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Superannuation Complaints Tribunal and the  
Public/Private Distinction in Australian  
Administrative Law

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# Superannuation Complaints Tribunal and the Public/Private Distinction in Australian Administrative Law

Greg Weeks

## **Abstract**

This article considers the Superannuation Complaints Tribunal (SCT) and the capacity of its decisions to be reviewed. While the constitutional position of the SCT is settled after the decision of the High Court in *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, its categorisation as a private body remains open to question. This being the case, the susceptibility of decisions of the SCT to review is compared with the equitable standards upon which trustee decisions are reviewable. Challenges to decisions of the SCT may not be possible under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* but the quasi-private character of the SCT – a private body with a public function – presents scope for courts to hold that the SCT owes an equitable duty to those within its jurisdiction.

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## INTRODUCTION

Over the course of the last two decades, the policies of successive governments have made superannuation ubiquitous, to the extent that superannuation is now received as a compulsory payment by of 90%<sup>1</sup> of the Australian population. As a result, superannuation has changed in character from an investment choice made by individuals to augment the aged pension to a form of “compulsory investment”. Inevitably, the need has arisen to help the many millions of Australians for whom superannuation represents their only exposure to investment risk. Considerations that general equitable principles, which usually govern the relationship between trustees and beneficiaries were, in isolation, ill-suited to deal with the new level of demand, led to the creation of the Superannuation Complaints Tribunal (SCT) by the *Superannuation (Resolution of Complaints) Act 1993* (Cth) (S(RC) Act). The “private” nature of that essentially public tribunal has since become a point of interest and contention.

It is now several years since the High Court handed down its decision in *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83. In that case, a trustee challenged a decision of the SCT, ultimately without success, on the grounds that it had exercised judicial power, and thereby offended Ch III of the *Constitution*. In rejecting this view, the High Court held that the statutory powers exercised by the SCT are contractual as between the SCT and the trustee of a superannuation fund, due to the voluntary election of the trustee to bring the fund within the ambit of the *Superannuation Industry (Supervision) Act 1993* (Cth), in order to be eligible for the tax benefits to which complying funds are entitled (and which, indeed, have been the attraction of superannuation trusts for many years).<sup>2</sup> This election incorporated the SCT’s powers into the terms of the trust instrument<sup>3</sup> and the power of the SCT was therefore held to be private (at [43]-[44]).

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<sup>1</sup> Productivity Commission; *Review of Certain Superannuation Legislation*; Fig 2.1.

<sup>2</sup> See *Scott v Commissioner of Taxation of the Commonwealth [No 2]* (1966) 40 ALJR 265 (Windeyer J).

<sup>3</sup> *Superannuation Industry (Supervision) Regulations 1994*, reg 13.17B; see also Airo-Farulla G and White S “Separation of Powers, “Traditional” Administration and Responsive Regulation” (2004) 4 MQLJ 57.

However, while this solved the constitutional issue in *Breckler*, it remains true that the SCT is a body of considerable size and power and is indisputably in the public sphere. There has been significant academic disquiet<sup>4</sup> over the insistence of the High Court, in cases like *Breckler* and *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 on a firm division between public and private power. Indeed, this is a debate which is also alive in other countries.<sup>5</sup> The admission in the judgment of the majority in *Breckler* that it may in fact “be a breach of trust not to exercise the election so as to obtain the revenue benefits which follow”<sup>6</sup> seems a clear indication that the trustee of a superannuation fund has no *practical* discretion to avoid the jurisdiction of the SCT, which is a statutory body made up of “officers of the Commonwealth within the meaning of s 75(v) of the *Constitution*”.<sup>7</sup> Airo-Farulla and White posit the argument that the High Court may have been prepared to define the power of the SCT as private, even though at best the SCT is only “quasi-private”, because the distinction is “not critical to ensuring that intended beneficiaries [can] enforce Tribunal decisions”.<sup>8</sup> It may be that the most accurate characterisation of the SCT is as a public body which makes privately enforceable decisions.

This article will examine the role of the SCT, both in terms of its allocated function and practical effect. Reviewability of trustee decisions will be compared with that of SCT (and other tribunal) decisions, with an eye to establishing on precisely which grounds – and upon which standards – decisions about superannuation trusts may be challenged. Finally, the SCT will be analysed in light of the broader argument about the public/private distinction.

## ROLE OF THE SCT

The creation of the SCT by the S(RC) Act followed recommendations in an Australian Law Reform Commission Report.<sup>9</sup> While *Breckler* has made it clear that the SCT is not a Ch III court, and has no entitlement to the exercise of Commonwealth judicial power, its nature is capable of more precise explanation.

The SCT certainly has administrative powers and functions.<sup>10</sup> Branson J has pointed out that, although it lacks the power to resolve all legal issues between the parties,<sup>11</sup> the SCT is required to form a view as to the proper construction of any provisions of the governing rules of a fund upon which its determination depends,<sup>12</sup> in respect of which it must provide written reasons.<sup>13</sup> It has more in common with administrative tribunals<sup>14</sup> than with courts, in that it is a review body<sup>15</sup> which assesses whether a given decision<sup>16</sup> is “fair and reasonable”.<sup>17</sup> However, the review is not *de novo*, in

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<sup>4</sup> Mantziaris C, “A ‘Wrong Turn’ on the Public/Private Distinction: *NEAT Domestic Trading Pty Ltd v AWB Ltd*” (2003) 14 PLR 197; Cane P, “Accountability and the Public/Private Distinction” in Bamforth N and Leyland P (eds), *Public Law in a Multi-Layered Constitution* (2003, Hart Publishing, Oxford); Airo-Farulla and White, n 3.

<sup>5</sup> Cane, n 4, p 248.

<sup>6</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [44] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

<sup>7</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [35]; a decision of the SCT is therefore subject to collateral review in the original jurisdiction of the High Court, or in the Federal Court under *Judiciary Act 1903* (Cth), s 39B(1).

<sup>8</sup> Airo-Farulla and White, n 3 at Ptt IV, A.

<sup>9</sup> *Collective Investments: Superannuation* (1992) ALRC 59.

<sup>10</sup> *Colonial Mutual Life Assurance Society Ltd v Brayley* [2002] FCA 1333 at [27] (Branson J makes the point that, as the decision is taken to be that of the decision-maker concerned, the SCT lacks the capacity to make authoritative and binding determinations of right); see also *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [45].

<sup>11</sup> *Colonial Mutual Life Assurance Society Ltd v Brayley* [2002] FCA 1333 at [27].

<sup>12</sup> *Employers First v Tolhurst Capital Ltd* (2005) 143 FCR 356 at [81].

<sup>13</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 40.

<sup>14</sup> See *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [71], where Kirby J quoted from the dissent of Sundberg J in the earlier Full Federal Court hearing to the effect that any analogy between the SCT and the Administrative Appeals Tribunal is limited. The limited review grounds available to the SCT are one obvious point of departure.

<sup>15</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 37(1); see *Seafarers’ Retirement Fund Pty Ltd v Oppenhuus* (1999) 94 FCR 594.

<sup>16</sup> As opposed to the process by which the decision was reached: *Colonial Mutual Life Assurance Society Ltd v Brayley* [2002] FCA 1333 at [31]; *National Mutual Life Association of Australasia Ltd v Scollary* [2002] FCA 695 at [24] (Ryan J); *Pope v Lawler* (1996) 41 ALD 127 at 134 (RD Nicholson J).

that the decision of the trustee is susceptible to review under the Act only on these limited grounds. A review into a decision is only conducted by the SCT in the event that attempts to resolve the complaint by conciliation have failed.<sup>18</sup> For an appeal from the SCT, the *Federal Court Rules* assimilate the procedure with that of an appeal from the Administrative Appeals Tribunal wherever possible.<sup>19</sup>

A decision of the SCT is taken to be the decision of the original decision-maker.<sup>20</sup> The SCT is able to exercise private powers under the trust deed to settle disputes between a beneficiary or beneficiaries and the trustee of the fund. Recourse to the SCT is contingent upon the failure of a fund's internal dispute resolution procedures to satisfactorily resolve a member's complaint.<sup>21</sup> The SCT has the power to refer a complaint to a more appropriate tribunal,<sup>22</sup> other than a court, if it sees fit to do so.<sup>23</sup>

As will be discussed below, there has been some judicial consideration given to the capacity of the SCT to make orders under the trust deed to remedy unfairness or unreasonableness by the trustee which may extend to the settlement of disputes<sup>24</sup> or an order for compensation.<sup>25</sup> However, it is probable that the power of the SCT cannot extend further than this, and must of course stop short of judicial activity;<sup>26</sup> it is usually limited to directing a trustee to reconsider the relevant decision.<sup>27</sup>

## REVIEW OF TRUSTEE DECISIONS

In equity, trustees are held to a range of duties which tend to be applied more strictly than those, for example, under contract. The fiduciary obligations of a trustee to the beneficiary or beneficiaries of the trust are indicative of the fact that the relationship is generally not one formed by agreement but by an express declaration.<sup>28</sup> Trustees are subject to a number of duties beyond the broad fiduciary requirements, but most of these "can be, and often are, varied or even abrogated entirely" by the provisions of a specific trust deed.<sup>29</sup> Superannuation trusts tend to be explicit as to the duties of the trustee, meaning that the requirements of the general law are of limited application.

Equity will not overturn the exercise of a discretionary power by a trustee simply because it is unfair or unreasonable.<sup>30</sup> However, the *Superannuation Industry (Supervision) Act* alters the general law of trusts in this respect. Although beneficiaries of superannuation funds have rights which arise from, and are governed by, the general law of trusts rather than from statute,<sup>31</sup> and these rights are

<sup>17</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 37(2); this suggests that the subject of the review is a trustee discretion: *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [24]; see also *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469 at 493 (Sundberg J, dissenting); but note *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 14AA.

<sup>18</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 12(1)(a), (b).

<sup>19</sup> *Federal Court Rules*, O 53B r3; *Cameron v Board of Trustees of State Public Sector Superannuation Scheme* [2003] FCA 63 at [4] (Spender J).

<sup>20</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 41(3).

<sup>21</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 19.

<sup>22</sup> The complaint-handling bodies prescribed under *Superannuation (Resolution of Complaints) Regulations 1994*, Sch 2, for the purposes of this section are the Australian Association of Permanent Building Societies Inc, Australian Banking Ombudsman Ltd, Credit Union Dispute Resolution Centre, Financial Industry Complaints Service Ltd, Insurance Brokers' Dispute Facility and Insurance Enquiries and Complaints Ltd: *Superannuation (Resolution of Complaints) Regulations 1994*, reg 6.

<sup>23</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 22A; there is currently no case law on this provision.

<sup>24</sup> *Retail Employers Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359; [2001] FCA 1330.

<sup>25</sup> *United Superannuation Pty Ltd v Harrison* [2001] FCA 1468.

<sup>26</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83.

<sup>27</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 46(4); see also s 37(3).

<sup>28</sup> Evans M, *Equity and Trusts* (2003) p 473.

<sup>29</sup> Evans, n 28, p 473.

<sup>30</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [24].

<sup>31</sup> *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469 at 484 (Heerey J); see also *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [41].

enforceable in ordinary courts, the election by the trustee to make a trust eligible for the taxation advantages available to regulated funds<sup>32</sup> imposes a “fair and reasonable” standard.

The “fair and reasonable” review standard<sup>33</sup> against which decisions of trustees are measured under the S(RC) Act stands in contrast to judicial review standards. As Gleeson CJ noted in *NEAT*:

judicial review is not an invitation to judges to decide what they would consider fair or reasonable if they were given the function conferred upon [the body whose decision is challenged].<sup>34</sup>

Although the truth of Gleeson CJ’s statement is undoubted, there remains some level of nexus between common law judicial review standards, such as *Wednesbury* unreasonableness<sup>35</sup> and *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 CLR 59 “extreme irrationality or illogicality”, and the “fair and reasonable” standard which attaches to superannuation trustee discretions under the S(RC) Act (s 37(2)).

This point is in sympathy with a comparison drawn by Gummow J in *Minister for Immigration & Ethnic Affairs v Eshetu* (1999) 197 CLR 611 at [123]-[126], between the standards applied under judicial review and those used in the review of the exercise of trustee discretions. His Honour remarked (at [124]):

what have come to be known as principles of “*Wednesbury* unreasonableness” have developed by analogy to principles governing the judicial control in private law of the exercise of powers and discretions vested in trustees and others.<sup>36</sup>

Likewise, in *Applicant S20*, McHugh and Gummow JJ point out the “affinity”<sup>37</sup> between the reasoning of Lord Greene MR in *Wednesbury* and the statement of Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 505, that an “unreasonable or plainly unjust” result may point to the miscarriage of a judicial discretion, despite the fact that the “nature of the error of law may not be discoverable”.

This line of reasoning was later “drawn together” in *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473, where Dixon CJ stated that, where a discretion is allowed by the legislature, the exercise of that discretion will be vitiated if “the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment”. For current purposes, this analogy breaks down only because the original discretion exercised by the trustee of a superannuation fund is not one “given by legislation”, as were the discretions to which the comments of Dixon CJ were directed in *Klein*. Rather, it is an equitable discretion the exercise of which is measured against a statutory standard.

Nonetheless, the reasoning in *Eshetu* and *Applicant S20* points to substantial common ground between judicial review for *Wednesbury* unreasonableness or *Applicant S20* “extreme irrationality or illogicality” and the “fair and reasonable” standard against which discretionary decisions of trustees are measured under the terms of the *Superannuation Industry (Supervision) Act*. This interplay suggests a more blurred distinction than that recognised by Gleeson CJ in *NEAT*.<sup>38</sup>

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<sup>32</sup> *Income Tax Assessment Act 1936* (Cth), Pt IX.

<sup>33</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 37(2).

<sup>34</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [20].

<sup>35</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>36</sup> See also *Kruger v Commonwealth* (1997) 190 CLR 1 at 36 (Brennan CJ cited *Wednesbury* in support of the proposition that statutory discretions are conferred by the legislature with the intention that they be exercised reasonably).

<sup>37</sup> *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 CLR 59 at [66]-[69]; both judgments being said (at [68]) to draw to some extent upon the decision of the House of Lords in *Sharp v Wakefield* [1891] AC 173 at 179-180.

<sup>38</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [20].

## STANDARDS FOR TRUSTEES UNDER STATUTE, JUDICIAL REVIEW AND EQUITY

It is interesting that the S(RC) Act has placed the common law concepts of “unfairness” and “unreasonableness” upon the quintessentially equitable relationship between trustee and beneficiary. Writing extra-judicially, Sir Anthony Mason has argued that, even as the distinction between the common law and equity erodes, it is important to maintain a distinction between what is “unfair” and what is “unconscionable”, the latter concept “denoting conduct which involves one person taking advantage of another’s special vulnerability or disadvantage in a way that is both unreasonable and oppressive”.<sup>39</sup> The imposition of the “fair and reasonable” standard alone on trustees removes the explicitness of the fiduciary relationship between them and the beneficiaries of trusts. That superannuation trusts are thus no longer completely equitable reveals a greater truth; they are now characterised by relationships between investment managers and consumers, rather than trustees and beneficiaries. Under these circumstances, it is appropriate to analyse the suitability of some other review standards.

One aspect that marks out common law judicial review standards like *Wednesbury* unreasonableness and *Applicant S20* “extreme irrationality or illogicality” is that they are seldom other than clear cut: these are “serious errors”.<sup>40</sup> *Wednesbury* unreasonableness demands that a decision be “so unreasonable that no reasonable authority could ever have come to it”,<sup>41</sup> and as such is a standard that covers only the most outrageous decisions.<sup>42</sup> It is difficult to make a finding of unreasonableness where “the decision-maker gives legally complete and impeccable reasons”.<sup>43</sup> “Extreme irrationality or illogicality” must likewise, in general, be “obvious”,<sup>44</sup> and may even be more difficult to establish than the *Wednesbury* unreasonableness standard.<sup>45</sup> The common ground shared by these review grounds and the statutory review standard in the *Superannuation Industry (Supervision) Act* have been noted above. There are also some points of contrast.

The *Breckler* majority pointed out, of SCT review:

The limitation of the grounds of complaint to one that the decision was unfair or unreasonable suggests that what is involved is a complaint as to the exercise by the trustee of a discretion rather than the discharge of duties ...<sup>46</sup>

Discretionary decisions of a trustee may be challenged in courts with equitable jurisdiction,<sup>47</sup> but equity would not hold the trustee to a standard of “fairness and reasonableness”.<sup>48</sup> In contrast, the SCT is legislatively armed with wide powers to review decisions which would be unreviewable under the general law of trusts and indeed, if made pursuant to an administrative discretion, would necessarily be treated with some level<sup>49</sup> of judicial deference.<sup>50</sup>

<sup>39</sup> Mason AF, “The Place of Equity and Equitable Remedies in the Contemporary Common Law World” (1994) 110 LQR 238 at 258-259.

<sup>40</sup> Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (3rd ed, Thomson Lawbook, 2004) p 267 (re *Applicant S20*).

<sup>41</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229-230 per Lord Greene MR.

<sup>42</sup> “This means little more than avoiding sheer lunacy” according to Aronson et al, n 40, p 102.

<sup>43</sup> Aronson et al, n 40, p 335.

<sup>44</sup> Aronson et al, n 40, pp 225-226.

<sup>45</sup> *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [59] (Santow JA); see Aronson et al, n 40, p 266.

<sup>46</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [24].

<sup>47</sup> Although equity generally gives beneficiaries no more than a right to be considered by the trustee and to compel the trustee to administer the trust properly: *Gartside v IRC* [1968] AC 553; see also Evans, n 28, p 297.

<sup>48</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [24].

<sup>49</sup> But not absolute: Aronson et al, n 40, p 86 (fn 3).

<sup>50</sup> See *R v Trebilco; Ex parte FS Falkiner & Sons Ltd* (1936) 56 CLR 20 at 32 (Dixon J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42 (ministerial discretions); Aronson et al, n 40, p 255.

An investigation by the SCT into a decision by a trustee is analogous to judicial review of a decision whose validity is determined by a “mixture of fact and opinion, or even a pure opinion”.<sup>51</sup> This amounts to review of a subjective determination, which was considered by Gummow J in *Eshetu*.<sup>52</sup> In that case, the decision-maker’s satisfaction that the applicant was suitable to be granted asylum was in issue, rather than the objective fact of the applicant’s suitability. As with SCT statutory review, it was not open to the court to draw its own conclusions as to the suitability of the applicant.<sup>53</sup> Rather, given that the decision-maker’s opinion was formed properly and bona fide,<sup>54</sup> it ought not to be overturned. To do so is simply “to substitute the court’s opinion for the decision-maker’s”.<sup>55</sup>

The limited grounds of review available to the SCT mean that it is unable “to substitute whatever might be its view on the merits for that of the Trustee”.<sup>56</sup> It is not necessary for the SCT to inquire “whether the Trustee’s decision was the correct or preferable one”,<sup>57</sup> nor is it the task of the SCT “to engage in ascertaining generally the rights of the parties”.<sup>58</sup> However, this is not to say that review undertaken by the SCT is limited to the ascertainment of errors of law, as is the case in judicial review. Rather, the “fair and reasonable” standard seems to demand some analysis of the merits of a trustee’s decision – an exercise available under judicial review in only the broadest terms.<sup>59</sup>

Nor is the jurisdiction of the SCT “narrowly confined to determining what benefits are payable to members under the relevant trust documentation”,<sup>60</sup> but is now considered to offer limited scope to fashion remedies appropriate to the circumstances. Allsop J in *Retail Employers Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359; [2001] FCA 1330 and later Wilcox J in *United Superannuation Pty Ltd v Harrison* [2001] FCA 1468 have recently considered the capacity of the SCT to settle disputes on more general grounds than mere interpretation of the relevant instrument. Wilcox J stated that, within the limitations imposed by the fact that the SCT is not a judicial body,<sup>61</sup> there is no reason why the SCT’s decision-making power should not extend to determining compensation, including financial compensation, where it was an “appropriate way of removing the unfairness or unreasonableness”.<sup>62</sup> Wilcox J also noted that, even if the SCT proves an unsuitable forum in which to obtain redress against a superannuation fund, this by no means precludes an aggrieved party from seeking compensation in another, more suitable, jurisdiction.<sup>63</sup>

The SCT is “not empowered to remedy all unfairness or unreasonableness that it may perceive”.<sup>64</sup> Section 37(5) of the S(RC) Act provides, inter alia, that the SCT may not make findings which are contrary to law or to “the governing rules of the fund concerned”.<sup>65</sup> Whether a decision is

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<sup>51</sup> Aronson et al, n 40, p 228; see also *Minister for Immigration & Ethnic Affairs v Eshetu* (1999) 197 CLR 611 where Gummow J described such review as being of a “jurisdictional fact”, however, he added at [130] that the use of that term was “awkward” (an opinion with which Kirby J concurred in *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 CLR 59 at [125]) and it might therefore be preferable to refer to such review as being of a “requirement”: see Aronson et al, n 40, pp 227-228.

<sup>52</sup> *Minister for Immigration & Ethnic Affairs v Eshetu* (1999) 197 CLR 611 at [127]ff.

<sup>53</sup> *Minister for Immigration & Ethnic Affairs v Eshetu* (1999) 197 CLR 611 at [147] (Gummow J); see also Aronson et al, n 40, p 228.

<sup>54</sup> *Buck v Bavone* (1976) 135 CLR 110 at 118 (Gibbs J).

<sup>55</sup> Aronson et al, n 40, p 229.

<sup>56</sup> *Cameron v Board of Trustees of State Public Sector Superannuation Scheme* [2003] FCA 63 at [35] per Spender J.

<sup>57</sup> *Cameron v Board of Trustees of State Public Sector Superannuation Scheme* [2003] FCA 63 at [31] per Spender J.

<sup>58</sup> *Retail Employers Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359; [2001] FCA 1330 at [31] per Allsop J.

<sup>59</sup> Such as for “*Wednesbury* unreasonableness” or Applicant S20 “extreme irrationality or illogicality”.

<sup>60</sup> McAlister and McConnell, “Expansion of the SCT’s jurisdiction” (2001) 13(4) SLB 45 at 48.

<sup>61</sup> Most importantly, that the relevant decision must be one that concerns the claimant’s rights under the relevant trust deed: see McAlister and McConnell, n 60 at 48.

<sup>62</sup> *United Superannuation Pty Ltd v Harrison* [2001] FCA 1468 at [44] (his Honour’s remarks in this regard were obiter dicta since the matter did not arise on the facts in this case).

<sup>63</sup> *United Superannuation Pty Ltd v Harrison* [2001] FCA 1468 at [49].

<sup>64</sup> *Colonial Mutual Life Assurance Society Ltd v Brayley* [2002] FCA 1333 at [34] per Branson J.

<sup>65</sup> Through which recourse to the jurisdiction of the SCT lies by contract.

unfair or unreasonable within the terms of the Act is to be decided only after initial consideration of whether such a decision conforms with the governing rules of the relevant fund.<sup>66</sup> This cannot be the case if the decision was required by those rules.<sup>67</sup>

The relevant standard of fairness is to be applied to the decision in its application to the complainant rather than the process by which the decision was made.<sup>68</sup> The decision may be taken to be “fair and reasonable” notwithstanding that the SCT would have come to a different decision.<sup>69</sup> Therefore, the procedural fairness, or otherwise, of a decision is not reviewable by the SCT, although it may be judicially reviewable.

The SCT will misdirect itself if it requires that the evidence establish the veracity of the complainant’s claim, rather than the fairness and reasonableness, or otherwise, of the trustee’s decision.<sup>70</sup> The SCT may form its own opinion as to the trustee’s decision,<sup>71</sup> but this is not determinative of the fairness or reasonableness of that decision<sup>72</sup> and a mere difference in view does not empower the SCT to overturn the decision of the trustee.<sup>73</sup> The capacity of the SCT to impose its view at the expense of the trustee’s decision is limited to an extent that even judicial review of a discretionary decision is not.<sup>74</sup>

## REVIEW OF TRIBUNAL DECISIONS

Review of tribunal decisions for errors of law by the Federal Court must necessarily be on curtailed grounds from those on which the SCT reviews trustee decisions. The Federal Court may hear “appeals” from the SCT where an error of law is alleged, but does so in its original, rather than its appellate jurisdiction.<sup>75</sup> As Gummow J pointed out in *TNT Skypak International (Aust) Pty Ltd v Commissioner of Taxation* (1988) 19 ATR 1067 at 1069; 82 ALR 175, this is because the appeal is not from a decision given in respect of a “matter”, in the sense in which that word is used in Ch III of the *Constitution*, by a court exercising Commonwealth judicial power. The right of “appeal” from decisions of the SCT to the Federal Court on questions of law does not allow for inquiry as to the merits of a complaint.<sup>76</sup>

Once a complaint has been remitted to the jurisdiction of the Federal Court, the S(RC) Act allows the court to “make such orders as it thinks appropriate”.<sup>77</sup> The Act specifies orders available to the Federal Court on appeal as including “an order affirming or setting aside the determination of the Tribunal and an order remitting the matter to be determined again by the Tribunal in accordance with the directions of the Court”.<sup>78</sup> There is a level of confusion which attaches to the term “affirming” when used to dispose of an application which has failed, and the High Court has commented that it is “not the most appropriate term”.<sup>79</sup> This notwithstanding, the Federal Court is

<sup>66</sup> *Retail Employers Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359; [2001] FCA 1330 at [28] (Allsop J); *Employers First v Tolhurst Capital Ltd* (2005) 143 FCR 356 at [77] (Branson J).

<sup>67</sup> *Retail Employers Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359; [2001] FCA 1330 at [28] (Allsop J).

<sup>68</sup> *Pope v Lawler* (1996) 41 ALD 127 at 134 (RD Nicholson J).

<sup>69</sup> See *Cameron v Board of Trustees of State Public Sector Superannuation Scheme* (2003) 130 FCR 122 (Whitlam, Kiefel and Dowsett JJ).

<sup>70</sup> *National Mutual Life Association of Australia Ltd v Jevtovic* [1997] FCA 359 (Sundberg J).

<sup>71</sup> The formation of which opinion is no evidence that it has necessarily been the basis of the SCT’s finding; if the reasons of the SCT demonstrate that the determination of the trustee was unfair or unreasonable in the circumstances, and that this is the basis for the finding of the SCT, that finding will not be overturned by the Federal Court simply because the SCT has formed an opinion: *National Mutual Life Association of Australia Ltd v Scollary* [2002] FCA 695 at [33] (Ryan J).

<sup>72</sup> *Briffa v Hay* (1997) 75 FCR 428 at 437 (Merkel J).

<sup>73</sup> *National Mutual Life Association of Australia Ltd v Scollary* [2002] FCA 695 at [20] (Ryan J).

<sup>74</sup> Namely, the decision-maker’s error “must be so substantial as to take the impugned act or omission beyond the realm where reasonable minds should agree to differ”: Aronson et al, n 40, p 87.

<sup>75</sup> *Colonial Mutual Life Assurance Society Ltd v Brayley* [2002] FCA 1333 at [2] (Branson J).

<sup>76</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 46.

<sup>77</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 46(3).

<sup>78</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 46(4); see also s 37(3).

<sup>79</sup> *Abebe v Commonwealth* (1999) 197 CLR 510 at [54] per Gleeson CJ and McHugh J: their Honours note that the power to “affirm, reverse or vary the judgment appealed from” is inherent in the court’s jurisdiction under the *Federal Court of Australia Act 1976* (Cth), s 28(1)(a).

bound to affirm any decision of the SCT which was “fair and reasonable in the circumstances” in its application to the complainant.<sup>80</sup> Where there is a finding for the complainant, he or she is to be placed “as nearly as practicable in such a position that the unfairness, unreasonableness, or both ... no longer exists”.<sup>81</sup>

Questions of law arising from a complaint may also be referred to the Federal Court by the SCT, either on its own initiative or by the request of a party, without the SCT having given a ruling.<sup>82</sup> Indeed, it may be preferable for the SCT to refer a question of law to the Federal Court rather than to form a view, which is not necessarily conclusive, upon which the ultimate determination of the SCT depends.<sup>83</sup> The SCT is bound by the decision of the Federal Court on any such question of law.<sup>84</sup>

The Federal Court also has the capacity to review the jurisdiction of the SCT,<sup>85</sup> although it is without jurisdiction in the event that the SCT is found not to have made a “determination” under s 46 of the S(RC) Act.<sup>86</sup> The applicant in *Ray v Superannuation Complaints Tribunal* (2004) 136 FCR 548 at [51] was refused resort to the Federal Court under this section since it was held that various “decisions” of unnamed delegates of the trustee could not be held to amount to a determination. Nonetheless, it was accepted that it was within the power of the court to grant relief under s 39B of the *Judiciary Act 1903* (Cth) because the applicant had raised matters “arising under [a law] made by the [Commonwealth] Parliament”,<sup>87</sup> provided that such relief did not demand that the SCT act outside its jurisdiction.<sup>88</sup>

*Evans v Superannuation Complaints Tribunal* (2002) 125 FCR 239 concerned applications for a writ of mandamus and for review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act) after the SCT made a decision not to review the applicant’s case, believing itself to lack jurisdiction. This was because the “decision” which the applicant sought to have reviewed had allegedly been made prior to the enactment of the S(RC) Act. Finding such to be the case, Branson J confirmed that the SCT lacked jurisdiction but noted that an appeal may still lie to the Administrative Appeals Tribunal for any decision made by a superannuation fund trustee prior to the application of the Act.<sup>89</sup>

## REVIEW UNDER THE AD(JR) ACT?

The applicant in *Ray* sought relief under the AD(JR) Act. Although it was unnecessary to examine this ground, since the jurisdiction of the Federal Court had already been attracted by s 39B of the *Judiciary Act*,<sup>90</sup> Goldberg J did not expressly exclude the possibility that relief could lie under the AD(JR) Act.

It has been noted by Gleeson CJ that the AD(JR) Act, “in some circumstances, provides a more restricted form of judicial review than is otherwise available” as a result of the way in which it has

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<sup>80</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 37(6); this is the same standard against which the original decision of the trustee was assessed by the SCT, serving to confirm that the SCT stands in the position of the trustee when a matter is “appealed” to the Federal Court.

<sup>81</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 37(4).

<sup>82</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 39(1).

<sup>83</sup> *Employers First v Tolhurst Capital Ltd* (2005) 143 FCR 356 at [82] (Branson J); *Colonial Mutual Life Assurance Society Ltd v Brayley* [2002] FCA 1333 at [36] (Branson J).

<sup>84</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 39(3).

<sup>85</sup> *Ray v Superannuation Complaints Tribunal* (2004) 136 FCR 548; see also Riordan G, “Super Cases: *Ray v Superannuation Complaints Tribunal*” (2004) 16(4) *Australian Superannuation Law Bulletin* 62.

<sup>86</sup> Goldberg J interpreted this term to mean “the ultimate or final disposition of the substance of a complaint or matter”, rather than encompassing “a preliminary or threshold decision”: *Ray v Superannuation Complaints Tribunal* (2004) 136 FCR 548 at [49].

<sup>87</sup> *Judiciary Act 1903* (Cth), s 39B(1A)(c).

<sup>88</sup> *Ray v Superannuation Complaints Tribunal* (2004) 136 FCR 548 at [51] (Goldberg J).

<sup>89</sup> *Evans v Superannuation Complaints Tribunal* (2002) 125 FCR 239 at [41] (Branson J noted that an application must usually be made within 28 days of the confirmation or variation of a decision, but that this period may be altered by the Administrative Appeals Tribunal under *Administrative Appeals Tribunal Act 1975* (Cth), s 29(7)).

<sup>90</sup> *Ray v Superannuation Complaints Tribunal* (2004) 136 FCR 548 at [17].

been interpreted.<sup>91</sup> If it were possible to seek AD(JR) Act review of a determination by the SCT, that determination would need to be classified as a “decision of an administrative character made ... under an enactment”.<sup>92</sup> This is a phrase which has been judicially examined on numerous occasions, most recently in two High Court cases (*NEAT* and *Griffith University v Tang* (2005) 221 CLR 99; 79 ALJR 627). As a result of the majority judgments in these cases (and notwithstanding strong dissents from Kirby J in both<sup>93</sup>), it now seems settled that a decision covered by the AD(JR) Act is “required or authorised by an enactment”,<sup>94</sup> derives its force from the enactment (rather than the general law<sup>95</sup>) and has “the capacity to affect legal rights and obligations”.<sup>96</sup> This tripartite<sup>97</sup> test must be met under all criteria before a decision is susceptible to AD(JR) Act review.<sup>98</sup>

To invoke the grounds of review in the AD(JR) Act, s 5, it would first have to be established that the complainant is “a person aggrieved” by the relevant decision.<sup>99</sup> Satisfaction of this requirement would be self-evident. Whether a determination by the SCT is a “decision of an administrative character made ... under an enactment” is a more contentious point. The analysis of Gleeson CJ in *NEAT* followed that of Mathews J at first instance,<sup>100</sup> where her Honour held that the “express or implied authorisation” of the Act was sufficient to bring decisions by AWBI within the AD(JR) Act. However, Gleeson CJ did not need to make a final ruling on this point, and the majority (McHugh, Hayne and Callinan JJ) denied that AWBI was subject to any administrative law restriction at all on “the manner in which [it] exercised its power to withhold consent” from *NEAT*.<sup>101</sup>

Regardless of whether a determination by the SCT is a “decision of an administrative character made ... under an enactment”, it is arguable that AD(JR) Act relief could not be obtained by complainants because of the consensual nature of their relationship with the SCT.<sup>102</sup> Such was held to be the case in *Griffith University*, although there is a marked point of difference between the situations. There, the majority held that the relationship between the parties was dependent upon mutuality, the removal of which did not necessarily indicate a “decision” on the part of the university.<sup>103</sup> A complainant to the SCT, on the other hand, has no option but to submit to the jurisdiction of the SCT; election *by a trustee* to bring a superannuation fund within the *Superannuation Industry (Supervision) Act* is irrevocable.<sup>104</sup> Because the jurisdiction of the SCT has been activated by the trustee’s consent, the consent of the complainant is irrelevant. This situation is broadly analogous to that in *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402, in which it was held that the ASX listing rules were not an instrument reviewable under the AD(JR) Act

<sup>91</sup> *Griffith University v Tang* (2005) 221 CLR 99; 79 ALJR 627 at [3]; see also Aronson et al, n 40, p 71; cf *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [101] (Kirby J).

<sup>92</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 3(1).

<sup>93</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [66]ff; *Griffith University v Tang* (2005) 221 CLR 99; 79 ALJR 627 at [99]ff.

<sup>94</sup> *Griffith University v Tang* (2005) 221 CLR 99; 79 ALJR 627 at [49] per Gummow, Callinan and Heydon JJ.

<sup>95</sup> Relevantly, eg, the law of contract: *Griffith University v Tang* (2005) 221 CLR 99; 79 ALJR 627 at [3] (Gleeson CJ); Aronson et al, n 40, p 71.

<sup>96</sup> *Griffith University v Tang* (2005) 221 CLR 99; 79 ALJR 627 at [80] (Gummow, Callinan and Heydon JJ); adapted from *Australian National University v Lewins* (1996) 68 FCR 87 at 103 (Lehane J).

<sup>97</sup> And cumulative: *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 (McHugh, Hayne and Callinan JJ); see also Aronson et al, n 40, p 79.

<sup>98</sup> *Griffith University v Tang* (2005) 221 CLR 99; 79 ALJR 627 at [89] (Gummow, Callinan and Heydon JJ); Professor Aronson saw this as an arguable conclusion of the joint judgment in *NEAT* (McHugh, Hayne and Callinan JJ) but the state of High Court authority seems settled in the wake of *Tang*: Aronson, “Is the ADJR Act hampering the development of Australian administrative law?” (2004) 15 PLR 1 at fn 63.

<sup>99</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(1).

<sup>100</sup> *NEAT Domestic Trading Pty Ltd v Wheat Export Authority* (2000) 64 ALD 29 at [41]-[42] per Mathews J; quoted from Aronson et al, n 40, p 78.

<sup>101</sup> Aronson et al, n 40, p 78.

<sup>102</sup> *Griffith University v Tang* (2005) 221 CLR 99; 79 ALJR 627 at [91] (Gummow, Callinan and Heydon JJ).

<sup>103</sup> Indeed, nor would the continuation of the relationship of mutual consensus indicate a “decision” on the university’s part – *Griffith University v Tang* (2005) 221 CLR 99; 79 ALJR 627 at [91] (Gummow, Callinan and Heydon JJ).

<sup>104</sup> *Superannuation Industry (Supervision) Act 1993* (Cth), s 19(5); see *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [9].



The principles of procedural fairness are directed at ensuring that adjudicative methods of decision-making are executed properly where the rights and interests of a person are at stake.<sup>114</sup> While the decisions of a trustee are discretionary,<sup>115</sup> those of the SCT are adjudicative and are subject to the requirement of procedural fairness. This means that both the complainant and the trustee must be heard<sup>116</sup> by the SCT and that there be no reasonable apprehension of bias in favour of either party by the Tribunal members.<sup>117</sup> It is the conduct of the SCT hearing which is subject to procedural fairness requirements rather than the facts found per se. A successful application for common law judicial review for a breach of procedural fairness does not therefore obtain for the complainant a decision more favourable than the one given by the SCT, but does require that the SCT rehear the submissions of both parties in a procedurally fair manner.

A complainant is also able to attract the jurisdiction of the Federal Court<sup>118</sup> to seek relief under a constitutional writ “in respect of a decision ... affected by jurisdictional error”,<sup>119</sup> since the SCT is comprised of “officers of the Commonwealth within the meaning of s 75(v) of the *Constitution*”.<sup>120</sup> A remedy in the nature of mandamus, prohibition or injunction may be sought against the members of the SCT for acting, or being about to act, without lawful power.<sup>121</sup> Judicial review for jurisdictional error by administrative decision-makers who are officers of the Commonwealth has been described by the High Court as a “fundamental constitutional principle”<sup>122</sup> which leads to the conclusion that any error by the SCT that can be categorised as “jurisdictional” must be inherently capable of review in the Federal Court.

There is a strong presumption in Australian law, confirmed in *Breckler*, that every administrative act is susceptible to collateral challenge.<sup>123</sup> Whether or not collateral challenge is always available to a complainant is a different matter. In *Ousley v The Queen* (1997) 192 CLR 69, the majority of Toohey, Gaudron and Gummow JJ insisted that collateral challenge is available only for an administrative decision invalid on its face. This approach stems from decisions of the High Court in *McArthur v Williams* (1936) 55 CLR 324 and *Posner v Collector for Inter-State Destitute Persons (Vic)* (1946) 74 CLR 461, and has been used as authority in matters concerning collateral challenge up to *Behrooz v Secretary of the Department of Immigration & Multicultural & Indigenous Affairs* (2004) 219 CLR 486.

However, Aronson, Dyer and Groves have argued that this is an erroneous interpretation of the respective ratio decidendi in those cases,<sup>124</sup> which has inhibited development in the Australian approach to collateral challenge. While it was suggested<sup>125</sup> by Lehane J<sup>126</sup> in *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582; 147 ALR 649 at 663-664 that the expansion of the AD(JR) Act to cover all errors of law may be taken to have expanded the

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<sup>114</sup> See *Kioa v West* (1985) 159 CLR 550 at 584 (Mason J) (Mason J held that this was a common law duty while Brennan J held it to be the result of an implied legislative intent (at 609-611)). For present purposes, nothing turns on this distinction, since *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 11 makes fairness an express legislative requirement; see also Aronson et al, n 40, pp 381-382.

<sup>115</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [24].

<sup>116</sup> “The hearing rule” – see Aronson et al, n 40, p 370ff.

<sup>117</sup> “The rule against bias” – see Aronson et al, n 40, p 370ff.

<sup>118</sup> Under *Judiciary Act 1903* (Cth), s 39B(1), instead of in the original jurisdiction of the High Court.

<sup>119</sup> *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495; [2005] FCA 1290 at [33] per Emmett J (his Honour was there referring to the jurisdiction of the Federal Court to review a decision of the Takeovers Panel).

<sup>120</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [35].

<sup>121</sup> This is jurisdictional error – see Aronson et al, n 40, p 28.

<sup>122</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 511 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

<sup>123</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [46]-[47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); [94]-[96] (Kirby J); confirming *Ousley v The Queen* (1997) 192 CLR 69; indeed, *Breckler* was decided, in part, on the basis that a body subject to collateral challenge could not be exercising judicial power, the majority noting (at [46]) that the availability of collateral challenge is not of itself decisive, but tends to indicate that determinations of the SCT lack the “conclusive character” which is the hallmark of judicial, but not administrative, decisions; see also Aronson et al, n 40, p 634.

<sup>124</sup> Aronson et al, n 40, p 634.

<sup>125</sup> Without the issue being resolved.

<sup>126</sup> With whom Beaumont and Whitlam JJ concurred.

coverage of collateral challenge in Australia, a broader approach is no guarantor of a successful challenge.<sup>127</sup> The restriction of collateral challenge to cases in which an administrative order is void on its face may have a questionable long-term outlook<sup>128</sup> but seems entrenched in the short term.<sup>129</sup> The availability of collateral challenge to determinations of the SCT probably has greater significance to the constitutional status of the SCT than it does as an effective remedy for complainants.

### THE SCT AS “QUASI-PRIVATE”

While *Breckler* settled the question of whether the SCT exercises judicial authority in the negative by holding that it exercises private – rather than sovereign – power, it is by no means settled that the SCT is a private rather than a public entity. It should be noted that *Breckler* was a constitutional case, and the analysis of the majority was geared to dealing with the constitutional question of whether the SCT exercises judicial power in violation of Chapter III rather than to a precise determination of what kind of power the SCT exercises in fact. Airo-Farulla and White note that there is an “air of unreality”<sup>130</sup> to the finding of the majority that the SCT exercises “private rather than public power”, and suggest that this gloss may be the result of a belief by the majority that the distinction “was not critical to ensuring that intended beneficiaries could enforce Tribunal decisions”.<sup>131</sup>

Indeed, the finding of the majority that the SCT exercises private power was far from crucial to the overall result in *Breckler*, since there were a number of other indicia which suggested that the SCT does not exercise judicial power.<sup>132</sup> The analysis of Kirby J stressed proper characterisation of judicial power to a greater extent than the majority in reaching the same conclusion. This tends to suggest that the High Court has by no means closed the door on the possibility that the SCT should more appropriately be classified as “quasi-private”, as I submit it ought, but leaves the substantial difficulty of how the determinations of such a body should be treated by the courts.

*Breckler* contains several interesting dicta which shed some light on the changing nature of the divide between public and private power in Australian law. The majority admitted that, while the authority of the S(RC) Act came as a result of an election by the trustees of the relevant fund, they were left with no practical option to do otherwise. Indeed, “cases may be readily imagined where it would be a breach of trust not to exercise the election so as to obtain the revenue benefits which follow”.<sup>133</sup> The availability of an election was decisive in settling the constitutional question, but the majority indicated an awareness that it amounts to no more than a formality. As such, it should not be seen as decisive of the “private” nature of the SCT’s jurisdiction.<sup>134</sup>

Kirby J pointed even more explicitly to the nature of the SCT’s power, commenting that:

With the passage of time, the large expansion of public administration, the growth in the responsibilities and activities of government and the changing needs of a modern and complex society, some earlier decisions on the scope of judicial power need to be read with care. This is because they were written in a different world in which the functions of government were more limited and fewer

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<sup>127</sup> Mr Boddington was not saved from his £10 fine by a broader approach in *Boddington v British Transport Police* [1999] 2 AC 143.

<sup>128</sup> Aronson, “Criteria for Restricting Collateral Challenge” (1998) 9 PLR 237 at 240.

<sup>129</sup> This aspect of *Ousley* has not been the subject of extensive consideration in recent High Court decisions.

<sup>130</sup> Airo-Farulla and White, n 3 at Ptt IV, A.

<sup>131</sup> Airo-Farulla and White, n 3 at Ptt IV, A.

<sup>132</sup> These included the level of judicial oversight of SCT determinations (*Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [45]) and the availability of collateral challenge (at [46]-[47]).

<sup>133</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [44].

<sup>134</sup> Subsequent to *Breckler*, some people elected to run off-shore superannuation schemes on the basis that they are more tax effective than compliance with the Commonwealth legislative framework. It may now therefore be the case that there is some additional level of choice available. Nonetheless, the vast majority of Australians who are members of superannuation funds fall within the jurisdiction of the SCT for want of any practical alternative.

citizens had the needs or means to obtain the kind of speedy, informal and inexpensive decision-making which modern tribunals can offer and which courts, typically, cannot.<sup>135</sup>

His Honour's description of Tribunal decision-making reflects the S(RC) Act, which states that the objective of the SCT is to provide mechanisms for conciliation of complaints or the review of decisions which are "fair, economical, informal and quick".<sup>136</sup> Seen from this perspective, this is not an issue which needs to be haunted by the restless ghost of the *Boilermakers' Case*<sup>137</sup> if it can be accepted that there is a role for public law remedies in regard to the "modern regulation of activities which, although private, have large public consequences".<sup>138</sup> To this end, it is important to consider to what extent the *Datafin* principle has made its way into Australian law (*R v Panel on Take-overs & Mergers; Ex parte Datafin plc* [1987] 1 QB 815). I take as my starting point the remark of Professor Aronson that the reception of *Datafin* has been "cautious".<sup>139</sup>

*Datafin* held that common law judicial review could be exercised against non-statutory bodies involved in public functions. While the analogy between the Panel on Take-overs and Mergers – which had no "visible means of legal support"<sup>140</sup> – and the SCT – created by statute – is not absolute, it is sufficient to observe that both are essentially private, non-government bodies exercising power in the public sphere. In the case of the SCT, the public aspect lacks definition, but is nonetheless clear. Superannuation has become a vital part of Commonwealth government policy for retirement income, and assumes ever-greater relevance as the population continues to get "older".

The availability of "fair, economical, informal and quick" complaint resolution promotes both the effectiveness of and the level of public confidence in the system while preventing parties from seeking, in the first instance, remedies through courts with equitable jurisdiction. These "higher" courts tend already to be overloaded, and increasing judicial attention is being given to "case management" to prevent the wheels of justice from turning even more slowly. It may be considered that the provision of the SCT is, in this regard, merely another form of the "outsourcing" of government functions which motivated the result in *Datafin* and the dissent of Kirby J in *NEAT*.<sup>141</sup>

Outsourcing of government functions through an "agency process of securing another to provide goods or services directly to the public"<sup>142</sup> is the root of whatever difficulty exists in dealing with the blurred demarcation between public and private spheres. In a sense, this process has risen parallel to superannuation itself, as governments have become less inclined to provide from the public purse that which can be seen to benefit from the supposed competitive edge of private enterprise.

Professor Kingsford Smith has noted the extent to which this process also occurs informally. Regulation of financial services has become "decentred", operating in "the 'shadow of the state', and [manifesting] the exercise of power that is simultaneously public and private".<sup>143</sup> Governments have allowed hybrid entities to thrive in the contemporary regulatory environment, preferring to use influence to achieve outcomes "through the autonomous behaviour of others"<sup>144</sup> than to act in their own names. The fact that these autonomous actors tend to be "private" creates the same problem as that faced by those who would challenge the SCT, leaving Kingsford Smith to lament the failure of

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<sup>135</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [80].

<sup>136</sup> *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 11.

<sup>137</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>138</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [84], fn 198 per Kirby J, referring to *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] 1 QB 815.

<sup>139</sup> Aronson, n 98 at fn 78.

<sup>140</sup> *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] 1 QB 815 at 824 per Lord Donaldson.

<sup>141</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [68].

<sup>142</sup> Aronson, "A Public Lawyer's Responses to Privatisation and Outsourcing" in Taggart (ed) *The Province of Administrative Law* (1997) p 41.

<sup>143</sup> Kingsford Smith, n 108 at 448.

<sup>144</sup> Kingsford Smith, n 108 at 445.

the common law to “develop from underlying ... values to address the variety of decentred exercises of power”.<sup>145</sup>

The prevalence of outsourcing by government has thrown forth a generation of mixed administration which is not easily interpreted or predicted from within the traditional public/private dichotomy.<sup>146</sup> Professor Aronson has noted that one reason for this is that complainants seeking review of privatised and outsourced entities tend to be consumers, and consumer complaints have not been the stuff of judicial review.<sup>147</sup> This is certainly borne out in the case of the SCT, complainants to which are almost inevitably consumers. Modern superannuation is the first wave of enforced investment, and recent “choice of fund” legislation has only increased the quandary; government policy seeks to allow people control of their superannuation but has reason to be wary of the additional consumer risk that this entails.

The solution of fashioning the amount and the nature of the administrative law available to a “quasi-private” body like the SCT, rather than insisting either on a “single package” or nothing at all,<sup>148</sup> would seem to be most appropriate. The difficulty remains in finding a definition of power adapted to this purpose.

## **PUBLIC/PRIVATE DISTINCTION IN AUSTRALIAN LAW**

The point at which *Datafin* has exercised the greatest hold on the imagination of Australian courts is the suggestion by Lloyd LJ that the Panel was merely the pawn<sup>149</sup> of the government. As Aronson, Dyer and Groves point out,<sup>150</sup> the roles were reversed in *NEAT*, where the statutory authority was controlled by the privately owned growers’ company, but Gleeson CJ and, most particularly, Kirby J were intrigued by the possibility of judicial review for nominally private entities invested with such de facto power. The Court of Appeal in *Datafin* placed reliance not on the body exercising the power, but on whether the power could be characterised as “public power”.<sup>151</sup> Similarly, Gleeson CJ in *NEAT* favoured looking at the “substance” of the role filled by AWBI,<sup>152</sup> rather than to classify it as “private” merely because it was an incorporated body.<sup>153</sup>

It is interesting to note the extra-judicial writing on this point by Finn J, who does not seem plagued by issues of definition in this regard:

Whether a body takes the form of a statutory corporation or a state-owned registered company it acts for and on behalf of the public which owns and empowers it. Its character is irrevocably public. Whatever its activities, its constitutional location is in the public sector and as a trustee for the public. In this at least I do not believe there is the slightest room for doubt. Acceptance of popular sovereignty in our constitutional thinking has seen to that.<sup>154</sup>

Finn J denies that there exists a “grey zone” between the public and private sectors, indicated by the fact that some public entities have business or commercial features. He argues instead that such bodies do not lose their public character simply because the “executive intent is, seemingly, to give them quasi-private attributes”.<sup>155</sup> This argument was made specifically in regard to Government Business Enterprises, rather than public bodies exercising private power in the manner of the SCT, and may now have lost some of its lustre in the wake of the decision of the High Court in *NEAT*. Nonetheless, the ideas of Finn J on the expectations the public ought to have of public bodies are compelling, no less so if they are applied to quasi-private bodies.

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<sup>145</sup> Kingsford Smith, n 108 at 455.

<sup>146</sup> Aronson, n 142, p 46.

<sup>147</sup> Aronson, n 142, p 47.

<sup>148</sup> Aronson, n 142, pp 52-53.

<sup>149</sup> Or ventriloquist’s dummy: Aronson et al, n 40, p 118.

<sup>150</sup> Aronson et al, n 40, p 130.

<sup>151</sup> Which need not possess the force of law to be so construed: see Aronson et al, n 40, p 118.

<sup>152</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [29]

<sup>153</sup> It was on this ground that the majority of McHugh, Hayne and Callinan JJ reached its conclusion

<sup>154</sup> Finn PD, “The State Corporation” (1999) 3 *Flinders Journal of Law Reform* 1 at 3.

<sup>155</sup> Finn, n 154 at 3-4.

In similar vein, the Gleeson CJ raised an interesting line of inquiry for future consideration in *NEAT* when he remarked that the statutory monopoly enjoyed by AWBI should be “seen as being not only in the interests of wheat growers generally, but also in the *national interest*. To describe it as representing purely private interests is inaccurate”.<sup>156</sup> This is where the *Datafin* principle finds the greatest traction with the characterisation of the SCT as a “quasi-private” body. The “public function”<sup>157</sup> of the SCT differs from that of the Panel in *Datafin*: it is a body created by the Parliament rather than one with no “visible means of legal support”<sup>158</sup>. However, the public function which the SCT performs militates against the conclusion that it is a wholly “private” entity. It is worth noting, in this regard, that the position of the majority in *NEAT* that any “public interest” in AWBI was rebutted by the fact that it had been incorporated – that is, to serve selfish interests – does not apply to the SCT.<sup>159</sup>

The “public character” test suggested by Gleeson CJ’s reasoning in *NEAT*<sup>160</sup> is harder to apply than a test of “public function”. Judicial interpretation in the wake of *Datafin* has shown the difficulty of operation inherent in a test which asks the true “character” of an entity<sup>161</sup> and identification of the “public realm” inevitably involves some level of political judgment.<sup>162</sup> Moreover, Professor Aronson points out that such a test must necessarily be “fuzzy” if review is to be withheld from the commercial and private functions of statutory bodies.<sup>163</sup>

However, if nothing else, the search for the “public character” of a body should encourage further analysis of whether it can accurately be labeled simply as either public or private. Mantziaris points out that the fact that five High Court judges came to different findings on the same facts as to the proper characterisation of AWBI is demonstrative of the difficulty with such binary labeling. Further, he suggests that this mode of characterisation may tend to disguise normative, extra-statutory interpretation entered into by judges about where the boundary between private and public ought properly to lie.<sup>164</sup>

The *NEAT* majority denied AWBI’s susceptibility to judicial review since AWBI was “private”, but left the door ajar by specifically marking out for future consideration whether private sector bodies can ever be subject to judicial review.<sup>165</sup> A more flexible stance on what constitutes a “public” body than was evident in the majority judgment in *NEAT* is essential for this to occur, but the fact that the SCT (unlike AWBI) is not incorporated removes at least the first hurdle.

## CONCEPT OF TRUST APPLIED TO PUBLIC BODIES

The suggestion by Gleeson CJ in *NEAT* that the susceptibility of a body’s activities to judicial review be determined with reference to “the public interest”<sup>166</sup> raises some interesting parallels with the oft-repeated analogies between public service and trusts. That the power of public entities is “held on trust” for the public is a position which has been put forcefully by Paul Finn, both before<sup>167</sup> and after<sup>168</sup> his appointment to the Federal Court,<sup>169</sup> but has seldom been accepted literally,<sup>170</sup>

<sup>156</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [27] (emphasis added).

<sup>157</sup> It should be noted that the “public functions” of “hybrid” bodies are expressly covered by the *Human Rights Act 1998* (UK). Since this is not an issue relevant to the Australian context, it is preferable to adopt the reasoning of Gleeson CJ; see Aronson, n 98 at 9; Aronson et al, n 40, p 121.

<sup>158</sup> *Datafin* [1987] 1 QB 815 at 824 per Lord Donaldson.

<sup>159</sup> See Aronson, n 98 at 10.

<sup>160</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [29].

<sup>161</sup> See Aronson et al, n 40, p 120.

<sup>162</sup> Aronson et al, n 40, p 131.

<sup>163</sup> Aronson, n 98 at 11.

<sup>164</sup> Mantziaris, n 4 at 200.

<sup>165</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [49]-[50].

<sup>166</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [29].

<sup>167</sup> Finn PD, “The Abuse of Public Power in Australia: Making Our Governors Our Servants” (1993) 75 Canberra Bulletin of PA 14.

<sup>168</sup> Finn, n 154.

<sup>169</sup> And, indeed, while speaking judicially: *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; 146 ALR 1 at 40-41.

with most seeing it as having value only as a metaphor<sup>171</sup> or in a political sense.<sup>172</sup> The “muted”<sup>173</sup> and “guarded”<sup>174</sup> reaction may have much to do with a suspicion that there is nothing more substantial to the analogy than semantic attraction, or perhaps to the belief that “legal reasoning by reference to metaphor is often uninformative and sometimes productive of confusion”.<sup>175</sup> Nonetheless, even on this level, parallels may be observed between equitable relationships of trust – fiduciary relationships – and publicly exercised power on a more general level.<sup>176</sup>

Professor Finn drew extensively on the fiduciary concept in arguing that the public at large, but most particularly the disadvantaged, are in a position of significant vulnerability to government and quasi-government entities.<sup>177</sup> Indeed, how could it be argued otherwise? Entities wholly or partly associated with government have immense power compared to the individual, and notwithstanding various administrative law remedies, the individual will always be vulnerable to this power.<sup>178</sup> This imbalance is not lessened when the government outsources its work “in the public interest” to an external, quasi-private entity and Professor Finn takes the view that “they remain public trustees still”.<sup>179</sup> What, therefore, is demanded of them are “those standards of honesty, impartiality and disinterest which are the essence of their trustee (or fiduciary) role”.<sup>180</sup>

There is a certain irony to any suggestion that equitable principles re-attach themselves to superannuation trusts and the standards of review by the SCT when superannuation is inexorably becoming a purely commercial venture. As Sir Anthony Mason has said, the fiduciary relationship is imposed on commercial transactions with the greatest reluctance, because the parties are supposed to be equal.<sup>181</sup> However, this is the nub of the argument: superannuation is like no other investment because it is compulsory. These are not normal commercial parties, dealing at arm’s length and on equal footing. Rather, it is ever more likely that the investor is dealing with a large banking or financial corporation as her or his trustee. If it is accepted that compulsory superannuation payments are the fruit of a policy to reduce the necessity for the government to fund the retirement of an ageing population, then the SCT – the quasi-private body charged with monitoring the “fairness and reasonableness” of the system – ought certainly to have its fiduciary obligations to superannuation investors judicially enforced. It ought also to be subject to judicial review.

It may be that superannuation has progressed from being a trust in the traditional, equitable sense to part of a broader level of metaphorical “trust”, but the need for the equitable concern with standards of conscience, fairness and equality may never have been more vital.

## CONCLUSIONS

It is evident that the jurisdiction of the SCT is, in practical terms, as difficult to avoid as having superannuation in the first place. As such, the SCT holds a public function in spite of its officially “private” character which should contain some level of equitable duty to those who find themselves within its jurisdiction. The occupation of the twilight between public and private ought no longer to justify placing a body beyond judicial consideration.

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<sup>170</sup> With Professor Finn being a notable exception, remarking that public officials hold borrowed power “in our service, as our servants”: Finn, n 167 at 15, 18.

<sup>171</sup> *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 481 (Kirby J).

<sup>172</sup> Aronson et al, n 40, p 86 in reference to Parliament.

<sup>173</sup> Finn, n 167 at 15.

<sup>174</sup> Aronson et al, n 40, p 86.

<sup>175</sup> Mason, n 39 at 240.

<sup>176</sup> Aronson et al, n 40, p 86.

<sup>177</sup> Finn, n 167 at 14.

<sup>178</sup> Furthermore, Professor Kingsford Smith notes that cloaking the enormity of government power in the shroud of “private power” removes many of the avenues of redress which would ordinarily be available: Kingsford Smith, n 108 at 465-466.

<sup>179</sup> Finn, n 167 at 20.

<sup>180</sup> Finn, n 167 at 20.

<sup>181</sup> Mason, n 39 at 245.

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Superannuation Complaints Tribunal and the public/private distinction in Australian administrative law

The Federal Court is possessed of broad jurisdiction to apply the law in relation to the SCT. It is able to enforce procedural fairness requirements against the SCT and is also able to answer questions of law, either as referred to it by the SCT<sup>182</sup> or on “appeal”. Furthermore, the Federal Court is able to deal with purely equitable issues using its associated jurisdiction<sup>183</sup> and accrued jurisdiction. I submit with respect that the decisions of the Federal Court in *Crocker*<sup>184</sup> and *Harrison*<sup>185</sup> have demonstrated that innovative and thoughtful resolution of complaints to the SCT is not beyond the scope of the legislation. This being the case, it is to be hoped that judicial analysis of the public nature of the SCT will be forthcoming.

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<sup>182</sup> Under *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 39(1).

<sup>183</sup> *Federal Court of Australia Act 1976* (Cth), s 32(1).

<sup>184</sup> *Retail Employers Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359; [2001] FCA 1330.

<sup>185</sup> *United Superannuation Pty Ltd v Harrison* [2001] FCA 1468.