complaint is not about a trustee decision, for example standalone insurance.
- The complaint is about an employer, for example failure to pay SG contributions.

In most of these instances the complaint relates to superannuation and it is understandable why a consumer may contact the SCT. However, equally, they are not complaints which could be considered by another financial services dispute resolution body. In the case of complaints about SG the relevant body is the ATO. The exception is approximately 20 complaints received each year by the SCT that relate to insurance or financial advice.

The SCT receives some complaints from consumers who have taken their complaint to FOS (in the first instance) rather than the SCT. In general, these relate to a life insurance claim, such as TPD or income protection. Anecdotally the root cause of the confusion originates when a consumer contacts the insurer rather than the trustee in the first instance and the insurer provides FOS's details rather than the SCT's details.

Top Reason SCT is Unable to Consider a Complaint (why outside SCT jurisdiction)	2015-16 proportion of all outside SCT jurisdiction complaints
Complaint has not first been considered by IDR	65%
Fund member enquiry in nature	11%
'Other'	5%
Outside TPD claim time limits	4%
Complainant does not have an interest in the death benefit	4%
Complaint is not about a trustee decision	4%
Complaint employer related	3%

Referrals made by SCT to other complaint handling bodies⁸		
Year of referral	Number of referrals	Other complaint - handling body
2004 - 05	6	FICS
2005 - 06	1	FICS
2006 - 07	nil	
2007 - 08	1	FICS
2008 - 09	2	FOS
2009 - 10	4	FOS

⁸ s 22A SRC Act

SUPERANNUATION COMPLAINTS TRIBUNAL

2010 - 11	1	FOS
2011 - 12	nil	
2012 - 13	1	FOS
2013 - 14	1	FOS
2014 - 15	nil	
2015 - 16	1	FOS

In addition to referrals made to other complaint handling bodies the SCT may provide information to complainants suggesting that another complaint handling body may be able to provide assistance.

Complaints provided with FOS details	
2015-16	15
2014-15	18

Referrals from FOS received at SCT	
2015-16	119
2014-15	148

The SCT does not observe a level of consumer confusion that would warrant consideration of the introduction of a one-stop triage service for financial service complaints. For superannuation complaints the introduction of such a service would introduce an additional layer of cost and complication into the system for negligible benefit.

6. Function of the Superannuation Complaints Tribunal

The Superannuation Complaints Tribunal was established by the Australian Government under the *Superannuation (Resolution of Complaints) Act 1993* following a recommendation of the Senate Select Committee on Superannuation in June 1992.

The Tribunal is a statutory authority and its determinations are binding on Trustees and Insurers. The Tribunal commenced operation on 1 July 1994 and held its first review meeting on 15 December 1994.

The Superannuation Complaints Tribunal is an independent dispute resolution body that offers a free, 'user-friendly' alternative to the court system. The Tribunal is completely impartial—we make decisions on the individual facts and merits of each complaint. We do not act for or represent any side to a complaint.

The Tribunal delivers end-to-end resolution for consumers.

The process for a complaint at the SCT is shown in **Figure 1**.

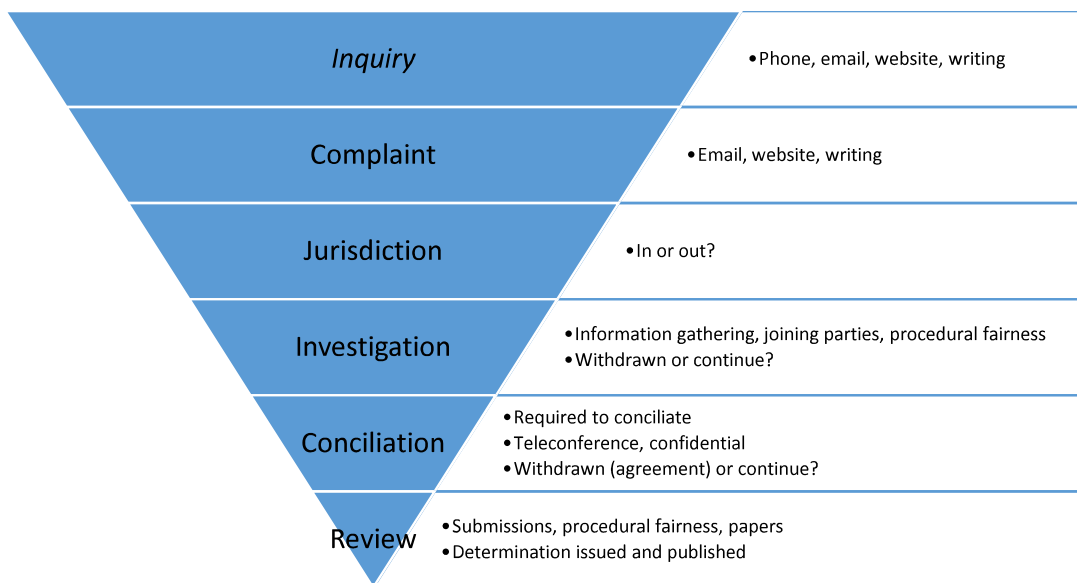


Figure 1: Complaint Process at the Superannuation Complaints Tribunal

The Tribunal deals with complaints relating to decisions and conduct of trustees, insurers and other decision-makers in relation to regulated superannuation funds, approved deposit funds, annuities, life policy funds and retirement savings accounts.

These include:

- **Trustees of a regulated superannuation fund** (other than a self-managed superannuation fund (SMSF)) and approved deposit funds (ADF). Including the decisions and conduct of people acting on behalf of the trustee and the

decisions or conduct of insurers in relation to insurance benefits provided under superannuation funds.

- **Life companies as providers of immediate and deferred annuities** (annuity policies). Including the decisions and conduct of people acting on behalf of the life company.
- **Providers of retirement savings accounts (RSA provider)**. Including the decisions and conduct of people acting on behalf of the RSA provider and the decisions of insurers in relation to insurance benefits where the premiums are paid from the RSA.

During 2015-16 the SRC Act was amended to provide for the external review of decisions in relation to benefits payable to those covered under the *Australian Defence Force Cover Act 2015*.

A complaint can be made to the Tribunal that a decision or conduct was unfair or unreasonable in its practical outcome or consequence. The Tribunal's jurisdiction is not limited by dollar considerations and its powers are only limited to the extent of providing a remedy of the demonstrated adverse impact of a decision or conduct.

Under the SRC Act, the functions of the Tribunal are to inquire (investigate) into a complaint and to try to resolve the complaint by conciliation. Only if the complaint cannot be resolved by conciliation does the complaint progress to review for determination.

The vast majority of complaints are resolved 'within the office' and only a small portion progress to a review meeting for determination. In 2015-16 of the complaints within the SCT's jurisdiction that were resolved 87% were resolved during investigation or conciliation and 13% by determination.

The Tribunal is based in Melbourne and conciliation is conducted via teleconference and reviews are held on the papers. Determinations are published.

The Tribunal has the power to join other parties to a complaint. This is critical for the robust consideration and resolution of many superannuation related complaints:

- Trustees provide insured benefits through group policies held with an insurer. The SCT joins insurers as a party to the complaint, effectively allowing for the decisions of both the trustee and insurer, to be considered as a single complaint. This enables the efficient handling of these complaints and a coherency of outcome between all the parties. This includes the joining of multiple insurers to a complaint where there is dispute as to which insurer is on risk for the complainant's claim.
- The most common area of complaint is the exercise of a trustee discretion regarding the distribution of death benefits. The complaint is lodged by someone who has an interest in the benefit. The complainant is **not** the consumer with the relationship with the superannuation provider.
- Further the complaint has the potential to impact on numerous parties (other potential beneficiaries) in addition to the superannuation fund. Whilst the complaint is about a trustee decision the dispute is between the potential

beneficiaries. The SCT has the capacity to join the potential beneficiaries to the complaint. This supports an efficient and coherent outcome for the resolution of disputed death benefit distributions.

The life cycle of a complaint is set out **Figure 2**:

LIFECYCLE OF A COMPLAINT

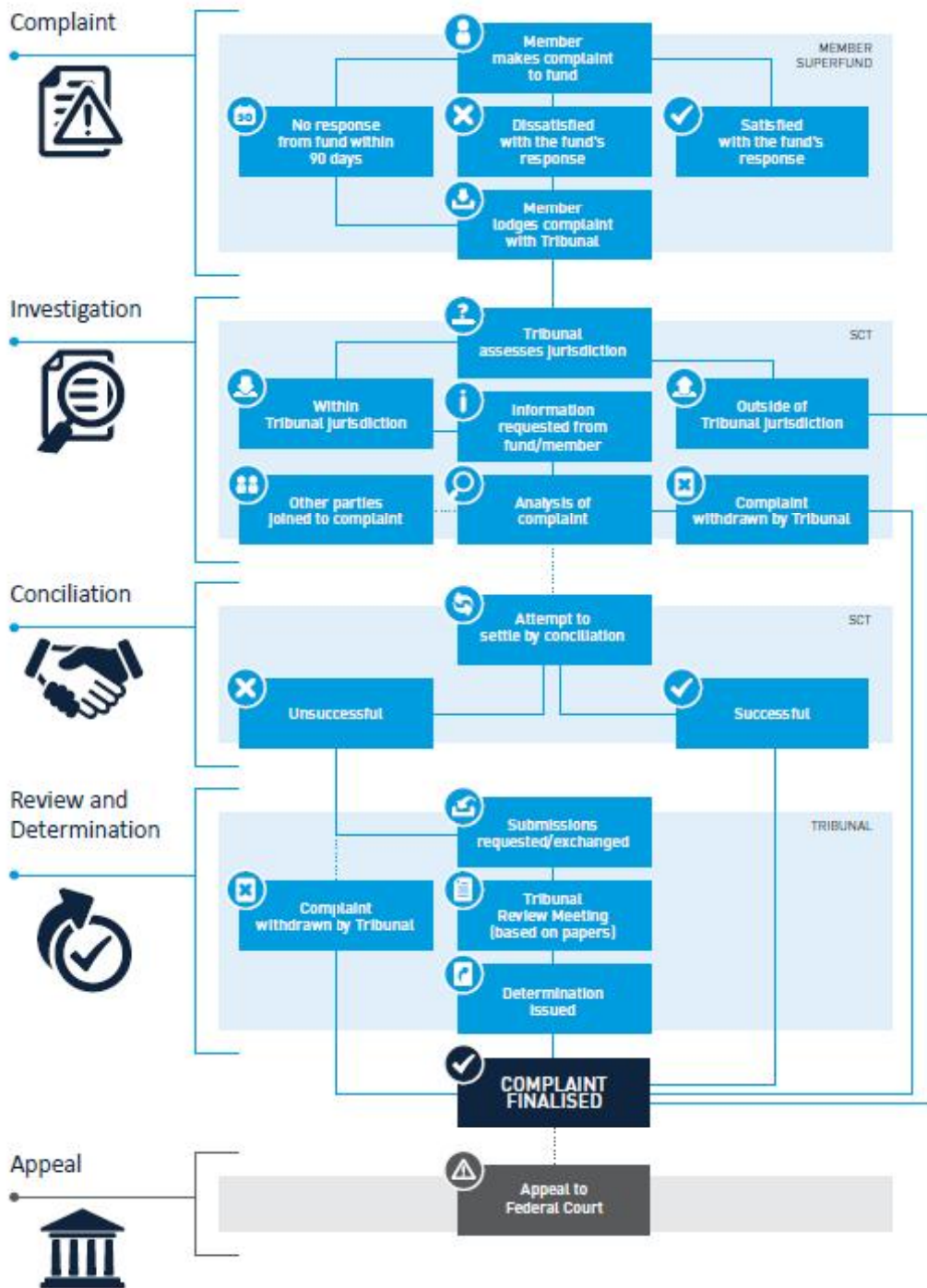


Figure 2: Lifecycle of a complaint

SCT Defining Characteristics

The SCT has a set of defining characteristics that are distinct from other financial service EDR schemes in Australia and afford a higher level of consumer protection in relation to superannuation. These include:

- Part of the Federal executive branch of government and therefore subject to administrative law
- Statutory authority
- Australian Government Agency

These defining characteristics give rise to the following grounds for review of complaints that are again distinct from the other existing EDR (industry) schemes:

Judicial Review:

- *Administrative Decisions (Judicial Review) Act 1977*, - review of decisions, conduct, failure to make a decision
- Section 46 *Superannuation (Resolution of Complaints) Act* - appeals against a determination

The level of judicial review is vital given that the Tribunal is not bound by dollar limits. Importantly, through the judicial review process, clear precedent for industry practice is established.

It is evident, that the obligation of the SCT to comply with the law and the right of appeal to the Federal Court, imposes a greater level of discipline on the SCT in its decision-making.

The SCT is required to report to either ASIC and/or APRA any failure to comply with a determination (s 65). There have only been 5 instances in the history of the Tribunal where the Tribunal has become aware that a party has refused, or failed to give effect to a determination.

Directly contributing to strict adherence to Tribunal determinations are the unique factors of: judicial review of Tribunal decisions, SCT's reporting obligations to APRA and ASIC, and APRA's ability to enforce failure to comply with a determination as an offence.

In addition to judicial review, the operations of the SCT as an Australian Government Agency are subject to further review and transparency through:

- Commonwealth Ombudsman - investigates complaints about Australian Government Agencies
- *Freedom of Information Act 1982*, legally enforceable rights to access government documents - applies to most Government agencies including SCT.

The SCT is required to report individual instances of a contravention of any law or of the governing rules of a fund, or breach of terms and conditions of a policy that may have occurred to either ASIC and/or APRA (s 64 and s 64A).

Tribunal members and staff working at the Tribunal are bound by secrecy provisions in the SRC Act (s 63).

A comparison of the SCT and Financial Ombudsman Service is provided in Appendix 1. This comparison is a useful exercise as it highlights the unique differences of the SCT complaints scheme and the level of consumer protection offered by a statutory body.

7. Complaints Volumes

The Tribunal's workload is driven by the number and types of complaints received, and the willingness of the parties to resolve their complaints by conciliation, rather than proceeding to review for determination.

Since 2004-05, the number of complaints received by the Tribunal has increased by around 41 per cent, growing from 1907 complaints in 2004-05 to 2688 complaints in 2014-15, equating to an annual growth rate averaging around 3.7 per cent. Complaints are forecast to continue to rise into the future.

	2010	2011	2012	2013	2014	2015	2016
Complaints Received	2,481	2,459	2,619	2,444	2,493	2,688	2,368
Written Enquiry							326
Total Received	2,481	2,459	2,619	2,444	2,493	2,688	2,694

In 2016 the Tribunal reclassified 326 complaints as written enquiries, to better service consumers and assist with a more efficient allocation of Tribunal resources. An enquiries process was established following analysis of out-of-jurisdiction complaints and in-coming correspondence across all channels.

In addition to increasing complaint volumes the Tribunal has experienced a material increase in enquiries.

	2012	2013	2014	2015	2016
Phone Enquiries	13,901	11,441	12,249	11,493	15,910
Email enquiry	n/a	n/a	6,004	7,310	7,724

It is anticipated that as consumers become more engaged with the superannuation industry, more consumers enter retirement and there is greater awareness of issues around life insurance through pooled insurance arrangements, the demand for the services of the SCT will continue to increase. As the industry evolves to provide drawdown products for retiring consumers it is expected that there will be a marked increase in consumer engagement with superannuation and a corresponding increase in complaints.

8. Complaints Natures

As the SCT considers complaints related to a decision of a trustee, the nature of complaints is varied. The Tribunal currently recognises 48 types of complaints which fit into three broad complaint categories:

- Those relating to administration;
- Disability benefits; and
- Death benefits.

Generally, the trustee decision being considered in the complaint involves the exercise of a trustee discretion e.g. who receives a death benefit distribution. Some trustee decisions are non-discretionary e.g. a complaint about a death benefit distribution involving consideration of the validity of a binding death benefit nomination.

The nature of complaints received by the Tribunal together with the multiple parties to a complaint means that the number of submissions considered by the Tribunal when resolving a single complaint, reflects the volume of submissions that would otherwise be associated with multiple complaints.

In the case of death benefit distributions, the Tribunal must not only consider if the trustee decision was fair and reasonable in the circumstances of the complainant, but also if it was fair and reasonable in the circumstances of other persons joined to the complaint and other persons with an interest in the death benefit.

Examples of complaints to the SCT

- A belief that a death benefit was paid or may be paid to the wrong person or people
- An unreasonable delay in a payment
- A miscalculation of a benefit, payment, or commutation
- A refusal to approve a claim for a disability benefit
- A refusal to provide insurance cover
- Increases in insurance premiums
- Misrepresentation about the terms and conditions of a life or annuity policy
- A refusal to release benefits on grounds of financial hardship
- Errors in processing investment switches
- Errors in annual statements
- Errors in information provided by a superannuation provider to the ATO for the purposes of the superannuation surcharge, member contributions statements or increased contributions tax on high income earners
- A superannuation provider's conduct in administering the splitting of a superannuation payment between spouses in accordance with a binding agreement or Family Court Order under the family law legislation.

Examples of enquiries to the SCT

In 2015-16 the Tribunal introduced fact sheets to inform consumers about the most common enquiries received by the Tribunal. These include:

- Financial Hardship
- Leaving Australia
- Employer not paying Superannuation Guarantee

Trends in complaint natures over time

The majority of complaints received by the SCT relate to the distribution of death benefits. At around 20% of all complaints received, death benefit distribution is the largest type of complaint received. This is reflective of the nature of death benefit distributions: money is able to be released from superannuation and personal disagreement reflecting beliefs of entitlement to the money, as distinct from eligibility for the benefit consistent with superannuation law.

Complaints relating to insurance is the largest group of complaint types and has increased dramatically over recent years. Insurance related complaints (claims, cover, premiums) now account for over one third of complaints received by the SCT. This is driven by external factors at play in the superannuation industry with increasing numbers of consumers aware of group life insurance arrangements offered through their superannuation accounts.

This is an example of the benefit that the SCT is able to provide to policy makers and to the superannuation industry – because complaints provide a forewarning of trends playing out in the superannuation industry.

As an industry that it is relatively new in financial services, this information is crucial to inform good policy deliberations and decisions.

The table below outlines as a proportion of total complaints received the 'top 10' complaint types over time⁹.

⁹ If a complaint type is in the top 10 for one year it has been included in the table across all years

% of total Complaints	2012	2013	2014	2015	2016
Account Balance	9%	5%	6%	5%	5%
Administration	7%	n/a	n/a	n/a	n/a
Administration - errors	5%	2%	2%	2%	2%
Death Benefit Distribution	21%	21%	18%	17%	22%
Deduction of insurance premiums	4%	7%	6%	10%	9%
Delay - Transfer of benefit	5%	4%	5%	4%	3%
Delay - Payment of benefit	3%	2%	2%	1%	1%
Disclosure of information	3%	3%	2%	3%	3%
Failure to provide information	2%	3%	4%	2%	2%
Fees and Charges	3%	4%	4%	5%	4%
Insurance cover in dispute (not subject to a claim)	2%	2%	2%	3%	3%
Financial hardship claims	2%	3%	3%	3%	3%
TPD - Declined on medical evidence	3%	3%	4%	5%	4%
TPD - Delay in decision	2%	3%	4%	3%	4%
TTD - Benefit amount in dispute	2%	2%	3%	3%	4%

A selection of case studies of complaints provides a relevant overview of the nature and complexity of complaints received by the SCT. The unique application of the Tribunal's power to bind parties together is evident in these decisions.

CASE STUDY 1

KEY ISSUES: 10 ADULT CHILDREN FIGHTING OVER BENEFIT, MULTIPLE COMPLAINTS

DETERMINATION NO: D10-11\086

AMOUNT IN DISPUTE: approximately \$587,000

BACKGROUND: The Deceased Member died at age 62. She had made a non-binding nomination to her husband however he died 1 month after her. The Trustee and the Tribunal were faced with 10 adult children between the ages of 29 and 59 fighting over the death benefit. 7 were biological, 3 step children-. They lived in 4 different countries. 6 complaints were lodged-1 by a step child and 5 by the biological children.

The Trustee's decision was to pay 25% to Joined Party 1 (daughter suffering from a disability) and the remainder equally between the remaining biological children (12.5% each).

The step child sought an equal distribution between all 10 children and stated the benefit should have been paid whilst her father was still alive. The biological children each sought different resolutions. They were not united. They proposed various different distributions. A number of the biological children sought to exclude one of their siblings – Joined Party 3. Another resolution sought was that

the disabled daughter should not receive a greater share because she was educated and, despite her disability, had a reasonable earning capacity. One of the parties sought distribution to the LPR.

There was deep distrust between the biological children that led to confidentiality requests.

DETERMINATION: The Tribunal set aside the trustee's decision and substituted it with a decision to pay 17.5% to Joined Party 1 (daughter with a disability) and 17.5% to Complainant 5 (daughter living with /caring for deceased member) with the remainder divided equally between the remaining biological children (each receiving 13% each).

The Tribunal determined not to pay any portion to the step children. They were well into their teen years when the deceased member married their father, they weren't dependant on her for very long and weren't dependant at the date of death.

CASE STUDY 2

KEY ISSUES: HIGH AMOUNT IN DISPUTE, BLENDED FAMILIES, PARTIES OTHER THAN THE POLICY HOLDER, DEATH BENEFIT

DETERMINATION NO: D15-16\077

AMOUNT IN DISPUTE: \$2 million

BACKGROUND: The Deceased tragically suicided and was survived by four children - 2 teenagers from his first marriage and 2 minor children under 10 from a recent de facto relationship. The Trustee decision was to pay 10% to each teenager and 80% to the mother of the two minor children. The Deceased's ex-wife and mother of the teenage children lodged a complaint arguing that the teenagers had greater financial needs than ordinary teenagers due to medical conditions.

DETERMINATION: The Tribunal altered the distribution to award 15% to the eldest teenager, 25% to the second eldest teenager and 60% to the two minor children. The Tribunal recognised that the teenage children had greater needs than provided for in the Trustees decision; one of the teenage children had psychiatric conditions before the death of the member and required a high level of support and the other teenager had developed psychiatric conditions as a result of the members passing. It is important for a Trustee to take into consideration all the surrounding circumstances, not the just the age of beneficiaries in distributing benefits.

CASE STUDY 3

KEY ISSUES: DISCLOSURE OF SUM INSURED, TRUSTEE OBLIGATION IN ADMINISTERING ACCOUNTS AND PROVIDING ACCURATE INFORMATION TO MEMBERS

DETERMINATION NO: D14-15\083

AMOUNT IN DISPUTE: \$140,000

BACKGROUND: The Complainant was a boilermaker. When he joined the Fund he completed an application form. The form contained 3 questions about his occupation. Amongst other things, he stated he was a boilermaker and that his duties were not of a professional nature. Based on his responses in the application form the Trustee concluded that he was a 'non-manual' worker and displayed the 'non manual' sum insured on his annual statements. The Complainant became TPD and the Insurer paid the 'manual' sum insured. The difference between the 'manual' and 'non-manual' sum insured was \$140,000. The Trustee argued that the information displayed on the annual statements was reasonable as it was based on the Complainant's incorrect responses to the application form.

DETERMINATION: The Tribunal was satisfied that the Insurer was only liable for the manual sum insured, however directed the Trustee to compensate the Complainant for the difference in the amounts. It should have been apparent to the Trustee that the Complainant's answers did not match with the occupation of boiler marker and the Trustee, being responsible for the administration of the policy, had a duty to seek clarification from the Complainant.

CASE STUDY 4

KEY ISSUES: TRUSTEES FIDUCIARY DUTY TO PURSUE CLAIMS, TPD DELAY, CLAIM FOR INTEREST

DETERMINATION NO: D15-16\124

AMOUNT IN DISPUTE: The complainant claimed \$22,000 however the award of the Tribunal was less than that.

BACKGROUND: The Complainant's wife had terminal ovarian cancer and lodged a claim for an insured terminal illness benefit with the fund. The Complainant's wife died 19 days after lodging the claim. The amount of the terminal illness benefit was \$525,000. The Insurer having been notified by the Trustee that the Complainant's wife had died, paid the death benefit sum insured (\$375,000) rather than the TI sum insured (\$525,000). The Complainant objected and the insurer subsequently paid the remaining \$150,000.

The Complainant sought interest on the delayed payment. The Insurer admitted that the entire \$525,000 should have been paid in the first instance and acknowledged that interest pursuant to the ICA should be applied between the two dates.

DETERMINATION: The Tribunal noted the SIS covenants require a Trustee to 'pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success'. The Trustee is not a mere conduit between the

member and the insurer, instead they are responsible for providing important benefits to members and their beneficiaries. The Trustee should have pursued a claim for interest when the additional sum was paid by the Insurer, or at least at any other time during the two year complaints process. The Tribunal directed the Trustee to pay interest.

CASE STUDY 5

KEY ISSUES: LATE ELECTION, THE IMPORTANCE OF BALANCING THE INTEREST OF THE WHOLE MEMBERSHIP AGAINST THE INDIVIDUAL MEMBER, SUPER A VALUABLE ASSET

DETERMINATION NO: D14-15\124

AMOUNT IN DISPUTE: Not estimated.

BACKGROUND: The Complainant was retrenched at or around the same time that her employer-sponsored defined benefit fund merged with another fund. She had a certain period to elect whether to take a defined benefit pension. If she didn't make an election she would be transferred to the Retained Category, essentially forgoing a lifelong pension.

The Trustee sent various pieces of communication to the Complainant about her options, initially providing a period of 90 days to make the election and then an extension of 60 days. The Complainant sought to make an election 56 days after the window closed when she discovered her benefit had been transferred to the Retained Category. The Trustee did not allow the late election.

The Trustee informed the Tribunal that the administrator needed to set a time limit because it was not appropriate for members who have ceased employment to have funds in the DB reserve and efficient management of the fund reduces costs which is in the best interest of all members.

DETERMINATION: The Tribunal allowed the late election. The Trustee sent information to the Complainant that was complex, confusing and less than fully transparent, with the exception of one piece of correspondence which the Complainant claimed not to have received.

On reducing costs to the entire membership base by setting time limits for the efficient management of the fund the Tribunal recognised that in meeting its obligation to act in the best interest of the beneficiaries, the Trustee is sometimes required to balance the interests of the beneficiaries more generally with the interest of a particular beneficiary – however acting in the best interest of the general membership should not always take priority over acting in the best interest of an individual beneficiary.

CASE STUDY 6

KEY ISSUES: FIDUCIARY RELATIONSHIP HIGHLIGHTED, INCORRECT ACCOUNT BALANCE**DETERMINATION NO:** D14-15\208**AMOUNT IN DISPUTE:** \$13,000

BACKGROUND: The Complainant had an account-based pension with the Fund. Due to an administrative error an additional day of investment earnings was applied to 9 investment switches completed by the Complainant between 2008 and 2010. This inflated the Complainant's account balance. The Trustee became aware of the error in 2010. 3 years later they notified the Complainant of the error and corrected it by deducting \$13,000 from his account. The annual statements until this date reflected an incorrect account balance. The Complainant's wife was on a partial disability pension and he was approaching retirement (he retired in 2014). Had the Complainant known the true account balance he would have been more frugal and thought twice about discretionary spending (holidays/car).

DETERMINATION: The Tribunal concluded that the Trustee had engaged in 'circumstantial silence' and that its obligations to its members to disclose the error as soon as it was aware was high due to the fiduciary relationship.

The Trustee was ordered to return the \$13,000 to the complainant's account as he had been able to demonstrate discretionary spending in excess of \$13,000, which he arguably wouldn't have made had he been aware of the error.

9. Governance and Transparency

It is the strong view of the SCT that the Review needs to be cognisant of the SRC Act and the fact that there are existing governance issues with the current legislated structure of the SCT that need to be rectified (and/or considered in possible changes to the current EDR structure).

The rectification of these issues would deliver greater governance and better transparency, supporting more efficient complaint resolution.

The current structure of the SCT has not kept pace with modern governance arrangements. At the most basic, the SCT as a statutory body has split functions between the role of the Chairperson as the 'head' of the Tribunal and the day-to-day business management of the Tribunal (staffing, resourcing, financial delegation etc.) that ASIC is responsible for, but which would normally fall to a Chief Executive Officer (CEO).

This raises significant issues for the appropriate management of the SCT on a daily 'business as usual' basis but also in the strategic resource management of the Tribunal – where the primary consideration needs to be in more efficient administration of the case load and appropriate IT and human resources to provide quicker resolution of complaints.

We submit that these issues can be rectified (for example, by providing the SCT with an operational autonomy so that it could assume business management functions in its own right and by recognising the dual role of the Chairperson as CEO and Tribunal Chair).

The establishment of a Board for the SCT under the Act would also strengthen the governance of the SCT and ensure that suitably qualified Directors with appropriate skills and experience can contribute to the operational autonomy of the organisation.

The challenges presented by the current structure should not be used as the basis to dismantle the Tribunal in the name of broader efficiency.

Consideration should instead be given to ensuring that consumer protection is paramount and moving away from a statutory body to consider superannuation complaints is in effect a weakening of the current consumer protection offered by the SCT.

From a practical perspective the impact of the current governance arrangements of the SCT directly impact the efficiency of the organisation. This is because:

- It is difficult to run the business when the Chairperson is technically not the CEO and has no financial delegation under the *Public Governance, Performance and Accountability Act 2013* ability to make and implement unilateral decisions on staffing/does not manage own budget

- The term 'Tribunal' (as a statutory body) is not defined in the legislation, other than in the context of constituting the Tribunal (as a review panel) for the review and determination of a particular complaint.¹⁰
- There is no provision for the Chairperson to delegate certain functions, such as the constitution of the Tribunal, so continuity of certain operational activities is reliant on the availability of one person.
- In reality less than 10% of complaints received by the SCT are resolved by the establishment of the Tribunal as a review panel. The vast majority are resolved during assessment of jurisdiction, investigation or conciliation. In 2015-16 of the 2,252 complaints finalised, 173 were finalised by determination (in 2014-15 2,903 and 286).
- The SCT has proactively recognised the valuable governance role afforded by a Board of Directors. This is reflected in the voluntary establishment of an Advisory Council. The formal recognition in legislation of the governance and oversight afforded by a Board of Directors would deliver significant benefits to the strategic direction of the SCT and oversight of operational activities, particularly in the context of an evolving and dynamic superannuation industry.

A review of the SRC Act and subsequent changes to the legislation is needed to modernise governance arrangements of the SCT and provide the SCT with:

- Operational autonomy recognising full scope of end to end dispute resolution and related activities;
- Establish a Board of Directors;
- Transparency of funding;
- Alignment of management responsibility for outcomes and resources; and
- Management ability to delegate certain functions.

For key stakeholders including Government, Consumers and Regulators legislation changes as outlined above will ensure that that the SCT will also deliver the appropriate 'voice' on policy issues, trends in superannuation complaints and a 'business as usual' approach to aligning operational requirements with resourcing.

Tribunal Members

The SRC Act sets out the constitution of the Tribunal including the appointment of members. In addition to a full time Chairperson and Deputy Chairperson there are currently 13 Part Time Members: 4 new appointments, 2 reappointments, 7 terms extended (to Jan 17).

The number of cases that part time members are able to consider and make a determination on typically ranges from 1 to 4 per month per member, depending on member availability and nature of complaints requiring review.

Part time Tribunal members are paid a daily sitting fee set by the Remuneration Tribunal.

¹⁰ SRC Act, ss 6 and 7

The SRC Act does not currently provide for the appointment of members on a full time basis or appointment for several days a week (other than the Chairperson and Deputy Chairperson). In practice, the Tribunal's obligation to conciliate complaints is performed by appropriately qualified staff, rather than by Tribunal members. With the rise in complaint volumes and complexity, the current 'sessional' nature of part time members limits the Tribunal's ability to efficiently resolve complaints requiring review on a timely basis.

The additional funding provided in the 2016/17 Budget together with anticipated appointments of additional part time members will significantly increase the resourcing to enable the SCT to work through the current backlog of complaints. However, we would note that the additional funding is temporary in nature only.

A consideration that has been given regarding the SCT is to the appointment of full-time or permanent part-time Tribunal members. This would provide a range of advantages to complement the current structure of the Tribunal member panel. The significant primary advantages include:

- Provide a significantly greater level of consistency across the determination process;
- Improved efficiency delivered by having cases reviewed more quickly and with less time between determinations;
- Cross pollination of knowledge between SCT secretariat staff and Tribunal members by being co-located;
- More effective use of specialist technical skills on the part time member panel; and
- Support continuity of knowledge and mentoring of new members during periods where terms expire and new appointments are made.

10. Resourcing and Funding

The annual operating expenditure of the SCT is cost recovered from the Australian Prudential Regulation Authority (APRA) regulated superannuation industry via the annual financial sector levies administered by APRA. In accordance with section 62(2) of the *Superannuation (Resolution of Complaints) Act 1993* (SRC Act) ASIC, on behalf of the Tribunal, manages the Tribunal’s finances within the designated appropriation, consistent with the *Public Governance and Accountability Act 2013*.

The effective operation of the SCT has been challenged since inception due to chronic under financial resourcing of the Tribunal in comparison to the demand for Tribunal services from consumers. Essentially, this directly relates to the lack of dollar funding to enable the SCT to resolve complaints in a timely fashion. The pressure on resolution of existing complaints, together with the governance constraints set out earlier in this submission has combined to limit the SCT’s ability to invest in improvements for the resolution of future complaints and improved consumer engagement services.

Figure 3 below, clearly highlights the year on year effect of the increase in open complaints, in effect more complaints are received in a year than are resolved in a year. Where additional funding has been provided to address the ‘backlog’ (as in 2013-2014) there is a clear correlation in an increase of complaints finalised.

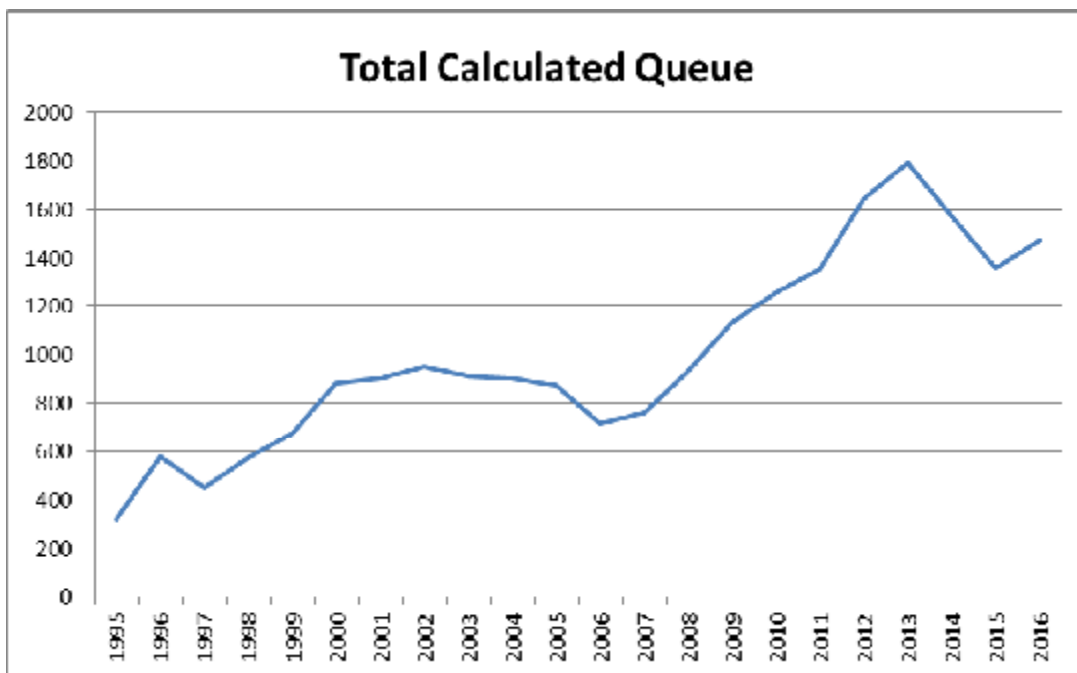


Figure 3: Number of open complaints by Year at the Superannuation Complaints Tribunal

The direct impact of under resourcing is translated to the time it takes to resolve complaints.

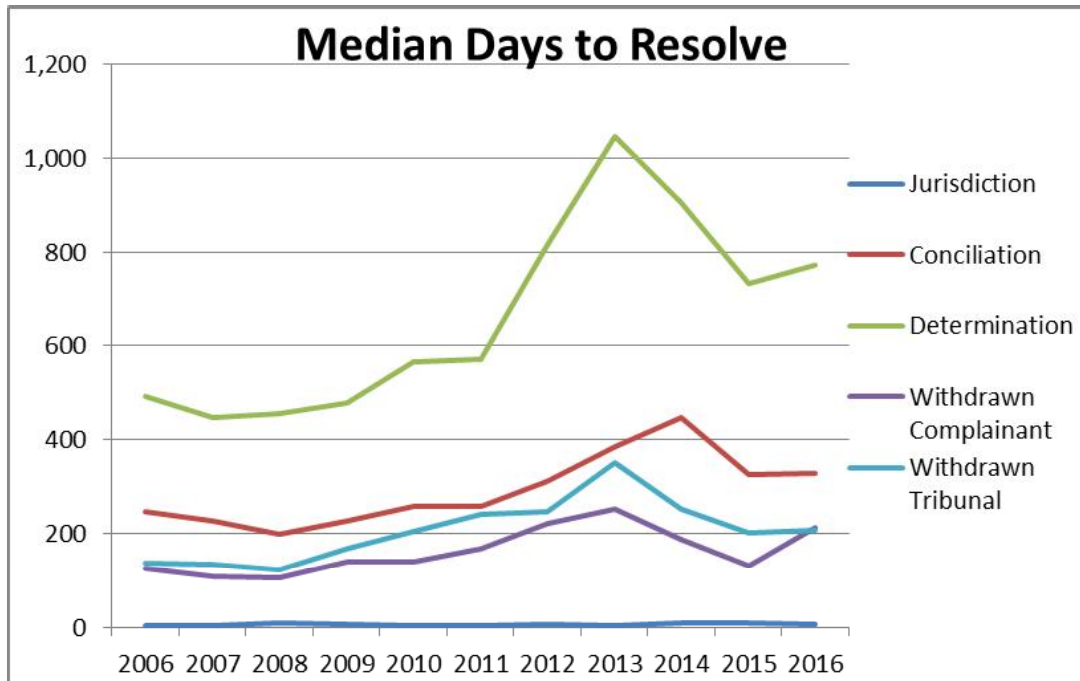


Figure 4: Median number of days taken to resolve a complaint at the Superannuation Complaints Tribunal.

It is important to note, that whilst the time taken to consider complaints is an issue – the quality of the work and outcomes for consumers delivered by the SCT is well regarded within the superannuation industry and by consumers.

Efficiencies have been driven by the SCT in the past financial year, within the existing funding appropriation that has resulted in an increase in the number of complaints finalised per person for the year to 70.4 compared with an average for the prior 5 years of 60.4 complaints.

At the 30 June 2016 the SCT had 1536 open complaints: 704 received in 2016, 627 received in 2015, 184 received in 2013 and 21 in 2013 or earlier.

Recent Budget allocations for the SCT are:

2014: \$6.6million
 2015: \$5.9million
 2016: \$5.2million

Recent staffing levels for the SCT (including Chairperson and Deputy Chairperson) are:

2014: 45 staff (43 full time, 2-part time)
 2015: 39 staff (35 full time, 4-part time)
 2016: 32 staff (26 full time, 6-part time)

The costs for the Tribunal are relatively stable (although significant efficiencies have been driven by the SCT in the last 12 months to reduce expenditure). Costs essentially relate to: People 82%; ASIC 14%; External Expenses 4%. ASIC provide all administrative resourcing for the SCT including staff employment, payment of bills, IT support, tenancy.

As outlined previously there is an urgent need for improved governance, transparency of funding and autonomy of operations of the Tribunal – achieved through changes to the current legislation to better align the role and responsibility of the Tribunal Chairperson to the activities and day-to-day management of the Tribunal.

Similarly, under the current arrangements i.e. ASIC has statutory responsibilities under subsection 62(2) of the SRC Act to provide the SCT with staff and facilities, ASIC also manages the SCT's finances within the designated appropriation.

Under this arrangement there is insufficient transparency of the funding model. Government makes an annual appropriation for the SCT but the funding is allocated to ASIC who then provide resourcing to the SCT.

There is no oversight by the SCT on the funding from consolidated revenue allocated to it but provided to ASIC. This results in the Chairperson of the SCT having a subordinate role on expenditure and the inability to allocate financial resources with clear and effective oversight.

From the perspective of the superannuation industry (which funds the SCT through the annual financial sector levies) there is no transparency on value for money of the SCT in terms of timeliness and efficiency for the levies collected from them.

Industry has clearly articulated that it is prepared to increase the level of funding it provides to the SCT to resource the Tribunal appropriately in order to reduce the time a complaint takes to being finalised. However, there is no transparency over how much of the levy is collected for the SCT or is actually provided to ASIC for the SCT each financial year.

This is an unwanted consequence of the current legislation and one that needs to be rectified.

11. Conclusion

The SCT considers that it is appropriate for the Review to consider that it is in the best interest of consumers that the superannuation dispute resolution body is statutory in nature because it provides greater protection for consumer dispute outcomes than that currently afforded by industry EDR schemes.

The current framework for superannuation complaints provides sound and reliable outcomes for consumers. There is real strength in the statutory authority model and the inherent link with the regulators ASIC and APRA that this structure provides through the reporting and disclosure requirements.

Where operational challenges currently exist, these relate to improved efficiency of the governance operations of the Tribunal and the need for greater transparency in relation to the allocation of funding to the Tribunal and increased funding.

Significant efficiencies can further be driven in the operation of the SCT through amendments to the SRC Act.

The Review should be cognisant of the following key points for the external resolution of superannuation complaints:

- Maintain statutory strength.
- Maintain no dollar limit jurisdiction.
- Maintain fair and reasonable review 'test' and remedy.
- Governance: modernise SRC Act to provide SCT operational autonomy, align outcomes and resources, recognise management role, improve flexibility and efficiency.
- Funding: provide clarity, industry willing to fund, increase amount.
- Effectiveness: end to end responsibility and control, from initial consumer contact to complaint resolution.

Appendix 1: A comparison of the SCT and the Financial Ombudsman

This comparison highlights the unique differences of the SCT complaints scheme and the level of consumer protection offered by a Statutory Body.

	SCT	FOS
Jurisdiction		
Amount under dispute	No limit	From 1 Jan 15 - \$500k max (see also limits to remedies)
Time limits	<p>Arguably much more generous time frames</p> <p>Complaints (other than death and disability) – no time limits</p> <p>Death and disability complaints – time limits apply</p>	For all complaints – 2 years from receipt of an IDR decision (if there is one) and 6 years from the date the applicant becomes aware (or should have been aware) they suffered the loss
Complaint about	<p>Decision involving exercise of Trustee discretion if unfair or unreasonable</p> <p>Decision not involving exercise of Trustee discretion if contrary to law</p>	Exercise of Trustee discretion only to extent: acted in bad faith; failed to give fair and proper consideration; or failed to exercise the discretion in accordance with the purpose for which it was conferred.
Excluded	Complaint about management of fund as a whole	Dispute about the level of a fee, premium, charge or interest rate
Providers	Trustees, insurers, and other decision-makers in relation to regulated superannuation funds, approved deposit funds, annuities, life policy funds, retirement savings accounts and certain public sector superannuation funds.	Complaints relating to Financial Service Providers (FSP) who are members of FOS
IDR	s101 SIS Act requires funds to establish arrangements for dealing with complaints. SCT can only deal with complaints previously attempted to resolve through IDR, s19 SRC Act	FOS generally gives FSP opportunity to resolve
Basis of decision making	Decision under review in its operation was fair and	Decides on what is fair in all the circumstances

	SCT	FOS
	<p>reasonable in relation to the complainant in all the circumstances</p> <p>Must affirm a decision considered fair and reasonable</p>	<p>No equivalent requirement</p>
Remedies		
Compensation cap	<p>No limit on compensation if required to place the complainant in the same position as if no unfairness or unreasonableness (or both) exists</p>	<p>Limit on compensation. From 1 Jan 15 \$309k for all complaints except claims about general ins broking, income stream life ins, uninsured motor vehicle.</p> <p>Can compensate for non-financial loss in certain circumstances</p>
Enforcement of determinations	<p>A trustee or insurer decision is essential varied or substituted immediately upon the determination: s41</p> <p>If a decision maker fails to comply with a determination the Tribunal must refer the matter to ASIC and/or APRA: s65.</p> <p>Operating standard under SIS Reg 13.17B that trustees comply with SCT determinations. APRA can enforce failure as an offence.</p> <p>Statutory Authority and rights to appeal support determination adherence and provide guidance to industry through establishing precedent.</p> <p>Historically the Tribunal has reported 5 occasions of non-compliance with a determination since inception. Including 1 since</p>	<p>Binding on FSP through membership of FOS, FOS can expel member.</p> <p>Compliance with determinations is enforceable indirectly, ultimately through ASIC taking action against the provider's licence</p> <p>From FOS May 2016 Circular:</p> <p>Since 1 January 2010:</p> <ul style="list-style-type: none"> • 32 FSPs have been unwilling or unable to comply with 137 FOS determinations made in favour of approximately 194 consumers. • The value of the outstanding amounts awarded by these determinations was \$12,611,859.05 plus interest as at 31 March 2016. • Inclusive of the interest awarded by the decision-maker and

SUPERANNUATION COMPLAINTS TRIBUNAL

	SCT	FOS
	2010, result was adherence to determination.	adjusted for inflation over time on a simplified per annum basis, the real value of this uncompensated loss is \$16,625,930.56.
Parties		
Individuals who are not the holder of the financial product	Death benefit distribution	Party can have legal interest or beneficial interest (FOS deals with complaints about trustees)
Representative	Tribunal must approve	Complainant can appoint, FOS can decline
Join other parties	<p>Tribunal has power to join other parties to a complaint.</p> <p>Complaints involving Trustee decision and insurer decision can be handled as one complaint.</p> <p>Death benefit distribution complaints can have many joined parties.</p>	
Complaint Handling Process		
Power to investigate and gather information	S25 and 27 SRC Act	Request information
Conciliation	Must conciliate, Part 5 SRC Act	May use negotiation, conciliation, mediation or deciding – recommendation prior to determination
Determination/Award	Part 6 on papers Binding on Trustee, insurer, through SRC Act	Can use interview Applicant must accept with binding release
Rule of Evidence	Not bound by rules of evidence	Not bound by rules of evidence
Confidentiality	Secrecy provisions, s 63 SRC Act, strict liability offence	Confidentiality except to extent reasonably necessary to carry out responsibilities
Ability to withdraw/exclude complaints	<p>Complaints can be withdrawn under s22.</p> <p>The Tribunal is beneficial legislation and only summarily dismiss in the</p>	Clause 5.2 of the FOS TOR list the circumstances in which a dispute may be excluded. FOS arguably has broader powers to 'exclude' complaints.

SUPERANNUATION COMPLAINTS TRIBUNAL

	SCT	FOS
	clearest of cases.	Can take into consideration conduct of applicant FSP can request FOS consider withdrawing complaint
Costing/Funding/Structure		
Free for complainants	yes	yes
Funding	Funding provided by industry through APRA levy	Funding is through member fees including dispute handling fees
Instrument that creates the entity and gives it powers	Statutory Authority – SRC Act Federal Government Agency	Company with constitution EDR Scheme approved by ASIC Operations governed by the FOS Terms of Reference
Flexibility	Legislative change	Board may amend Terms of Reference following consultation with ASIC, the Members and other stakeholders
People	Governor-General appoints Chairperson, Deputy Chairperson Minister appoints Tribunal Members ASIC employs staff approx. 30	Directors appoint Directors Directors appoint Ombudsmen FOS employs staff approx. 362 (2015 annual report)
Restrictions on operations and remedies		
Regulatory powers	no	no
Disciplinary powers	no	no
Power to award costs	no	In some circumstances

	SCT	FOS
Appeals/Complaints/Oversight		
Judicial	<p>Owing to the provisions in Part 7 of the SRC Act and because the SCT is part of the executive branch of government there are extensive appeal rights for parties.</p> <p>Appeals against outside jurisdiction and withdrawal decisions can be made to the Federal Court under:</p> <ul style="list-style-type: none"> • ADJR Act • Judiciary Act <p>Appeals against Determinations can be made to the Federal Court under:</p> <ul style="list-style-type: none"> • S46 (1) SRC Act • ADJR Act • Judiciary Act <p>Under the Australian Constitution parties may also have rights to appeal to the High Court</p>	<p>FOS is an EDR scheme.</p> <p>They are approved by ASIC.</p> <p>Financial service providers 'subscribe' to their services. This relationship is contract based.</p> <p>If a FSP is dissatisfied with a FOS decision the action will be based primarily in contract. There are very few other appeals grounds. FOS determinations can be reviewed in limited circumstances in state courts.</p>
Non judicial	<p>Commonwealth Ombudsman Complainants</p> <p>Obtain information under FOI</p>	<p>Complaints about FOS are made to FOS</p> <p>no access to FOI</p>
Additional Roles		
Regulator reporting	<p>Contravention of any law, governing rules or terms and conditions in relation to a complaint that may have occurred – each instance must be reported to APRA and/or ASIC, s 64 SRC Act</p>	<p>May provide reports and recommendations to ASIC, Privacy Commissioner about a FSP</p> <p>Must report serious misconduct to ASIC</p>
Systemic Issues	<p>Report each complaint (see regulator reporting)</p>	<p>Must report to the FSP and ASIC</p>