

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

(As read a first time)

**SUPERANNUATION (RESOLUTION OF COMPLAINTS)
BILL 1992**

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1990-91-92

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

Presented and read a first time, 16 December 1992

(Minister Assisting the Treasurer)

A BILL

FOR

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

The Parliament of Australia enacts:

PART 1—PRELIMINARY

Short title

5 1. This Act may be cited as the *Superannuation (Resolution of
Complaints) Act 1992*.

Commencement

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

10 (2) If this Act does not commence under subsection (1) within the
period of 6 months beginning on the day on which this Act receives

the Royal Assent, it commences on the first day after the end of that period.

Interpretation

3.(1) In this Act, unless the contrary intention appears:

“**approved deposit fund**” means an approved deposit fund within the meaning of the *Superannuation Industry (Supervision) Act 1992* that is a superannuation entity for the purposes of that Act; 5

“**Commissioner**” means the Insurance and Superannuation Commissioner appointed under the *Insurance and Superannuation Commissioner Act 1987*, or a person for the time being acting as Insurance and Superannuation Commissioner under that Act; 10

“**complaint**” means a complaint that the trustee of a fund has made a decision in relation to the complainant, in the performance of the trustee’s functions or the exercise of the trustee’s powers in relation to the fund, that is unfair or unreasonable; 15

“**eligible complainant**”, in relation to a fund, means:

- (a) a member or former member of a superannuation fund; or
- (b) beneficiary or former beneficiary in an approved deposit fund; or
- (c) a person claiming to be, or to be entitled to benefits through, a person referred to in paragraph (a) or (b); or 20
- (d) a person acting on behalf of a person referred to in paragraph (a), (b) or (c) or on behalf of the estate of such a person who has died;

“**excluded complaint**” means: 25

- (a) a complaint about a decision of the trustee of a fund that is declared by the regulations to be a fund, or is included in a class of funds that are declared by the regulations to be funds, to which this Act does not apply; or
- (b) a complaint about a matter included in a class of matters declared by the regulations to be matters about which complaints may not be made under this Act; 30

“**Federal Court**” means the Federal Court of Australia;

“**function**” includes duty;

“**fund**” means a superannuation fund or an approved deposit fund; 35

“**superannuation fund**” means a superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1992* that is a superannuation entity for the purposes of that Act;

“**Tribunal**” means the Superannuation Complaints Tribunal established by section 4; 40

“**Tribunal Chairperson**” means the Chairperson of the Tribunal;

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

(2) A reference in this Act to the making of a decision by the trustee of a fund is a reference to:

- (a) the making of a decision by the trustee or a person acting on behalf of the trustee or the failure of the trustee or such a person to make a decision; or
- (b) the taking of any other action by the trustee or such a person or the failure of the trustee or such a person to take any other action.

PART 2—ESTABLISHMENT AND CONSTITUTION OF THE SUPERANNUATION COMPLAINTS TRIBUNAL

Establishment

4. A Superannuation Complaints Tribunal is established.

Membership

5. (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

6. (1) A person who has reached 65 years of age must not be appointed as Tribunal Chairperson, and a person must not be appointed as Tribunal Chairperson for a period that extends beyond the day on which the person will reach 65 years of age.

(2) A person who is:

- (a) a trustee of a fund; or
- (b) a director or employee:
 - (i) of a body corporate that is a trustee of a fund; or
 - (ii) of a body corporate that is related to a body corporate that is such a trustee;

is not eligible to be appointed as Tribunal Chairperson.

(3) For the purposes of subsection (2), the question whether bodies corporate are related to each other is to be determined in the same manner as that question would be determined under the Corporations Law if, in section 46 of that Law:

- (a) the reference to a body that is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of another body were a reference to a body that is in a position to cast, or

control the casting of, more than one-quarter of that number of votes; and

- (b) the reference to a body holding more than one-half of the issued share capital of another body were a reference to a body holding more than one-quarter of the issued share capital of another body. 5

(4) 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; 10

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.

(5) Two of the Tribunal members other than the Tribunal Chairperson are to be persons appointed after the Minister has consulted the Minister for Consumer Affairs about their appointment. 15

Constitution of Tribunal in relation to particular complaints

7.(1) For the purposes of the performance or exercise of its functions or powers 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. 20

(2) In selecting the other Tribunal members to constitute the Tribunal in relation to a particular complaint, the Tribunal Chairperson is to take into account their qualifications, experience and suitability having regard to the nature of that complaint. 25

(3) The Tribunal Chairperson is to preside at all meetings of the members constituting the Tribunal in relation to a particular complaint.

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

(5) If the members constituting the Tribunal in relation to a particular complaint do not agree on the determination to be made by the Tribunal, a decision of the majority is taken to be a decision of all of them. 30

Disclosure of interests

8.(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: 35

(a) a fund; or

(b) a body corporate of a kind referred to in paragraph 6(2)(b); or

(c) any other business. 40

5 (2) 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 Tribunal member must, as soon as practicable after he or she becomes aware of the relevant facts, give written notice to the Tribunal Chairperson setting out the nature of the interest.

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

10 PART 3—FUNCTIONS OF TRIBUNAL

Functions

9.(1) The functions of the Tribunal are:

- 15 (a) subject to this section, to try to resolve by conciliation any complaint (other than an excluded complaint) made to the Tribunal by an eligible complainant; and
- (b) if it is not practicable to resolve such a complaint by conciliation, to review the decision of the trustee to which the complaint relates; and
- 20 (c) any functions conferred on the Tribunal by or under any other Act.

(2) The Tribunal does not have power to deal with a complaint under subsection (1) unless the complainant satisfies the Tribunal that:

- 25 (a) a complaint about the same subject matter was previously made to an appropriate person under arrangements for dealing with such complaints made by the trustee of the fund to which the complaint relates; and
- (b) the complaint so made was not resolved in a reasonable period under those arrangements to the satisfaction of the complainant.

30 (3) The Tribunal does not have power to deal with a complaint in relation to a decision by the trustee of a fund if the eligible complainant or any other person affected by the decision has instituted a proceeding in a court about the subject matter of the complaint and the proceeding has not been discontinued.

35 (4) If, after the making of a complaint to the Tribunal in relation to a decision of the trustee of a fund, the eligible complainant or any other person affected by the decision institutes a proceeding in a court about the subject matter of the complaint, the Tribunal does not have power to deal with the complaint unless the proceeding is discontinued.

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

10.(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 prepared under subsection (1) to be made available to members of superannuation funds and beneficiaries in approved deposit funds. 5

Power to obtain information and documents

11.(1) If the Tribunal has reason to believe that a person 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: 10

(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 15

(b) to produce to the Tribunal such documents as are stated in the notice.

(2) If documents are produced to the Tribunal in accordance with a requirement under subsection (1), the Tribunal: 20

(a) may take possession of, and may make copies of, or take extracts from, the documents; and

(b) may retain possession of the documents for such period as is necessary for the purpose of dealing with the complaint to which the documents relate; and 25

(c) during any period in which the documents are so retained by the Tribunal, must permit a person who would be entitled to inspect any one or more of the documents 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. 30

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

Penalty: 30 penalty units. 35

Review of decisions

12.(1) Subject to subsection (2), for the purpose of reviewing a decision of the trustee of a fund the Tribunal has all the powers and discretions that are conferred on the trustee by law or under the governing rules of the fund and is to make a determination in writing: 40

(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

5 (d) setting aside the trustee's decision and substituting a decision for the decision so set aside.

(2) The Tribunal must affirm the decision unless it is satisfied that the decision was clearly unfair or unreasonable.

10 (3) The Tribunal must not give a direction to the trustee, vary the trustee's decision, or substitute a decision for the trustee's decision, if compliance with the direction, the variation, or the substituted decision, as the case may be, would be contrary to law or to the governing rules of the fund.

15 (4) The Tribunal must give written reasons for its determination, including its findings on material questions of fact and a reference to the material on which those findings are based.

(5) The Tribunal must cause a copy of its determination and of the reasons for the determination to be given to the complainant and to the trustee.

20 (6) 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 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.

25 (7) Subject to subsection (8), a determination of the Tribunal comes into operation immediately upon the making of the determination.

30 (8) 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.

35 (9) 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 purposes 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 has or had effect.

PART 4—APPEALS

40 Appeals to Federal Court of Australia from determinations of the Tribunal

13.(1) The trustee or the complainant 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 twenty-eighth 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 such manner as is prescribed by rules of court made under the *Federal Court of Australia Act 1976*. 5

(3) The Federal Court has jurisdiction to hear and determine matters in respect of which appeals are brought to that Court in accordance with subsection (1) and that jurisdiction may be exercised by that Court constituted as a Full Court. 10

(4) The Federal Court is to hear and determine the appeal and may make such order as it thinks appropriate because of its decision.

(5) Without limiting by implication the generality of subsection (4), 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. 15

Operation and implementation of a determination that is subject to appeal

14.(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. 20

(2) If an appeal is brought to the Federal Court from a determination of the Tribunal, that Court or a Judge of that Court may make such order or orders staying or otherwise affecting the operation or implementation of either or both of the following: 25

- (a) the determination of the Tribunal or a part of that determination; and
- (b) the decision of the trustee to which the complaint to the Tribunal related or a part of that decision; 30

as that Court or Judge considers appropriate for the purpose of securing 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 Federal Court or a Judge of that Court may make an order varying or revoking the first-mentioned order. 35

(4) An order in force under subsection (2) (including an order that has previously been varied on one or more occasions under subsection (3)): 40

- (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.

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

15. If an appeal is instituted in the Federal Court in accordance with section 13:

- 10 (a) the Tribunal must cause to be sent 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 cause the documents to be returned to the Tribunal.

15 **PART 5—ADMINISTRATIVE PROVISIONS**

Division 1—Administrative provisions relating to Tribunal Chairperson

Terms and conditions of appointment

20 16.(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

25 17. 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.

30 **Leave of absence**

18.(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.

35 (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

19. The Tribunal Chairperson may resign from office by signed writing delivered to the Governor-General.

Termination of appointment

20.(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: 5

(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 10

(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 body corporate of a kind referred to in paragraph 6(2)(b); or 15

(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 8(1) without reasonable excuse. 20

Acting Tribunal Chairperson

21.(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 25

(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. 30

(2) Anything done by or in relation to a person purporting to act under subsection (1) 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 35

(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 40

22.(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

5 23.(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.

10 (2) Except as provided by subsection (1), a Tribunal member is not to be paid any remuneration or allowances in respect of his or her membership of the Tribunal.

(3) Subject to this section, the *Remuneration Tribunal Act 1973* applies in relation to the Tribunal.

15 **Resignation**

24. A Tribunal member other than the Tribunal Chairperson may resign from office by signed writing delivered to the Minister.

Termination of appointment

20 25.(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:

25 (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 8(2) without reasonable excuse.

PART 6—MISCELLANEOUS

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

35 26. The powers of the Tribunal under paragraph 9(1)(a) or section 10 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 28(2) and is authorised by the Tribunal Chairperson to exercise the powers concerned.

Liability for damages

40 27. A Tribunal member is not 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 on the Tribunal by this Act.

Staff and facilities

28.(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*. 5

(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 10

29.(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 28(2).

(2) Subject to subsection (3), and to sections 30 and 31, a person to whom this section applies must not, except for the purposes of this Act, directly or indirectly: 15

- (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 20
- (b) produce to any person or court a document so acquired.

(3) Subsection (1) does not prohibit the Tribunal from disclosing information or producing a document: 25

- (a) to the Commissioner if requested by the Commissioner to do so; or
- (b) to the trustee of the fund to whose decision the complaint related if the person who made the complaint consents in writing to the disclosure or production. 30

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

30. If, 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, a Tribunal member becomes aware that a contravention of any Act or of the governing rules of a fund may have occurred, he or she must as soon as practicable: 35

- (a) if he or she is a Tribunal member other than the Tribunal Chairperson—give particulars of the contravention to the Tribunal Chairperson; or 40

- (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

5 **31.(1)** If a Tribunal member becomes aware that a trustee of a fund has failed to give effect to a determination made by the Tribunal, he or she must as soon as practicable:

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

15 **(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.

Annual report

20 **32.(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

25 **33.** The Governor-General may make regulations prescribing matters:

- 30 (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.



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