22 October 2016

Highton, 3216

Ms Angela MacRae

Commissioner

Productivity Commission

Locked Bag 2, Collins St East
Melbourne VIC 8003,

Dear Commissioner

Re: Efficiency and Competiveness of the Superannuation System – Default Superannuation Funds

I note that the ***Productivity Commission*** is calling for submissions for the next stage of this inquiry.

The Treasurer, the Hon Scott Morisson MP, has pursuant to Parts 2, 3 and 4 of the *Productivity Commission Act 1998*, requested that the Productivity Commission conduct: a study to develop criteria to assess the efficiency and competitiveness of the superannuation system; and an inquiry to develop alternative models for a formal competitive process for allocating default fund members to products.

Further to my **Submission #1** and supplementary submission and **Submissions #2** and **#3**, I am lodging **Submission #4** which covers the legal risk exposure that fund members have in a compulsory superannuation system.

This risk exposure which could eliminate a member's retirement "*nest egg*" is in fact exploited by some trustees to prevent members questioning how the fund has been administered and how the fund is currently being administered.

Such trustees are clearly not acting in the "***best interests***" of the members and beneficiaries of their fund and should be excluded as suitable trustees of default superannuation funds.

Such trustees are not following the general advice of the High Court of Australia and other superior courts.

New fund members should not be exposed to legal risk in the process of allocating them to a default fund where the trustee has a track record of undertaking unnecessary adversarial litigation against fund members.

Yours Sincerely

Phillip Sweeney

Productivity Commission – Submission #4

Unnecessary Adversarial Litigation

Key Default Fund Selection Criteria

The Treasurer, the Hon Scott Morisson MP, has pursuant to Parts 2, 3 and 4 of the *Productivity Commission Act 1998*, requested that the Productivity Commission conduct: a study to develop criteria to assess the efficiency and competitiveness of the superannuation system; and an inquiry to develop alternative models for a formal competitive process for allocating default fund members to products.

A number of filters were proposed in **Submission #1** for the short listing of funds that might qualify for selection as default superannuation funds {**Appendix A**}.

The High Court of Australian in ***Finch v Telstra Super Pty Ltd*** [2010] HCA 36; (2010) 242 CLR 254 ruled at [35]:

> "The government considers that the taxation advantages of superannuation should not be enjoyed unless superannuation funds are operating efficiently and lawfully. For that reason it has, by procuring the enactment of the *Superannuation Industry (Supervision) Act* 1993 (Cth) ("the Supervision Act") and regulations made under it, imposed quite rigorous regulatory standards."

Acting in the "*Best Interests*"

Trustees of regulated superannuation funds have both a general law duty and a statutory duty to act in the "***best Interests***" of fund members and beneficiaries {**Section 52** of the ***Superannuation Industry (Supervision) Act 1993.***

However it is not uncommon for a dispute to arise between one or more members and the trustee of their superannuation fund.

In Australia superannuation is compulsory as a matter of Government policy however access to the law to resolve disputes is constrained by the doctrine of ***Separation of Powers*** that the High Court has derived from the ***Commonwealth of Australia Constitution Act***.

This means that the jurisdiction of the **Superannuation Constraints Tribunal** is very restricted in comparison to the UK Pensions Ombudsman {**Appendix B**}.

If a dispute arises concerning the interpretation of the provisions of the Trust Deed of the fund and validity of amendments made to the Trust Deed, the **Superannuation Complaints Tribunal** is unable to deal with such a dispute.

If one or more fund members seek to resolve such a dispute they can be placed in legal jeopardy by a trustee that fails to follow rulings of the High Court of Australia and the Victorian Court of Appeal.

The fund member or members can be exposed to enormous legal costs if the take proceedings in a Supreme Court with what might appear on a *prima facie* basis to be a solid case, but then loose on a legal technicality or because they rely on inexperienced lawyers who fail to properly plead and argue the case.

In such circumstances the member or members could lose all or much of their superannuation benefit.

Any review of the concept of "*efficiency*" in the superannuation industry must take into account the "***legal risk***" that fund members are exposed to even if the incumbent trustee of their fund has not engaged in any illegal conduct. An innocent mistake could still have a major ramification on the benefits members actually receive.

In a compulsory superannuation system fund members should not be placed in a position of legal risk when they attempt to ensure the proper administration of their superannuation trust which as a matter of law they are entitled to do.

Default Fund Selection Criteria

A number of filters can be used to identify funds which might be shortlisted to qualify for default superannuation fund status.

An important filter is compliance with the regulatory standards of the ***Superannuation Industry (Supervision) Act 1993 {SIS Act}.*** This has been covered in previous submissions***.***

The following criteria has been included in **Filter #3** {**Appendix A**}.

> "Also the trustees of all qualifying default funds should be required to sign an "***Onus of Proof***" declaration confirming that the trustee is aware of the ruling of the High Court of Australia in ***Finch v Telstra Super Pty Ltd*** [2010] HCA 36 and the Victorian Court of Appeal in ***Aloca of Australia Retirement Plan Pty Ltd v Frost*** [2012] VSCA 238."

The ruling of the High Court of Australian and the Victorian Court of Appeal means that adversarial litigation between a trustee and a fund member should be a "***last resort***" and not a "***first resort***".

Trustees should also follow the ruling of the High Court in **Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand** [2008] HCA 42, and seek judicial advice before defending adversarial proceedings initiated by a fund member or members.

In the *Macedonian* case, the High Court stated:

> "... a necessary consequence of the provisions of section 63 of the [Trustee] Act is that a trustee who is sued for breach of trust should take no step in defence of the suit without first obtaining judicial advice about whether it is proper to defend the proceedings."

The trustee would have to explain to the Court why the matter of contention had not been able to be resolved by non-adversarial methods such as the trustee seeking judicial advice on the matter of contention in the first instance.

Judicial advice has commonly been sought by a trustee in the following situations:

- where a trustee is in doubt about the proper interpretation of a provision in the trust instrument;
- where a trustee wishes to amend the trust instrument and seeks the additional comfort from the court that the amendments are within the trustee's power;
- Where the trustees seeks additional comfort from the court that a proposed "***successor fund transfer***" is within the trustee's power;
- Where the trustee is uncertain of the validity of previous amendments to the trust instrument;
- where beneficiaries of the trust are in dispute with each other or with the trustee; and
- when a trustee wishes to commence proceedings or defend proceedings that are brought against it.

There are two recent cases that demonstrate that litigation between a trustee and a fund member should be a "***last resort***" and not a "***first resort***".

The first case is ***Retail Employees Superannuation Pty Ltd v Pain*** [2016] SASC 121

The second case is ***Commonwealth Bank Officers Superannuation Corporation Pty Ltd & Anor v Beck & Anor*** [2016] NSWCA 218

Both cases related to the amendment of the provisions of regulated superannuation funds and how a trustee should approach concerns that might arise concerning previous amendments that date back in time.

The role of a trustee is to execute the trust and do so in a manner that is in the ***best interests*** of the beneficiaries of that trust.

Case 1: Non-Adversarial Proceedings

Retail Employees Superannuation Pty Ltd (the Plaintiff) is the trustee of the **Retail Employees Superannuation Trust (REST).**

The superannuation scheme has been established by a Trust Deed executed in 1988. The provisions of the founding Trust Deed have been amended on 40 occasions.

The defendant Evelyn Pain has been a member of the Trust since 1995. She agreed to be appointed to represent the interests of beneficiaries and potential beneficiaries of the Trust. These were not adversarial proceedings and the proceedings have been initiated by the trustee.

The 1988 Trust Deed reserved an amending power (**Clause 19**) which includes limitations and restrictions on how the amending power may be exercised by the trustee of the fund.

The Trustee was concerned that the limitations and restrictions contained in **Clause 19** are expressed in vague and ambiguous terms such that it might be contended that some amendments were not validly made.

The Trustee therefore sought ***judicial advice*** from the Supreme Court of South Australia so as to protect the welfare of the fund members and beneficiaries.

The actions of **Retail Employees Superannuation Pty** Ltd follows the general advice of the High Court for trustees to seek such advice provided in ***Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand*** [2008] HCA 42.

Case 1: Adversarial Proceedings

Peter Beck (the Plaintiff) was/is a member of the **Commonwealth Bank** staff superannuation fund, however he was originally a member of the Colonial Mutual Life staff superannuation fund and his

membership was transferred to the **Commonwealth Bank** after Colonial Mutual Life had been acquired by the **Commonwealth Bank**.

The first defendant was the trustee of the Colonial Mutual Life staff superannuation fund and the second defendant was Commonwealth Bank staff superannuation fund.

The transfer of fund membership increased the complexity and costs of the proceedings, which were also subject to an appeal which added further costs.

The Colonial Mutual Life staff superannuation fund provided a life pension to a fund member who had attained the age of 55 before being retrenched or retiring. A survivorship pension benefit was also provided for widows and widowers.

However if a member was retrenched before the age of 55 he or she only received a lump sum benefit of much lesser value than the life pension benefit.

The scheme had been established before superannuation had been made compulsory and it was established as a ***loyalty scheme*** to encourage experience staff to remain with their employer until retirement instead of leaving for a higher paying job with a competitor.

However with a large jump in the value of entitlements on attaining the age of 55, there was a large incentive for the employer to retrench experienced employees just before they attained the age of 55.

There is a statutory provision to protect a member's accrued benefit and is this case a condition was included in the ***Power of Amendment*** provisions to protect a member's accrued benefit.

The scheme was a Defined Benefit or "*balance-of-costs*" scheme where employees make a contribution as a fixed percentage of salary while the employer makes periodic contributions on a "*balance-of-costs*" basis.

Therefore there is a large incentive for the employer to retrench staff before they attain the age of 55 to reduce the employer's liability for the "*balance-of-costs*" contributions.

To counteract this large discrepancy in retirement outcomes, a discretionary power was included in the provisions of the Scheme to allow the trustee to grant and adjusted pension benefit to a long serving employee who might be retrenched just before attaining the age of 55 or was forced to retire due to ill health.

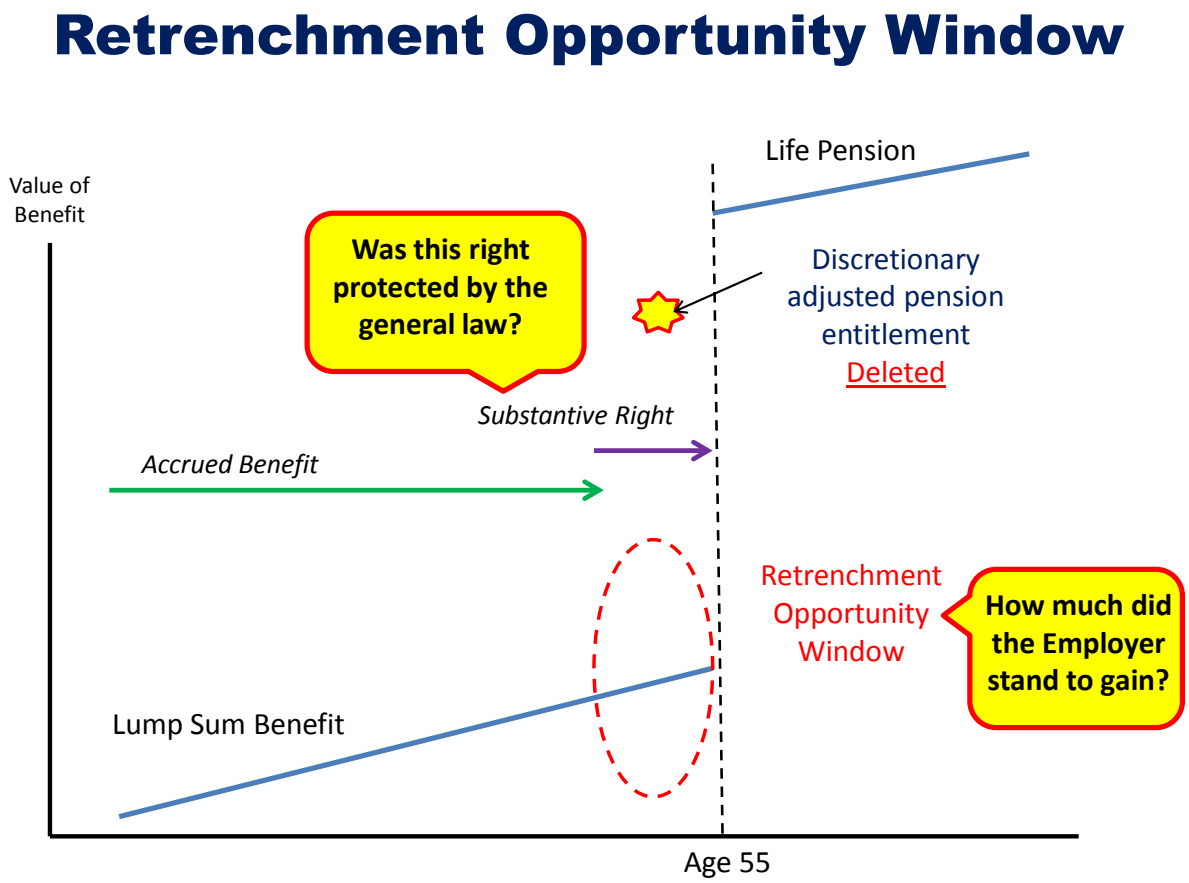
This discretionary power conferred on the Trustee provided a ***substantive right*** for a long serving fund member to be considered for the more valuable pension benefit, but is an adjusted form.

However this provision was deleted by an amending Deed executed on 30 December 1996.

These aspects of the scheme are illustrated in the following diagram.

The right to the ***accrued benefit*** was protected by statutory law and the explicit conditions imposed by the amending ***power*** in the Trust Deed.

The protection of the ***substantive right*** to be considered for a discretionary benefit was not protected by statutory law or by the express provisions of the amending power. But was there no protection of his potentially valuable right at all?



Peter Beck has not been advised of the amendment to delete the discretionary benefit and his consent had not been obtained as was the case with other fund members.

Mr Beck only learned of the amendment at a later date and held the view that the amendment had not been validly made with respect to the deletion of the discretionary power.

The trustee at the time in 1996 had acted on the advice of an in-house lawyer of the sponsoring employer and the trustee had not obtained the advice of the fund actuary nor sought ***judicial advice***.

Mr Beck raised his concern that the amendment which had purportedly deleted the discretionary pension entitlement had not been validly made with the new Trustee of the new fund.

The new Trustee failed to seek ***judicial advice*** in a similar manner as did the Trustee of the **Retail Employees Superannuation Trust (REST)** in **Case 1** and ignored the general advice of the High Court of Australia to seek such advice.

Therefore Mr Beck was forced to initiate legal proceedings against the Trustee of the **Commonwealth Bank** staff fund and thereby expose himself to adverse legal costs, even though on a *prima facie* basis he had a solid case.

The Trustee in 1996 had failed to give proper consideration to the proposed amendments and relied solely on the advice of an in-house lawyer who:

(i) may have had a ***conflict-of-interests***, since the lawyer was employed by the sponsoring employer – the **Commonwealth Bank**;
(ii) was not qualified to give actuarial advice, which the lawyer gave to the Trustee;
(iii) failed to advise the Trustee to consider seeking ***judicial advice*** to protect both the superannuation trust and the trustee, given that the proposed amendments were not merely administrative but affected the ***beneficial interests*** of the fund members, even if the proposals may not have affected the accrued benefit of fund members.

The in house lawyer failed to draw the trustee's attention to advice to be found in a widely used text books such as Jacob's Law of Trusts in Australia (7th Edition) at [2218] which notes the need to seek judicial advice in some circumstances:

> **"But a Trustee does not act reasonably when he or she acts in plain breach of the trust instrument even though the trustee's solicitor advises such a course[1].**
>
> **"However, if a trustee acts on the advice of counsel on a matter not arising directly out of the interpretation of the trust instrument, he or she will be entitled to relief.[2]**

(1) ***Re Dive*** [1909] 1 Ch 328
(2) ***Perpetual Trustees Co v Watson (No.2)*** (1927) 28 SR (NSW) 43); ***Dundee General Hospitals Board v Walker*** [1952] 1 All ER 896

Cases where trustees have sought judicial advice in relation to proposed amendments to the provisions of a superannuation scheme include:

- ***Re Retail Employees Superannuation Pty Ltd*** [2013] NSWSC
- ***Cuesuper Pty Ltd*** [2009] NSWSC 981
- ***Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd*** [2006] VSC 112

The trial judge stated at [218]:

> "The combined effect of amending Clause A11.1 and deleting clause A11.3 in the context of the December 1996 deed as it then stood was substantial: it was considerably broader than Ms Horan envisaged when she advised Colonial Mutual's Board to approve the December 1996 deed amendments."

This is further confirmation that the in-house lawyer was "***out-of-her-depth***" by making recommendations on complex mathematical formulae that only the fund actuary was qualified to make.

The Court of Appeal making reference to the High Court case of ***Finch v Telstra Super Pty Ltd*** [2010] HCA 36 stated:

> "However, it emphasised that so far as they may apply, the decision may be reviewable for want of properly informed consideration: at [66]. The importance of this matter in the context of superannuation funds was explained by Nettle JA in *Alcoa of Australia Retirement Plan Pty Ltd v Frost* [2012] VSCA 238; 36 VR 618 at [59] in the following terms (Redlich JA and Davies AJA agreeing):
>
> > "With respect, I entirely agree with his Honour. As the decision in Finch has enabled us better to understand, trustees of superannuation funds are no longer to be conceived of in the same way as custodians of charitable or family settlements through the exercise of whose absolute discretion settlors have chosen to channel their beneficence. The economic, industrial and ultimately social imperatives which inform the advent of the superannuation industry, not to mention that beneficiaries of the kind with which we are concerned in one way or the other invariably purchase their entitlements, are productive of legitimate expectations which the law will enforce. Superannuation fund trustees are bound to give properly informed consideration to applications for entitlements and, if that necessitates further inquiries, then they must make them."

Clearly in this matter the Trustee was "***bound to give properly informed consideration***" to the proposed amendments that would or may affect the entitlements of fund members and not rely on advice from a lawyer on actuarial matters.

In fact the trial judge agreed that the amendment that had purportedly deleted the discretionary power had been invalidly deleted.

However the transfer of the fund membership of Mr Beck to another fund had created additional complexity that had not been fully understood by Mr Beck's legal team and this was one of the reasons the Court of Appeal overturned the findings of the trial judge and then awarded costs against Mr Beck.

The Court of Appeal also held concerning the 1996 trustee:

> "There was no suggestion that it did not act in good faith."

The conditions imposed by the ***Power of Amendment*** did not limit the trustee to only seeking actuarial advice if the amendment would affect accrued benefits.

The trustees could not approve any amendment (without the consent of the members) if the accrued benefit of any member:

> "is detrimentally affected without the written consent of that Member (the value of the benefits accrued being such amount as the Trustees, after considering the advice of the Actuary, determine has accrued)."

To properly inform the Trustee before exercising the ***Power of Amendment***, the Trustee should have obtained the advice of the fund actuary on the impact of the proposed amendments on both the ***accrued benefits*** of members and their ***substantive rights***.

The proposed amendments included adjustments to provisions that purportedly discriminated between males and females, which included replacing the discretionary benefit with an "***augmentation of rule clause 10.1."***

An actuarial report would have also disclosed if the sponsoring employer stood to benefit from the proposed amendments {which it did – ***How many long serving employees were subsequently retrenched before attaining the age of 55?***}.

The Court of Appeal commented:

> "Whether the amendment in the present case had any material effect on members' financial interests is doubtful."

However that doubt would have been removed if the Trustee had obtained an actuarial report so as to properly inform itself of the impact on the beneficial interests of the fund members and not simply rely on advice from a lawyer who was not qualified to provide such advice.

The pleading in this matter did not allege a "***fraud on a power***" with respect to the exercise of the amending power, however if an actuarial report had been obtained this would have identified that the sponsoring employer stood to make a substantial gain from the deletion of the discretionary benefit clause without any offsetting benefit for the fund members and beneficiaries.

The Court of Appeal took the view that the 1996 trustee only had a duty to protect the "*accrued benefits*" (under ***statutory law***) and not the "*substantive rights*" of Mr Beck to be considered for a discretionary benefit (under the ***general law*** {*Gartside v Inland Revenue Commissioners* [1967] UKHL 6; [1968] AC 553 at 617 per Lord Wilberforce (Lord Hodson concurring); Metropolitan Gas Company v Federal Commissioner of Taxation [1932] HCA 58; (1932) 47 CLR 621 per Rich J}).

This adverse costs order would likely to have wiped out the lump sum benefit that Mr Beck did in fact receive.

This disastrous outcome for Mr Beck was a result of the trustee of the Commonwealth Bank superannuation fund seeking to use adversarial litigation as a "***first resort***" instead of a "***last resort***".

On a *prima facie* basis Mr Beck had a strong case and if the Trustee had acted in the "***best interests***" of Mr Beck and other long serving fund members who might be trenched before attaining the age of 55, the Trustee should have sought ***judicial advice*** in the same manner as the Trustee in **Case 1**.

Mr Beck could have agreed to be the Defendant and be appointed to represent the interests of beneficiaries and potential beneficiaries of the scheme.

Filtering Out Adversarial Trustees

Trustees who ignore the rulings of the High Court and other superior courts and seek to bankrupt any member who has valid concerns about the amendments to the original Trust Deed or to how the Trustee is interpreting the provisions of the scheme should be excluded as administrators of any default superannuation funds.

Members who have faced adverse cost orders and who can demonstrate that on a *prima facie* basis that they had a credible case should be able to use an "***Uber***" style member feedback filter {**Filter #2**} to have such adversarial trustees eliminated from the default fund selection process.

Trustees who engage in adversarial litigation with members of the fund should be required to show cause why the litigation was necessary and what measures had been taken to avoid such adversarial litigation. This is part of the trustees' duty to act in the "***best interests***" on members even if there is disagreement between the Trustee and one or more members.

Conclusions

The need for trustees to "***comply with the overarching legislative obligation to act in the best interests of members"*** is emphasised in ***APRA***'s submission to the Productivity Commission:

> APRA's prudential framework and supervisory approach focuses on ensuring that RSE licensees comply with the overarching legislative obligation to act in the best interests of members. The assumption underlying this approach is that compliance with this obligation should lead to achievement of appropriate outcomes for those members over the long term.

This "***overarching legislative obligation***" includes following the rulings of the High Court of Australia and other superior courts and to actively seek ***judicial advice*** when fund members or

beneficiaries can put a credible case before the trustee that requires further analysis and investigation and where ***judicial advice*** would be appropriate to protect both the fund members and the trustee.

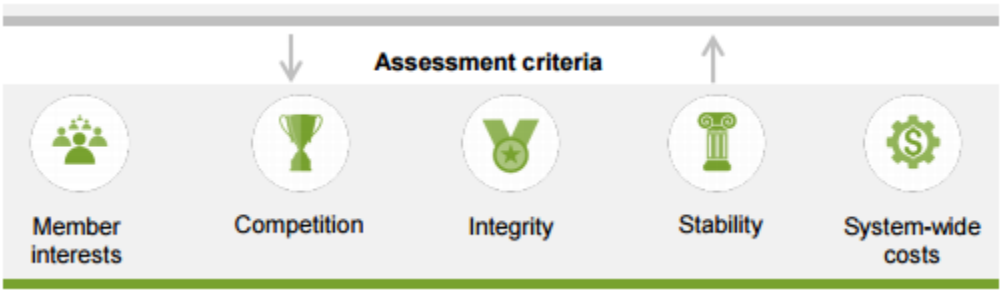
The cost of seeking ***judicial advice*** is taken from the fund and not out of the trustee's own pocket.

APRA should prepare a Practice Directive to advise trustees of regulated superannuation funds of the rulings of the High Courts and the Victorian Court of Appeal and that as a general principle trustees should seek ***judicial advice*** before engaging in adversarial proceedings against fund members and beneficiaries.

Appendix A

Filters

The assessment criteria proposed by the Productivity Commission are:



This submission proposes that there be five "*filters*" that should be used to narrow the category of funds that would qualify as being able to be selected as default superannuation funds.

Filter #1 {Member Interests}

A performance filter would be the first priority that would eliminate funds that had a consistence substandard net investment return to fund members over say a 5 to 10 year period.

Filter #2 {Competition}

An "***Uber***" style member feedback filter that would eliminate funds where fund members would be able to lodge complaints or provide a satisfaction rating with the body that provided an approved list of fund as default funds. Members who experienced extensive delays in obtaining insurance payouts and disputed or delayed superannuation benefit payments would be able to provide feedback on their experience with the fund in question {*Also refer to Maurice Blackburn submission DR-79*} .

Funds that rated poorly on member satisfaction would be excluded from the approved list of default funds.

Filter #3 {Integrity}

A transparency assessment would be made on the amount and clarity of information provided to members in annual reports and the ability to access other relevant documents such as the original Trust Deed and all amending Deeds on line.

Current it is not a statutory requirement for trustees to hold annual meetings for fund members, however there is no reason why trustees should not hold annual meeting for members on a voluntary basis.

Funds that operated on minimum disclosure standards would be eliminated from the approved list.

Funds whose trustee complies with the "***equal representation***" provisions of the ***Superannuation Industry (Supervision) Act 1993*** should also rank higher than funds whose trustee does not.

Filter #4 {Stability}

A compliance filter would assist in ensuring confidence in funds regulated by ***APRA*** and would eliminate funds that had a poor compliance record as reported by ***ASIC*** and ***APRA***.

Also the trustees of all qualifying default funds should be required to sign an "***Onus of Proof***" declaration confirming that the trustee is aware of the ruling of the High Court of Australia in ***Finch v Telstra Super Pty Ltd*** [2010] HCA 36 and the Victorian Court of Appeal in ***Aloca of Australia Retirement Plan Pty Ltd v Frost*** [2012] VSCA 238.

These cases confirm that a person with a *beneficial interest* of a regulated superannuation fund does not bear the onus of proof in establishing their credible claim to a benefit entitlement from the fund. Rather the trustee of the fund bears the onus of repudiating the claim if the trustee honestly believes that the claimant is misconceived as to their legal entitlement or the quantum of that entitlement.

That means that the trustee cannot adopt the tactic of: "If you want your superannuation benefit you can take us to court to get it – and we will aim to bankrupt you in the process with legal costs."

Trustees in a COMPULSORY superannuation system do have to act in the ***best interests*** of their members even when claims are the subject of dispute and not under the dictation of a parent company.

Filter #5 {System-Wide Costs}

Net returns to members can be reduced by explicit fees and charges as well as by related party transactions where the related party, such as an in house insurance provider or fund manager captures profits that the trustee as a fiduciary is unable to capture itself.

Whist explicit costs are easy to document and compare, the impact of related party transactions can only be effectively determined by examining the net returns to members over an extended period (say 5 to 10 years}.

Therefore while a filter covering explicit fees and charges should be included, this filter should be used in conjunction with the first filter – net investment returns.

Appendix B

Limited Jurisdiction of the Superannuation Complaints Tribunal

The Keating Government made superannuation compulsory for all working Australians in 1993 and enacted the ***Superannuation (Resolution of Complaints) Act 1993*** {**SRC Act**} which established the **Superannuation Complaints Tribunal** (***the Tribunal***) under **Chapter II** of the ***Commonwealth of Australia Constitution Act.***

Under s 14(2) of the ***SRC Act***, as originally enacted, a person could make a complaint to the Tribunal that the decision:

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

This gave the Tribunal extensive supervisory powers over the administration of large superannuation funds.

For example if an amending power was not conferred on a trustee and a trustee purported to exercise such a ***power*** to amend the Regulations of a fund to reduce member entitlements the Tribunal had jurisdiction under both limbs (a) and (b) to intervene.

Another example might be where the sponsoring employer held the amending ***power*** subject to the consent of the trustee and the employer sought to reduce member benefits and the trustee gave its consent, then again the Tribunal could intervene under limb (b).

The following is stated in ***Neil Wilkinson, Tony Tuohey & Marita Wall v Clerical Administrative & Related Employees Superannuation Pty Ltd & Ors*** [1998] FCA 51:

> "An amendment in 1995 introduced by the *Superannuation (Resolution of Complaints) Act 1995* (Cth) ("the amending Act") deleted the grounds in s 14(2)(a) and (b). The only ground of complaint now available under s 14(2) is that "*the decision is or was unfair or unreasonable*" (the words "*or was*" having been inserted by the amending Act). The Explanatory Memorandum to the Bill for the amending Act makes it clear that the amendment to s 14(2) was prompted by concern that a determination of the Tribunal that a trustee's decision was in excess of or an improper exercise of power would be an exercise of Commonwealth judicial power, having regard to the decision of the High Court in ***Brandy v Human Rights and Equal Opportunity Commission*** [1995] HCA 10; (1995) 183 CLR 245.

The extent of the statutory powers of the Tribunal was greatly reduced by this amendment and the ability of the Tribunal to supervise the conduct of dishonest and corrupt trustees was effectively eliminated.

Now the Tribunal could only supervise the conduct of honest trustees who had made an "*honest mistake*" that might be impugned on the grounds that a decision made by the trustee was "*unfair or unreasonable*".

An example of such a complaint is where a fund member is seeking the early release of his or her superannuation benefit on the grounds that he or she has become "***permanently and totally disabled***".

It is not always an easy decision for a trustee to make such as assessment since even if a person has suffered a serious accident that person might still be fit for work in a year's time depending on the qualifications of that person. If the trustee's decision was that the fund member might recover, then the fund member could challenge that decision in the SCT.

There is no question that the trustee has contravened "***any law or governing rule***" which would disqualify the SCT from dealing with such a complaint.

Now it is important to note that this is a power that a Court does not have. A Court can impugn the decision of a trustee on a number of grounds, such as the decision was made in *mala fides* or without proper consideration, however a Court cannot impugn a decision of a trustee on the grounds that was "*unfair or unreasonable*".

Therefore after the 1995 amendment there was no overlap of jurisdiction between the SCT and the Courts.

However the Full Federal Court of Australia in ***Neil Wilkinson, Tony Tuohey & Marita Wall v Clerical Administrative & Related Employees Superannuation Pty Ltd & Ors*** [1998] FCA 51 struck down the power of the Superannuation Complaints Tribunal ("SCT") to review the decision of a trustee of a superannuation fund on the basis that such a decision was "*unfair and unreasonable*". A majority of the Court found that this power was a **judicial power**, and that its conferral upon a non-judicial body breached the separation of judicial power achieved by the ***Australian Constitution***. The effect of the decision in *Wilkinson* was to remove the capacity of the SCT to act as an informal, quick and cost-effective means of resolving disputes arising from decisions made by trustees. The decision then left the SCT with only the power to conciliate such disputes.

The High Court of Australia then considered the jurisdiction of the Tribunal in ***Attorney-General (Cth) v Breckler*** [1999] HCA 28; 197 CLR 83; 163 ALR 576; 73 ALJR 981.

Now the status of trustees of regulated superannuation funds is different to that of other financial service providers.

Trustees have to make a non-renounceable election to become part of a compulsory superannuation system in exchange for tax benefits and to amend the terms of the Trust Deed constituting the superannuation scheme to agree to be subject to regulation under the ***Superannuation Industry (Supervision) Act 1993*** and the ***Superannuation (Resolution of Complaints Act 1993***.

Therefore the trustees of regulated superannuation fund are quasi-government agents.

It was on this basis that the High Court ruled that the Tribunal has jurisdiction over these quasi-government agents for a similar reason that the **Administrative Appeals Tribunal** has jurisdiction over the decisions of 100% Federal Government agencies.

However with respect to their other areas of commercial activity the banks are not quasi-government agents and do not operate through trustee companies.

The High Court in ***Brandy v Human Rights & Equal Opportunity Commission*** [1995] HCA 10; (1995) 183 CLR 245 stated at [22]

> "Thus, it has always been accepted that the punishment of criminal offences and the trial of actions for breach of contract and for wrongs are inalienable exercises of judicial power (36 ***Federal Commissioner of Taxation v. Munro*** [1926] HCA 58; (1926) 38 CLR 153 at 175 per Isaacs J) . The validity of that proposition rests not only on history and precedent but also on the principle that the process of the trial results in a binding and authoritative judicial determination which ascertains the rights of the parties (37 Reg. v. Davison (1954) 90 CLR at 368-370 per Dixon CJ and McTiernan J) . So, when A alleges that he or she has suffered loss or damage as a result of B's unlawful conduct and a court determines that B is to pay a sum of money to A by way of compensation, there is an exercise of judicial power."

The Outcome

The outcome of the review of the powers of the **Superannuation Complaints Tribunal** on constitutional grounds is that the Tribunal can only deal with complaints where a trustee has acted honestly and lawfully, but has made a decision on the grounds that the decision was "***unfair or unreasonable***".

The tribunal, unlike the UK Pensions Ombudsman, cannot deal with complaints alleging maladministration of the superannuation fund or the defective amendment of the provisions of the scheme.