

**REVIEW OF THE *FREEDOM OF INFORMATION ACT 1982* AND THE  
*AUSTRALIAN INFORMATION COMMISSIONER ACT 2010***

**SUPERANNUATION COMPLAINTS TRIBUNAL**

**SUBMISSION**

***Executive Summary***

The documents acquired by the Tribunal in connection with complaints made to it inherently involve personal and business information, often of a very private and personal character.

The *Superannuation (Resolution of Complaints) Act 1993* under which the Tribunal operates imposes a strict and restrictive regime in relation to the disclosure of and access to these documents.

The application of the generic ‘unreasonable disclosure’ and ‘public interest’ tests in the FOI Act to disclosure of these documents is fundamentally affected by the extent of the specific secrecy regime applied to the documents the Tribunal’s legislation.

The Administrative Appeals Tribunal, in *Denehy and Superannuation Complaints Tribunal* [2012] ATAA 608 AAT, has recently found that the strict and restrictive regime in relation to the disclosure of and access to documents acquired in connection with complaints has effect that disclosure will be ‘unreasonable’ for FOI purposes.

The Parliament’s clear intention in imposing specific controls over the disclosure and access to information or documents that relate to a complaint made to the Tribunal is also a statement that there is no ‘public interest’ in any access to these documents wider than the parties to the complaint.

It is submitted that the Tribunal is an agency where the full coverage of the FOI Act is not appropriate and that the FOI Act should not apply to documents held by the Tribunal that are acquired in connection with a complaint made to the Tribunal.

## **About the Tribunal**

1. The Superannuation Complaints Tribunal is an independent dispute resolution body which deals with a diverse range of superannuation-related complaints and offers a free, 'user-friendly' alternative to the court system. Over 2600 written complaints were made to the Tribunal in 2011-12.
2. The Tribunal was established by the Australian Government by the *Superannuation (Resolution of Complaints) Act 1993* (the **SRC Act**). The Tribunal's statutory functions require it to inquire into a complaint and try to resolve it by conciliation. If conciliation is unsuccessful, a formal review of the decision/s and/or conduct relating to the complaint is undertaken by a panel of Tribunal members and a formal determination issued – (s 12(1) of the SRC Act).
3. The Tribunal deals with complaints about decisions made by the operators of regulated superannuation funds, annuities and deferred annuities, and Retirement Savings Accounts. This submission, however, will focus on the largest segment of the Tribunal's activities, in relation to regulated superannuation funds.
4. In relation to complaints about superannuation funds, complaints can be made to the Tribunal by a fund member or a former fund member, or a person acting for, or for the estate of, such a person. Where the decision made by the fund involves the distribution of a death benefit payable from the fund, complaints can generally be made by any of the deceased member's dependants and also by the deceased's estate.

## **The Tribunal under the FOI Act**

5. The Tribunal is a "prescribed authority", and so an "agency", for the purposes of the FOI Act by virtue of being an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment – paragraph (a) of the definition of "prescribed authority" in s 4(1) of the FOI Act.
6. The Tribunal is a "micro agency" for the purposes of the Office of the Australian Information Commissioner, with a total staff of 45<sup>1</sup>. The Tribunal's FOI obligations are one part of the general duties of the Tribunal's Legal Section.

## **Information and documents held by the Tribunal**

### ***Inherently personal information***

7. The Tribunal's jurisdiction is to review a decision made by the trustee of a superannuation fund "in relation to a particular member or a particular former member" of a fund – s 14(1)(a) of the SRC Act. Under s 37 of the SRC Act, the determinations issued by the Tribunal are in relation to whether the operation of the decision of the trustee in relation to the complainant is fair and reasonable in the circumstances.

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<sup>1</sup> For the purposes of the *Information Publication Scheme: Survey of Australian Government Agencies* conducted by the Information Commissioner in May 2012, a micro agency has less than 100 staff.

8. As a result, all documents acquired by the Tribunal in connection with a complaint made to the Tribunal will inherently contain “personal information” within the meaning of s 4(1) of the FOI Act:
- a complaint about a decision to deny a claim for a disability benefit involves a benefit payable from a superannuation fund in the event of a temporary or permanent cessation of employment because of a partially or totally disabling physical or mental condition” – paragraph (a) of the definition of “disability benefit” in s 3(1) of the SRC Act. The personal information acquired by the Tribunal in relation to such a complaint may therefore include details of the complainant’s medical and employment history;
  - a complaint about a decision as to the distribution of a death benefit from a fund among a deceased fund member’s ‘dependants’ and/or estate will involve the Tribunal acquiring personal information not only about the deceased fund member, but will also include personal information about the complainant (i.e. a person who feels that they should receive some or more of the death benefit) and about other parties joined to the complaint under s 18 of the SRC Act (i.e. persons whose share of the death benefit would be affected by the complaint being upheld). This will also include detailed personal information about the deceased fund member’s personal and financial relationship with spouse(s), children, or persons claiming direct financial dependency or to be in an “interdependency” relationship with the deceased within the meaning of the *Superannuation Industry (Supervision) Act 1993*; and
  - a complaint by a fund member about a decision of a fund in a matter of fund administration that affects the member can involve the Tribunal acquiring a wide range of personal information about the member. This can include about the member’s employment, contributions to the fund, choices made between options offered by the fund, tax affairs and other aspects of the member’s financial affairs and life affected by the fund’s decision.
9. Personal information is provided to the Tribunal when a person makes their complaint to the Tribunal under s 14 of the SRC Act, responds to further inquiries made by the Tribunal and makes submissions to the Tribunal under s 32 of the SRC Act.

### ***Business information***

10. The parties to a complaint to the Tribunal include the trustee of the superannuation fund and, where the complaint relates death or disability benefits payable under a contract of insurance between the superannuation fund and an insurer, also the insurer – s 18(1) of the SRC Act. Both the fund trustee and a joined insurer are required by the SRC Act to provide the Tribunal with all documents or parts of documents that are in their possession or control that are considered by them to be relevant to the complaint – s 24(1) of the SRC Act.
11. As parties, both the fund trustee and an insurer also provide information and documents to the Tribunal in response to further inquiries made by the Tribunal and in submissions under s 32 of the SRC Act.

12. The Tribunal's jurisdiction in relation to superannuation funds will, in the vast majority of cases, cover funds as private commercial enterprises. A small proportion of funds within the Tribunal's jurisdiction are Government public sector superannuation funds.
13. The broad scope of "business information" was recognised by the Administrative Appeals Tribunal (AAT) in *Denehy and Superannuation Complaints Tribunal* [2012] ATAA 608 at paras 103-105, in relation to the test in the former s 43 of the FOI Act. These findings appear equally applicable in relation to the current s 27(2) and s 47G of the FOI Act.
14. As a result it is inherent in the handling of a complaint that the Tribunal will acquire business information with respect to both the person who, or organisation which, is the trustee of the superannuation fund and the organisation or undertaking that is the superannuation fund. Where an insurer is also a party to a complaint because of s 18(1) of the SRC Act, the Tribunal also acquires business information in relation to that insurer.

## **Restrictions on access to Tribunal information and documents**

### ***Statutory framework***

15. Section 63 of the SRC Act imposes a strict liability secrecy regime in relation to any information or documents acquired by the Tribunal in connection with a complaint made to the Tribunal. The disclosure prohibition imposed by s 63(2) of the SRC Act is that such information or documents must not, directly or indirectly, be disclosed, except in limited circumstances.
16. The prohibition covers members of the Tribunal and the staff of the Tribunal supporting the Tribunal. The SRC Act extends the prohibition to the disclosure of information or documents to courts and any other tribunal, authority or person having power to require the production of documents or the answering of questions – s 63(5). Contravention is an offence.
17. Section 38 of the SRC Act requires review meetings of the Tribunal to be held in private and provides that the Tribunal may give directions restricting the disclosure of information of documents relating to a review meeting. Subsection 38(4) also requires the Tribunal to have regard to the need to protect the privacy of the parties to a complaint when giving directions. The Tribunal gives a comprehensive direction prohibiting disclosure in every matter that proceeds to a review meeting. Contravention of a Tribunal direction is an offence.
18. Exceptions to the prohibition are limited:
  - under s 63(2B) disclosure for the purposes of the Act, including to ensure the parties to a complaint are accorded procedural fairness;
  - under s 63(3)(a) and s 63(3)(aa) to APRA and ASIC as the Australian Government's regulatory, supervisory and enforcement bodies in relation to superannuation; and
  - under s 63(4) so long as the disclosure does not enable the identification of the parties to a complaint. Versions of the Tribunal's determinations are published for the purposes of industry guidance in anonymised form in compliance with this provision.

19. One exception to the prohibition is disclosure to a party to a complaint, where the person who provided the information or document consents in writing – s 63(3)(b) of the SRC Act. Requests for access to documents made by parties to complaints are dealt with under this exception and outside of Part III of the FOI Act, under the general effect of s 3A of the FOI Act. Requests for access by persons who are not parties to a complaint are required to be considered under the FOI Act.

### ***Implied undertaking***

20. The AAT in *Denehy* also found that the strict and restrictive controls in the SRC Act in relation to the disclosure of information and documents, including the confidential nature of the Superannuation Complaints Tribunal’s proceedings, has effect to produce an implied undertaking in relation to the receipt of information and documents by parties under the Tribunal’s procedural fairness arrangements. This undertaking is that the information and documents which are disclosed to a party cannot be used for any other purposes than those concerned with the resolution of the complaint (*Denehy* supra at paras 43 -47).

### **Application of the FOI Act to documents held by the Tribunal**

21. Under the FOI Act access to documents that contain personal information and business information requires the application of generic tests in relation to whether:

- access to the document would involve the unreasonable disclosure of such information (s 47F and s 47G of the FOI Act), and
- access to the document would be contrary to the public interest (s 11A(5A) of the FOI Act).

22. An FOI application in relation to documents that were acquired by the Tribunal in connection with a complaint made to the Tribunal will involve documents to which s 63 of the SRC Act applies.

### ***Unreasonable disclosure***

23. As noted above, in *Denehy*, the AAT found that the strict secrecy regime imposed by the SRC Act has effect to produce an implied undertaking that restricted the use that could be made of any information and documents that the Tribunal obtained in connection with a complaint and its review. The AAT also found that, in relation to personal information and the former s 41 of the FOI Act:

- this was a relevant factor in deciding what amounts to unreasonable disclosure of personal information of access were given under the FOI Act (*Denehy* supra at para 47); and
- information was given to a dispute resolution body – the Tribunal – for a particular purpose and in circumstances where it is strictly controlled, and that to disclose it under the FOI Act into an environment in which there are no such controls and

restrictions is an unreasonable disclosure of personal information (*Denehy* supra at para 55).

24. These findings appear equally applicable in relation to the current s 47F of the FOI Act.

25. In relation to business information and the former s 43 of the FOI Act, the AAT in *Denehy* also found:

- the existence of a complaints scheme is relevant in deciding whether disclosure under the FOI Act is unreasonable in that but for the external complaints resolution scheme - the Tribunal – business information would not come into the possession of another person (*Denehy* supra at para 109); and
- the external dispute resolution scheme administered by the Tribunal carefully controls disclosure and use of material that is gathered by the Tribunal under compulsion from a fund trustee. Also that, where the request for access involves documents that the superannuation fund is not otherwise required to disclose under other regulatory or supervisory arrangements, access would be given under FOI only because it had first been required to be disclosed to the Tribunal (*Denehy* supra at para 113).

26. These findings appear equally applicable in relation to the current s 47G of the FOI Act.

### ***Public Interest***

27. Section 11B(3) of the FOI Act lists four factors that would favour access to a document in the public interest:

- (a) promote the objects of the FOI Act. In relation to the objects of the FOI Act in s 3 of that Act release of any agency documents requested could appear to promote the objects in s 3(1), (2) and (4), ie:
  - to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by providing for a right of access to documents
  - to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource
  - to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

However, it does not appear that release of documents that relate to a complaint made to the Tribunal would promote the object in s 3(3) of the FOI Act to promote Australia's representative democracy by contributing towards increasing public participation in Government processes, with a view to promoting better-informed decision-making and increasing scrutiny, discussion, comment and review of the Government's activities.

- (b) inform debate on a matter of public importance - it does not appear that release of documents that relate to a complaint made to the Tribunal would do this. However, it may be possible that a Tribunal determination in relation to a particular complaint may also be relevant to and have an impact on others in similar circumstances, and so might possibly approach being able to be considered

a matter of wider importance than just the complainant. This possibility is already addressed in s 63 of the SRC Act in that:

- the Tribunal publishes its determinations on its own website and on the Austlii internet legal database in a way that does not enable the identification of the parties to a complaint, in compliance with s 64(4) of the SRC Act; and
  - under s 44(2) the Tribunal can direct the trustee of a superannuation fund to inform any or all of the members or former members of the Tribunal's determination (which would be a disclosure for the purposes of the Act within the scope of s 63(2A) of the SRC Act);
- (c) promote effective oversight of public expenditure – would not appear relevant to information and documents acquired by the Tribunal in connection with complaints made to the Tribunal about the decisions of trustees of superannuation fund made in respect of fund members;
- (d) allow a person to access his or her own personal information – under s 63(3)(b) of the SRC Act a party to a complaint will be able to obtain the information or documents that the party themselves provided to the Tribunal. The Tribunal's procedural fairness arrangements also ensure that information and documents relevant to the complaint provided to the Tribunal by one party are exchanged with each other party as part of the submissions processes in s 32 of the SRC Act.

28. The AAT in *Denehy* recognised that the circumstances and particular facts of applications for access to documents acquired by the Tribunal in connection with a complaint inherently involve that the documents were acquired for the purposes of the dispute resolution process in the SRC Act and in the light of the express and strict secrecy of the information and documents so acquired.

29. The expression of the intention of the Parliament in relation to the secrecy of documents acquired in connection with complaints appears to be a significant factor in the analysis of where the public interest lies in relation to the release of personal information held by the Tribunal. These express features of the SRC Act, under which the Tribunal operates and under which documents are obtained, being expression of the intention of the Parliament, appears to be determinative that for s 11A(5) of the FOI Act access to these documents would, on balance, be contrary to the public interest. The specific attention of the Parliament to this also appears to outweigh any other more general public interest factors in favour of disclosure.

### **Mechanisms for exemption**

30. The Tribunal submits that the views of the AAT and expression of the Parliament's intention necessarily affect the outcomes of the generic considerations involved in access decisions under the FOI Act to such extent as to warrant a partial FOI exemption for the Tribunal.

31. Such a partial exemption could be under s 7(2) and Part II of Schedule 2 to the FOI Act and be to the effect that the Tribunal is exempt from the operation of the FOI Act in relation to documents made subject to the s 63 prohibition.

32. A partial exemption of this kind would let s 63 of the SRC Act operate as the sole determinant of the extent of any disclosures of information and documents covered by s 63 of the SRC Act. An FOI application in relation to documents that are not acquired by the Tribunal in connection with a complaint made to the Tribunal will not involve documents to which s 63 of the SRC Act applies. In this case, the generic tests in the FOI Act would be applied in their own context.
33. Such a partial FOI exemption would also remove the anomaly in the co-existence of the generic FOI access regime and s 63 of the SRC Act.
34. An alternative vehicle for such an exemption in the FOI Act may be that the FOI Act only applies to the Tribunal where a document relates to matters of an administrative nature, for the purposes of s 6 of the FOI Act.

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