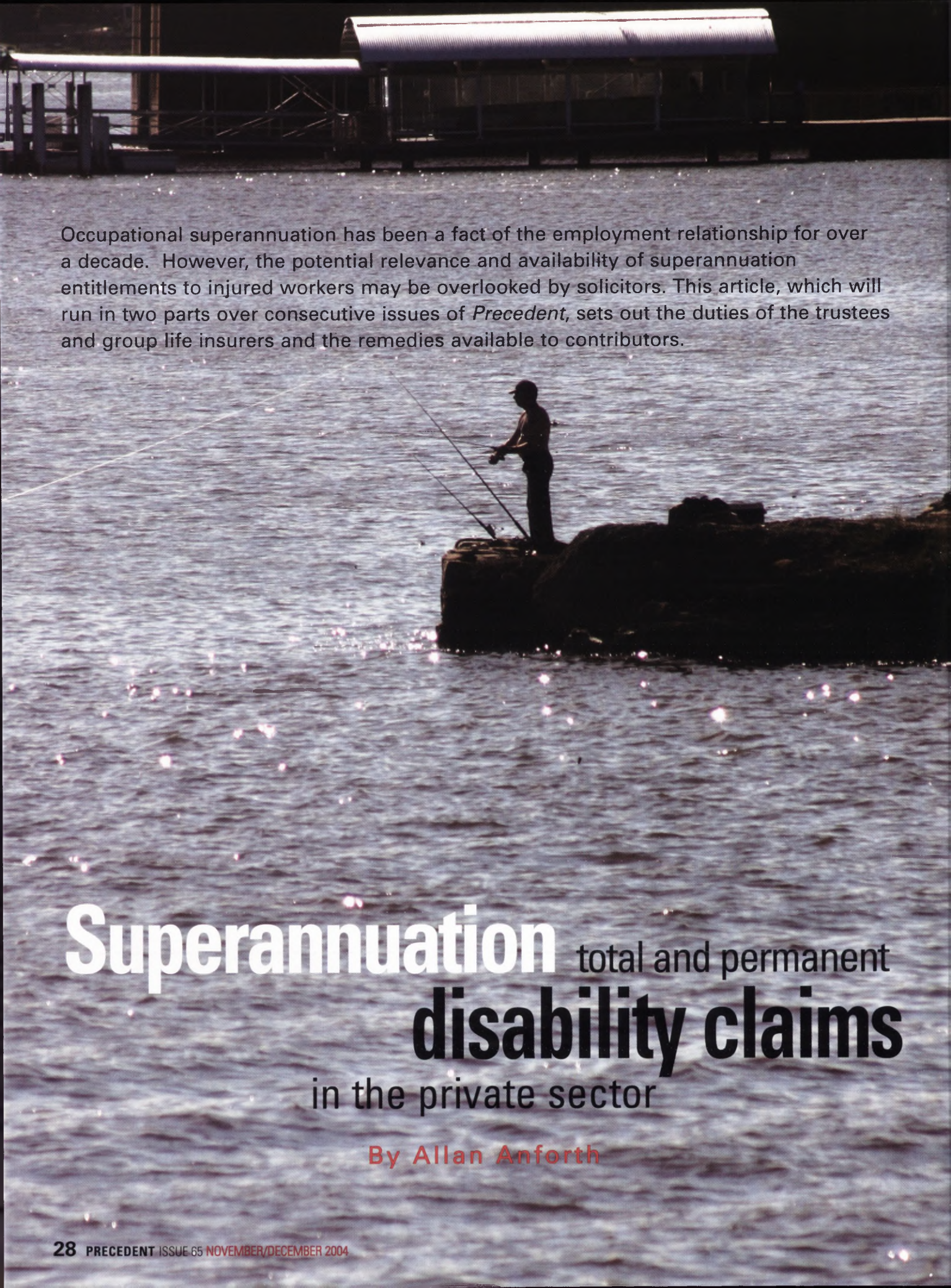

Occupational superannuation has been a fact of the employment relationship for over a decade. However, the potential relevance and availability of superannuation entitlements to injured workers may be overlooked by solicitors. This article, which will run in two parts over consecutive issues of *Precedent*, sets out the duties of the trustees and group life insurers and the remedies available to contributors.

Superannuation total and permanent disability claims in the private sector

By Allan Anforth

Most vocational superannuation schemes include entitlements for total and permanent incapacity (TPI) and commonly also make provision for total and temporary incapacity (TTI). (Sometimes the term 'disability' is used in lieu of 'incapacity', but nothing turns on this.)

Claims under these schemes may be attractive for several reasons:

1. They may pay substantially greater benefits than would be obtained under a workers' compensation scheme. It is not uncommon for the lump-sum TPI entitlement to be in the order of $100,000-$250,000 and for TTI entitlements to be 75%-100% of pre-incapacity income on a weekly basis.
2. Often the schemes contain no 'claw-back' clauses, so the injured employee is entitled to keep both the workers' compensation/common law award and the superannuation lump sum. The incapacity benefits under superannuation schemes are largely unregulated by statute and there are no statutory requirements that schemes must contain 'claw-back' clauses.
3. Payments under superannuation TPI or TTI often have no impact on the workers' compensation and common law entitlements. (The Commonwealth ComCare scheme is an exception to this.)
4. It is not necessary to prove that the incapacity was caused by some act of negligence or that it arose out of or in the course of employment.

THE LEGISLATION

Statutory regulation of vocational superannuation has occurred since at least 1986, when the *Occupational Superannuation Standards Act* 1986 and its associated legislation came into force. In 1992, the present compulsory scheme of vocational superannuation was enacted (*Superannuation Guarantee Charge Act* 1992; *Superannuation Guarantee (Administration) Act* 1992 and associated legislation). In 1993, the regulation of standards for occupational superannuation was transferred to the *Superannuation Industry (Supervision) Act* 1993 (SIS) and its regulations, and is now administered by Australian Security Investment Commission (ASIC).

Complaints and enquiries are regulated under the *Superannuation (Resolution of Complaints) Act* 1993 (s101) and its regulations, which provide for both internal and external review of decisions of trustees of schemes. The external mechanism is through the Superannuation Complaints Tribunal (SCT). The enactment of the tribunal legislation, however, did not repeal the power of the Supreme Court to review the conduct of trustees of superannuation funds.

Superannuation schemes are created by a trust deed and are administered by a trustee. The deed itself spells out the terms of the superannuation scheme and the powers of the trustee, albeit with some statutory intervention.

Superannuation death and disability policies are regulated by *the Life Insurance Act* 1984 and *Insurance Contract Act* 1984 and must be underwritten by a registered life insurance company, unless the trustee has been granted self-insurer status. Trustees effect death and disability coverage by taking out a group life policy with a registered life insurance company, with the trustees as the insured and the contributors as the lives insured. Thus the contributor's contractual rights exist in relation to the trustees and not directly with the life insurance company concerned. It is a matter for the trustees to deal with the life insurance company in relation to any claim, although the beneficiary does have a right to compel the trustee to take necessary proceedings and has the right to bring proceedings directly against the insurer (see below).

TOTAL AND PERMANENT DISABILITY INSURANCE

The terms of a superannuation scheme are to be found in the relevant trust deed, which defines most of the rights and obligations of the trustees and contributors. The trust deed may define the terms of the TPI and TTI explicitly or it may simply provide that the terms are to be ascertained from the terms of the policy taken out with the life insurance company. Even if the trust deed does define these terms, such definitions may be of no practical use because the payment of TPI or TTI has to come from the life insurance company under the group life policy, and the insurer will pay only if the definitions of the insurance policy are satisfied.[1] Thus, for practical purposes, the important definitions are those of the group life insurance policy. Because the actual terms of a TPI and TTI are not the subject of statutory regulation, whether in the trust deed or group life insurance policy, they may vary from deed to deed, although in reality there is a fair degree of consistency. For this reason, it is necessary to obtain both the trust deed and the group life policy as a first step to determining a contributor's entitlements.[2]

DUTIES OF THE SUPERANNUATION TRUSTEE AND GROUP LIFE INSURER

The trustee is a party to two contracts:

1. a contract with the contributor arising out of the trust deed (*ASEA Brown Boveri Super Fund No.1 P/L*);[3] and
2. a contract with the group life insurer on behalf of the contributors.

The trustees are in a fiduciary relationship with the contributor and owe the usual duties of a trustee in equity. Their duties have been reduced to statutory form in s52 of the *Superannuation Industry (Supervision) Act* 1993. This section provides that all superannuation trust deeds are deemed to include a covenant by the trustees, inter alia:

'(a) to act honestly in all matters concerning the entity;
(b) ...
(c) to ensure that the trustee's duties and powers are performed and exercised in the best interest of the beneficiaries ...'

The duty imposed on the insurer is set out in s13 of the *Insurance Contract Act* 1984, which provides:

'A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.'

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Section 13 applies only to insurers and not to trustees of super schemes. However, s13 in its application to insurers, and s52 of the *Superannuation Industry (Supervision) Act* 1993 in its application to trustees, have been taken to impose the same obligations – that is, the duty of good faith is the same test as the duty to act honestly and in the best interest of the beneficiary.[4] Whether the duty imposed by s13 on insurers amounts to a full fiduciary relationship was doubted by the Master of the WA Supreme Court in *Marksimovic v Royal & Sun Alliance Ltd.*[5]

The duty of good faith and fair dealing extends to both matters of procedure (*Vidovic*; *Wyllie*) and of substance, and to the determination of the claim (*Beverley*), as well as to matter leading to the formation of the contract. The trustee's/insurer's duty to the contributor in assessing TPI cases has been paraphrased in terms of the duty to act in good faith and to deal fairly with the claim.[6] This has also been paraphrased as requiring a 'real and genuine consideration of the claim' without ulterior motives.[7]

In *ASEA Brown Boveri Super Fund No. 1 P/L*, Beach J considered at length the nature of the trustee's duties to the beneficiaries of superannuation trusts. He rejected the argument that the trust did not attract all the duties of a trust relationship, as well as the proposition that the trustees were entitled to put the interests of the trust company on an equal footing with those of the individual beneficiaries.

In *Esso* and *ASEA* the court considered whether the decisions of trustees were assailable on the same grounds as administrative decisions. In both cases, the court returned an affirmative answer with two important qualifications. First, in the absence of any duty of the trustees to provide reasons for their decision it may be hard to make out the various grounds of administrative review. Secondly, in those trusts in which the trustees are given 'absolute' or 'unfettered' discretions, the traditional administrative review grounds may not apply and review may be limited to the good faith and fairness criteria. In *Dillon v Burns Philp Finances Ltd*,[8] the court set aside the decision of a trustee on the basis of irrelevant considerations having been taken into account. In *Hannover Life Reassurance v Membrey*,[9] the court entertained a 'no evidence' ground of appeal. These last two cases further suggest that trustees' decisions are assailable for common law error of law in the SCT.

THE TRUSTEE'S OBLIGATIONS TO PURSUE THE CLAIM

The contributor is entitled to look to the trustee to pursue and protect the contributor's interests in relation to the group life insurer, and can enforce this right at law.[10] The trustees have a corresponding duty to actively pursue the interests of the contributor against the insurer.[11] Independently, s48(1) of the *Insurance Contract Act* 1984 enables a person who is not a party to the insurance contract, but to whom the insurance cover extends, to recover the amount of his loss from the insurer. Although it is not entirely clear that TPI cover enacted by a superannuation trustee is a 'loss' within the meaning of s48(1), it may be so.[12]

The contract between the trustees and the insurer is a contract for the benefit of a third party, namely the contributor, upon which the contributor can sue directly.[13] This option is open where the trustees decline to proceed on behalf of the contributor. In general terms, there is an open debate as to whether an insurer can be joined as a defendant by a third party (that is, the contributor). There are authorities each way, which are summarised by Warne in *Joining the Fence-sitting Insurer as a Defendant in Liability Proceedings*.[14] It does seem, however, that a less strict view is taken in sickness and injury insurance matters to the joining of the insurer by the employee.[15]

The following further points emerge from the cases:

1. The trustee/insurer must ensure that the medical reports obtained are directed to the correct test of TPI contained in the trust deed, including having regard to any words of limitations appearing in the definition of TPI or TTI.[16]
2. Generally, the trustee/insurer is expected to ask relevant medical referees to comment directly on the TPI test.[17]
3. The trustee/insurer is expected to give the employee a copy of any adverse medical reports for comment (*Chammas*; *Wyllie*; *Beverley*).
4. There is some doubt as to whether the insurer/trustees are bound to provide the employee with an opportunity to be heard before making a decision; *Karger v Paul* suggests not, but *Wyllie* suggests that it may not be possible to afford procedural fairness without doing so.
5. In *Tonkin v Western Mining Corp Ltd*,[18] the Court of Appeal in WA said that a trustee/insurer does not have to

actively investigate all facets of the employee's claim; they only have to consider fairly matters before them and be prepared to reconsider the matter if new evidence comes to light. The decision in *Wyllie* held that for the insurer to fail to seek and take evidence on a relevant issue is an error of law.

6. The insurer/trustee does not have to provide reasons for their decision (*Hartigan Nominees P/L v Ryder*)[19] but, if reasons are given, then the court may review the trustee's decision on the basis of those reasons.[20] Young J in *Maciejewski* made the further point that if the trustee does not give reasons or evidence in court of the basis for the decision, then it *is a virtual certainty* that the court will conclude that the trustee had no good reason for the decision. See Burchett AJ in *Hay v Total Risk Management P/L* to the same effect.
7. The onus of proof rests on the contributors to establish their TPI and TTI status (*HCF Life Insurance Co P/L v Kelly*[21]).

REMEDIES AVAILABLE TO THE AGGRIEVED CONTRIBUTOR

An application for TPI benefits is made to the trustee. It is the trustee who deals with the insurer. The insurer will advise the trustee of its decision under the group life policy and the trustee will advise the contributor. A contributor to a superannuation fund who is aggrieved by the trustee's decision to reject an application for TPI has two remedies:

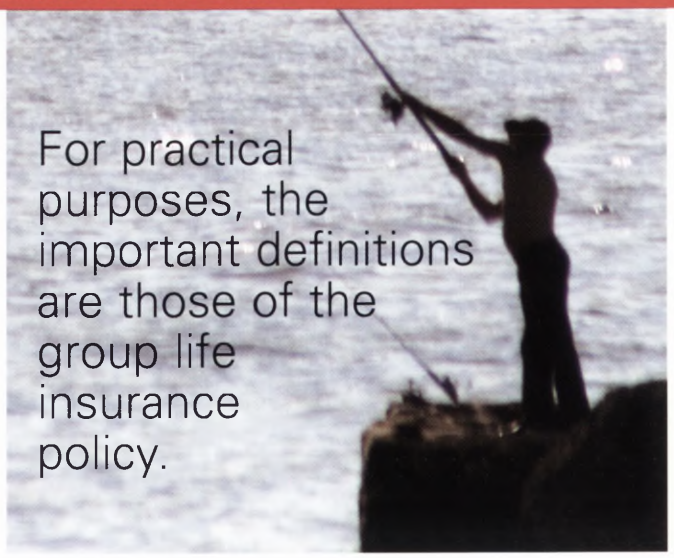
1. the Superannuation Complaints Tribunal (SCT); or
2. the common law courts (covered in Part 2 of this article).

The Superannuation Complaints Tribunal

The Superannuation Complaints Tribunal (SCT) is a statutory body set up under the *Superannuation (Resolution of Complaints) Act* 1993. It has jurisdiction in respect of all complying superannuation funds in Australia. In *Attorney General v Breckle,*[22] the High Court upheld the constitutional validity of the terms of the *Superannuation (Resolution of Complaints) Act* 1993 on the basis that a superannuation fund is not obliged to apply to the Tax Commissioner for complying status (although without such status it receives no concessional tax advantage). But, should a superannuation fund make such an application, then it is required to agree to submit to the jurisdiction of the SCT. In this sense, the ultimate jurisdictional basis of the SCT is that of contract, but the distinction is essentially hypothetical, as no superannuation fund is going to forego concessional tax advantages just to circumvent the SCT's jurisdiction.

In relation to the SCT's jurisdiction, there are three important limits that must be observed:

1. Any claim for TTI or TPI must be lodged with the trustee within one year of the termination of the contributor's employment (s14(6B));
2. Any appeal from the trustee's decision must be lodged with the SCT within one year of the trustee's original or primary decisions (s14 (6A)); and
3. The SCT is bound by the terms of the trust deed and group life policy and cannot make decisions inconsistent with the terms of these documents (s37(5) of the *Complaints Act*).[23]



Often trust deeds make provisions for contributors to seek reconsideration of the trustees' decisions, or for other informal modes or review. While there is no problem with the contributor activating these modes of review, the one-year time-limit for lodgement in the SCT runs from the date of the primary decision, and not from the date of any reconsideration or decision arising from an informal mode of review. If the original decision is varied on internal review, then s14(6D) provides that the decision as varied is to be taken to be the original decision, but the clock for appeal purposes still runs from the date of the original decision and not the date of the internal review. It is thus important not to allow more than 12 months to elapse in the internal review process.

There is no provision for an extension of time in either case. A failure to observe these time-limits may see the contributors' rights irretrievably compromised.

The powers of the SCT

The SCT has jurisdiction to review complaints against both trustees and the group life insurers (ss18 and 37).

The powers of the SCT are principally set out in ss14 and 37.

Section 14(2) provides that a complaint may be made to the SCT if the contributor alleges that the decision was 'unfair or unreasonable'. Sections 14(6A) and (6B) fix the time-limits referred to above. Section 14(6D) provides that any reconsideration by the trustee or insurer replaces the original decision, but the one-year time-limit for lodging applications with the SCT still runs from the date of the original decision.

Section 37(3) gives the SCT all the powers of the trustee and the insurer. The SCT is empowered to affirm or vary the decision of the trustee or insurer, and may substitute its own decision for that of the trustee or insurer.

Sections 37(3) and (4) require the SCT to make a decision to remedy the unfairness and unreasonableness of the trustee or insurer. If no unfairness or unreasonableness is found, then the SCT must affirm the decision (14(6)). The SCT's powers must be exercised in conformity with the trust deed and group life policy (s14(5)).

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An appeal lies from the SCT to the Federal Court only on a point of law.

Earlier in the SCT's history, the Federal Court had construed s14 as being limited to the issue of whether, on the evidence before the trustee, the trustee's decision was unfair or unreasonable and that the power did not extend to a de novo review of the trustee's decision on the merit.[24] In short, under these authorities the SCT was engaging in a form of judicial review rather than an administrative or merits review, which severely limited its usefulness to consumers.[25]

In 1999, the Federal Court handed down two decisions in which the court dissented from earlier decisions and held that the SCT had the power of de novo merits review and is not limited to reviewing the decision of the trustee and insurer in terms of the evidence before the trustee or insurer. Rather, the SCT is empowered to make its own decision on what the decision should have been.[26] In *National Mutual Life Association v Scollary*, Ryan J considered that s36(c) of the *Complaints Act* permitted the SCT to take into account evidence that was not before the trustee or insurer.[27]

The decision in *Campbell* was appealed to the Full Federal Court, which said that the task of the SCT was to determine whether the trustee's or insurer's decision was fair or reasonable, but that in order to do so the SCT stands in the shoes of the trustee or insurer and is required to conduct a de novo review.[28]

The concept of the SCT standing in the shoes of the trustee or insurer has been adopted by the Federal Court on various occasions.[29] Notwithstanding the common adoption of the term, the approach of the Federal Court is to distinguish clearly the function of the SCT from genuine merits reviews of the type conducted by the Administrative Appeals Tribunal. The functions of the SCT are a limited form of administrative review to determine whether the trustee's or insurer's decision was fair and reasonable. Unless the SCT finds otherwise, it is required to affirm the decision under review. This form of review starts from the premise that reasonable minds may differ in the assessment of evidence and findings of fact. Accordingly, the SCT must do more than simply disagree with the trustee or insurer's decision; it must find that the decision is unfair and unreasonable. It is an error of law for the SCT simply to determine de novo whether the applicant is entitled to the benefit claimed, as opposed to determining whether the trustee's or insurer's decision is unfair or unreasonable.[30]

The SCT can consider whether it finds the applicant entitled to the benefit claimed, but only as a guide to whether the trustee's or insurer's decision was unfair or unreasonable.[31] The unfairness or unreasonableness can be found in the processes adopted by the trustee or insurer, as well as in the substantive decision arrived at (*Scollary*).

The SCT cannot give relief in respect of unfairness which arises from the terms of the trust deed or group life policy itself, as the SCT is bound by the terms of these documents.[32]

The SCT is an administrative tribunal and as such cannot make findings of law that are binding on the parties. It can, however, make such findings of law as are necessary to carry out the review before it (*Hornsby* and *Brayley*).

The SCT does not provide for an award of legal costs.

In *Crocker*, the court held that the SCT had available to it all the powers available to the trustee to determine the claim. This included the power conferred on the trustee in the trust deed to enter into agreement to compromise claims against the fund arising other than benefits payable under the fund. In this case, it was alleged that the trustees had provided negligent advice to a contributor and were therefore at risk of suit in tort. The court held that the SCT could, if it so chose, make an order in the nature of a compromise of that claim. More recently, Wilcox J in *Telstra Corporation v Aboushadi* applied the same principle in the context of a claim under the *Safety and Rehabilitation Act* 1998.[33] The decision in *Alcoa* suggests the contrary, in that the court held that the SCT could only review such decisions as the trustee had in fact purported to make. As the trustee had not addressed the issue of a compromise of the claim in tort, the SCT had no jurisdiction.

REVIEW IN THE COMMON LAW COURTS

Aggrieved employees do not have to bring their claims in the SCT; they can take their claims against trustees and insurers to the supreme court (district court, county court), based on a breach of the duty owed to them by these persons in the context of their respective contracts.

Part 2 of this article, which will appear in the next edition of *Precedent*, will examine this process. ■

Notes: **1** *Constantides v Du Pont Superannuation Fund P/L* 2002 FCA 534; *Davis v Rio Tinto Staff Superannuation Fund P/L* 2002 FCA 376. **2** A review of authorities of common specific wording of TPI definitions appears in Part 2 of this article, to be published in the January/February 2005 edition of *Precedent*. **3** Unreported, SC Vic, Beach J, 1997. **4** *Edwards v Hunter Valley Co-Op Diary Co Ltd* 1992 7 ANZIC 61-113; *Vidovic v Email Superannuation Ltd,* unreported SC NSW 3/3/95; *Chammas v Harwood Nominees P/L* 1993 7 ANZIC 61-175; *Wyllie v National Mutual Life Association,* unreported SC NSW 18/4/97; and *Beverly v Tyndall Life Insurance* 1999 WASC 198. **5** 2003 WASC 46. **6** *Edwards; Chammas; Vicovic;* and *Wyllie*. **7** *Karger v Paul* 1984 VR 161; *Rapa v Patience,* unreported SC NSW 4/4/95; *Vidovic; Wyllie; ASEA Brown Boverie Super Fund No. 1 P/L,* unreported SC Vic 1997; *Esso Australia Ltd v APADA,* unreported SC QLD 5/10/93; *Beverley; Hay v Total Risk management P/L,* 2004 NSWSC 94. **8** Unreported SC NSW 1988. **9** 2004 FCA 1095. **10** *Edwards*. **11** *Ferenance v Wreckair & Co Ltd* 1993 AILR 108; *Gilbenkians Settlement* 1970 AC 508. **12** *McArthur v Mercantile Mutual Life Insurance Co Ltd* 2001 QCA 317 at 4. **13** *CE Heath Casualty and General Insurance Ltd v Grey* 1993 7 ANZIC 61-109; and *Wyllie*. **14** Parts I and II in 1998 9 *ILJ* No. 3 and 1998 10 *ILJ* No. 1. **15** *Szuster v Hesta Ltd* 2000 SADC 2. **16** See, for example, 'for which she is reasonably qualified by education, training or experience' (*Wyllie; Edwards; Whiley v State Public Sector Superannuation Scheme,* unreported SC NSW 3/4/97l; *Neskovski v Roger,* unreported NSW SC 12/5/95; *Constantides;* and *Davis v Rio Tinto* on the difference between 'unlikely' and 'unable' to engage in paid work. See *Till v The National Mutual Life Association* 2004 ACTSC 40 on the meaning of 'occupation' being limited to work habitually carried on, but contrast *HCF Life Insurance Co P/L v Kelly* 2002 WASCA to the contrary. See *Rio Tinto* for the need to consider the practical reality of an application finding work in the labour market as part of the concept of an incapacity for work; and *Alcoa Australia Retirement Plan P/L v Thompson* 2002 FCA 256 for a collection of authorities of various definitions of total and permanent disability. **17** *Gomes v Austchen Nominees P/L* 1993 7 ANZIC 61-159. **18** *Tonkin v Western Mining Corp Ltd,* unreported CA WA 20/4/98. **19** 29 NSWLR 405. **20** *Maciejewski v Telstra Super P/L* 1998 44 NSWLR 601, per Young J; *Telstra Super P/L v Flegeltaub* 2000 2VR 276. **21** 2002 WASC 264. **22** 1999 163 CLR 576. **23** *Colonial Mutual Society Ltd v Brayley* 2002 FCA 1333; *Retail Employees Superannuation P/L v Crocker* 2001 FCA 1330; *Flexiplan Australia P/L v Pankhurst* 2001 FCA 1535; and *Alcoa*. **24** *National Mutual Life Association of Australia Ltd v Jevtovic* 1997 359 FCA 8/5/97; *Adkins v The Health Employees Superannuation Trust Australia Ltd* 1997 794 FCA 15/8/97; *Briffa and Ors v Hay* 1997 544 FCA 20/6/97; *Collins v AMP* 1997 643 FCA 18/7/97. **25** For a discussion of some of these Federal Court decisions, see 'Superannuation (Resolution of Complaints Act) – Fresh Evidence', D Gurvich 71 *ALJR* 684; 'Equity and Trusts', D Maclean 70 *ALJR* 955; 'Guidelines for Handling Total Disablement Claims', S Hankey, *NSWLSJ* August 1998, 54; 'What is the Future of the Superannuation Complaints Tribunal', R Hunt, *NSWLSJ*, August 1998, 34. **26** *Seafarers Retirement Fund P/L v Oppenhuis* 1999 FCA 1683, Merkel J; *National Mutual Life Association of Australasia Ltd v Campbell* 1999 FCA 1717, Heerey J. **27** See to the same effect also Alcoa; *Seafarers Retirement Fund P/L v Oppenhuis* 1999 FCA 1683; the Full Federal Court in *Campbell*; *Military Superannuation Board No. 1 v Stanger* 2002 FCA 671; but on the contrary, see *Constantides*. **28** 2000 FCA 852, 23/6/00, Black CJ, Emmett and Hely JJ. **29** For example, *Crocker; Constantides*. **30** *Alcoa; Constantides; Cameron v Board of Trustees of State Public Sector Superannuation Scheme* 2003 FCAFC 214; *Hornsby v Military Superannuation and Benefits Board of Trustees No. 1* 2003 FCA 54. **31** *National Mutual Life Association v Scollary* 2002 FCA 695. **32** *Colonial Mutual Life Assurance Society Ltd v Brayley* 2002 FCA 1333 30/10/2002; *Rhodes v Tower Superannuation Fund* 2004 FCA 510 27/4/2004 **33** 2004 FCA 811.

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