

1998

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**SUPERANNUATION LEGISLATION AMENDMENT (RESOLUTION OF COMPLAINTS)
BILL 1998**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer,
the Hon Peter Costello, MP)

Table of Contents

Outline.....	1
Financial Impact Statement.....	3
Abbreviations	5
Commentary	7
Background.....	7
Voluntary arbitration by the Tribunal.....	8
Complaints about non-discretionary decisions	9
Consequential amendment to the SIS Act	9

Outline

This Bill will make amendments to the *Superannuation (Resolution of Complaints) Act 1993* (the SRC Act) to enable the Superannuation Complaints Tribunal (the Tribunal) to arbitrate superannuation complaints with the consent of the parties.

The SRC Act provides for the establishment of the Tribunal to deal with superannuation complaints in a manner that is fair, economical, informal and quick.

However, in February 1998, the Federal Court decisions of *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* (1998) 152 ALR 332 and *Brekler v Leshem* [1998] 57 FCA (unreported, 12 February 1998) (the Federal Court decisions) significantly impaired the ability of the Tribunal to meet its objectives.

In July 1998, the Senate Select Committee on Superannuation reviewed the impact of the Federal Court decisions and recommended that the Government investigate the feasibility of putting an interim solution in place.

The Government is committed to ensuring that superannuation fund members have access to an effective dispute resolution mechanism as an alternative to the courts. Accordingly, the Bill amends the SRC Act to confer on the Tribunal the function of arbitrating complaints with the consent of the parties to the complaint. This will help address the backlog of complaints that have built up since the Federal Court decisions.

Financial Impact Statement

The Bill will provide a cost effective dispute resolution mechanism for superannuation fund members, as an alternative to the courts.

Given that the Tribunal is already established, the financial impact of the Bill on Government expenditure will be negligible.

Abbreviations

Committee	Senate Select Committee on Superannuation
Federal Court Decisions	Federal Court decisions of <i>Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd</i> (1998) 152 ALR 332 and <i>Brekler v Leshem</i> [1998] 57 FCA (unreported, 12 February 1998)
Tribunal	Superannuation Complaints Tribunal
SRC Act	<i>Superannuation (Resolution of Complaints) Act 1993</i>
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>

Commentary

Background

The SRC Act provides for the establishment and operation of the Superannuation Complaints Tribunal to resolve fund member superannuation complaints in a manner that is fair, economical, informal and quick. The Tribunal is intended to provide superannuation fund members with access to an effective dispute resolution mechanism as an alternative to the courts.

Under the SRC Act, where a complaint is made to the Tribunal, the Tribunal must inquire into the complaint and try to settle it by conciliation. If complaints cannot be resolved by conciliation, the Tribunal must fix a date, time and place for a meeting to review the decision or conduct to which the complaint relates.

In February 1998, the Federal Court decisions of *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* (1998) 152 ALR 332 and *Brekler v Leshem* [1998] 57 FCA (unreported, 12 February 1998) made two key findings in relation to the functions of the Tribunal:

- that, as a matter of interpretation of the SRC Act, the Tribunal is only entitled to receive complaints concerning discretionary decisions made by a trustee as opposed to decisions which are not discretionary, and
- that any exercise by the Tribunal of its power to review the decision of a trustee under the SRC Act is an invalid exercise of the judicial power of the Commonwealth.

As a result of the Federal Court decisions, the Tribunal is unable to use its review powers and is left with an inquiry and conciliation role only. The ability of the Tribunal to meet its objectives has been significantly impaired.

In July 1998, the Senate Select Committee on Superannuation released its report on possible options for superannuation dispute resolution following the Federal Court decisions (the 31st Report of the Senate Select Committee on Superannuation 'Resolving Superannuation Complaints — Options for dispute resolution following the Federal Court decision in *Wilkinson v CARE*').

The Committee noted that the Government was examining options for addressing the complaints review gap left by the Federal Court decisions. However, the Committee also noted that there were time concerns with implementing a long term solution because of a growing backlog of cases awaiting review before the Tribunal.

Consequently, the Committee recommended that the Government, in consultation with industry and the Tribunal, investigate the feasibility of putting an interim solution in place. The Committee noted that the most feasible interim solution appeared to be to allow the Tribunal to arbitrate disputes by consent.

Voluntary arbitration by the Tribunal

The amendments proposed by the Bill will enable the Tribunal to arbitrate complaints with the consent of the parties. This is an interim solution to allow the Tribunal to continue to provide a form of superannuation complaints dispute resolution. The Government, in consultation with industry and the Tribunal, is currently addressing options for a longer term solution.

The Bill will amend current section 11 of the SRC Act, which sets out the objectives of the Tribunal, and current section 12, which sets out the functions of the Tribunal, to reflect the conferral of arbitration powers on the Tribunal. Current section 11 will be amended to provide that one of the objectives of the Tribunal is to provide mechanisms for the arbitration of complaints (Bill Schedule 1 item 5). Current section 12 will be amended to include conducting an arbitration in respect of a complaint as an additional function of the Tribunal (Bill Schedule 1 item 6).

Where a complaint is made to the Tribunal, and conciliation has been unsuccessful in resolving the complaint, the Tribunal must give the parties written notice of their ability to resolve the complaint by arbitration. The written notice to the parties must be accompanied by a form of an arbitration agreement approved by the Tribunal. If the parties to a complaint enter into an arbitration agreement and lodge the agreement with the Tribunal within 28 days of the notice, the Tribunal will be able to arbitrate the complaint (Bill subsection 48B(2)).

The arbitration agreement must be in a form approved by the Tribunal, must be executed by the parties to it and must nominate the law of a particular State or Territory as being the law that is to govern the operation of the agreement (Bill subsection 48B(4)).

An arbitration is to be conducted as the Tribunal thinks fit and in accordance with the law relating to commercial arbitration of the State or Territory nominated in the arbitration agreement (Bill subsection 48C(1)). The Tribunal will be required to prepare a memorandum explaining how it may arbitrate complaints and make the memorandum available to superannuation fund members (Bill Schedule 1 item 7).

It is anticipated that this memorandum and the arbitration agreement approved by the Tribunal will give the Tribunal the opportunity to set a framework for the conduct of arbitrations. Procedural matters such as the giving of evidence, the holding of hearings, the constitution of the Tribunal to hear arbitrations, the giving of reasons in relation to awards and the enforceability of awards will be governed by the arbitration agreement in accordance with the laws relating to commercial arbitration of the State or Territory nominated in the arbitration agreement.

However, to ensure the integrity of conciliation conferences, the Bill will amend current section 30 of the SRC Act in relation to evidence given at an arbitration. Section 30 provides that at a review meeting, unless the parties otherwise agree, statements must not be made about any word spoken or act done at a conciliation conference. The Bill will amend section 30 to ensure that, unless the parties otherwise agree, the same protection applies at an arbitration in relation to any word spoken or act done at a conciliation conference (Bill Schedule 1 item 9).

Where the Tribunal makes an arbitration award, the Bill will provide that a document purporting to be certified by the Tribunal Chairperson or Tribunal Deputy Chairperson to be a true copy of the award is prima facie evidence of the award (Bill section 48D).

The Tribunal must notify parties to an arbitration of possible appeal rights the party may have. New section 48E requires the Tribunal to give to each party to an arbitration a written notice that if the party is dissatisfied with the award, the party may have appeal or review rights under the law of the nominated State or Territory relating to commercial arbitration. The powers under section 48E

must be exercised on behalf of the Tribunal by the Tribunal Chairperson or the Tribunal Deputy Chairperson (Bill Schedule 1 item 11).

The Tribunal will be able to arbitrate complaints made before or after the commencement of the Bill (Bill section 48A). This will allow the Tribunal to use the option of arbitration to address the backlog of complaints awaiting review which has arisen since the Federal Court decisions.

Current subsection 63(2) of the SRC Act prohibits the recording or disclosure of information by a Tribunal member or a member of the Tribunal's staff acquired in connection with a complaint made to the Tribunal. The Bill will amend this section to extend it to the new arbitration function of the Tribunal (Bill Schedule 1 item 12).

In light of the interim nature of the Tribunal's arbitration function, Part 7A will cease to have effect on a day to be fixed by Proclamation (Bill section 48F).

Complaints about non-discretionary decisions

In addition to finding that the review powers of the Tribunal were judicial powers, the Federal Court decisions found that the SRC Act did not confer jurisdiction on the Tribunal in relation to complaints about non-discretionary decisions. Such decisions are either legally correct or legally incorrect. The Court found that because the SRC Act expressly prevents the Tribunal from acting contrary to the law, the governing rules of a superannuation fund or any contract of insurance, there is no room for the application of a 'fair and reasonable' test in the review of non-discretionary decisions. This effectively leaves the review of non-discretionary decisions to the ordinary courts.

To ensure that the Tribunal's ongoing functions extend to non-discretionary decisions, the Bill will insert a new provision into the SRC Act which clarifies that a complaint may be made under the SRC Act in relation to a decision which involves the exercise of a discretion or a decision which does not involve the exercise of a discretion (Bill Schedule 1 item 8, subsection 14AA(1)).

New subsection 14AA(1) will ensure that the Tribunal is able to receive complaints about both discretionary and non-discretionary decisions, and hence exercise its inquiry and conciliation and arbitration functions in relation to such complaints.

In addition, the Bill will insert a further provision to the effect that a decision which does not involve the exercise of a discretion is taken to be unfair or unreasonable if the decision was legally incorrect (Bill Schedule 1 item 8, subsection 14AA(2)). In relation to non-discretionary decisions, this will resolve the tension between the requirement to determine a complaint by reference to a 'fair and reasonable' test and the requirement not to do anything that is contrary to law.

Section 14AA has general application to the Tribunal's inquiry, conciliation, review and arbitration functions under the SRC Act.

Consequential amendment to the SIS Act

The *Superannuation Industry (Supervision) Act 1993* (the SIS Act) sets out the framework for the prudential supervision of the superannuation industry. The SIS Act regulates the conduct of trustees of superannuation entities to ensure the prudent management of superannuation fund monies.

The Bill will amend the SIS Act to ensure that trustees are not prevented from entering into an arbitration agreement, or complying with an award of the Tribunal under an arbitration agreement,

Commentary

as a result of any provisions of the SIS Act, any other law of the Commonwealth, any law of a State of Territory or any provisions in the governing rules of a superannuation fund (Bill Schedule 2, item 1).