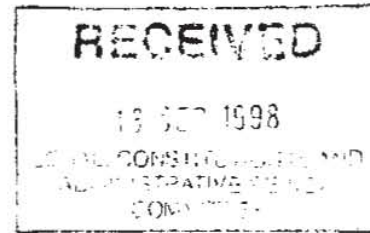


Submission No 18
Spec 14.1.



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The Chair
Legal, Constitutional and Administrative Review Committee
Legislative Assembly of Queensland
Parliament House
George Street
BRISBANE QLD 4000

18 September 1998

Dear Sir

Re: **Strategic Review of the Ombudsman**

Thank you for your invitation to comment on the *Report of the Strategic Review of the Queensland Ombudsman*.

Professor Wiltshire's report gives extensive consideration to the funding arrangements and internal organisation of the Ombudsman's Office. These are not matters about which the Board would wish to comment - the QSuper Board is more concerned with other aspects of the Report, in particular:

- (i) the effects of the outcomes reviews by the Parliamentary Commissioner on the business of the Board and the costs to the members of the Plans associated with obtaining advice and responding to the Ombudsman's findings;
- (ii) the manner in which reviews are conducted, particularly the length of time taken to finalise investigations; and
- (iii) clarification of which aspects of the Board's business are subject to review by the Ombudsman.

Effects of Reviews by the Commissioner

In the past, the Board was aware of problems arising from delays in finalising reviews of members' entitlements, particularly in the case of disability benefits, due to protracted investigations by the Ombudsman's Office. This has been a particular source of concern in cases where the Board is clear in its determination after having reassessed individual disablement benefit entitlements a number of times, on the basis of extensive evidence. Apart from

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administrative costs, there is concern that extended delays in finalising these matters may have a detrimental effect on the well being of the members concerned.

Matters investigated by the Ombudsman's Office were generally related to legal interpretations which, although technically valid, were unlikely to have a bearing on members' entitlements under the rules of the Plans. Discussions were held between representatives of the GSO and the Ombudsman's Office and the more recent experience has been that investigations of this nature are now treated less formally and are usually resolved quickly and with a minimum of inconvenience to members. The Board takes care to seek Crown Law advice if there is uncertainty about technical interpretations of the Deed.

Confusion over the role of the commissioner.

The *Parliamentary Commissioner Act 1974* refers to matters which are subject to investigation under section 13. This section instructs that the Commissioner is to investigate any administrative action taken by an agency with the following exceptions:-

- (a) any administrative action where the person aggrieved has a right of appeal, reference, or review to or before a recognised tribunal or by virtue of the royal prerogative;
- (b) any administrative action for which the person aggrieved has a remedy through a court of law.

However, the Commissioner is also given the discretion to deal with investigations in these excepted matters if it is considered that it would be unreasonable to expect the aggrieved person to use the specified forums, or if the matter warrants investigation to avoid injustice.

For the reasons mentioned later, the Trustees have voluntarily subjected their decisions to the scrutiny of the Superannuation Complaints Tribunal ("SCT") which is now under the jurisdiction of the Australian Securities and Investment Commission. Subsequent to this action, and in earlier informal discussions with representatives of the Ombudsman's Office it was verbally proposed that, in recognition of the Board's determinations being subject to the scrutiny of the SCT, future investigations involving discretionary benefit issues would not generally be pursued - it was understood, however, that investigations of some matters of a procedural nature or matters arising in respect of members unable to gain access to the Tribunal would continue to be reviewed by the Ombudsman.

Much of the review power of the SCT has been withdrawn following a Federal Court decision in February 1998 and as an interim solution legislation will be introduced to enable the Tribunal to arbitrate where the parties to a dispute agree to accept the decision.

The exact role of the Parliamentary Commissioner in relation to the QSuper Board has not been exhaustively explored or defined but, given that the current relationship has been operating effectively from the Board's perspective, formal clarification has not been sought. More recently the perception is that investigations have tended away from fiduciary considerations and have

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had more to do with procedural matters.

Involvement in fiduciary decisions.

The QSuper Board is made up of ten Trustees and is represented equally by Government (employer) representatives and trade union (member) representatives. The Board is primarily committed to the prudential supervision of the Fund including the balancing of the interests' of individual members with the interest of the membership as a whole. With the increasing complexity of superannuation and its regulation, the Trustees agreed to subject their decisions to the scrutiny of the SCT in the event of disagreements. The SCT has a specialised understanding of the superannuation industry with a national perspective. Where there are enquiries about superannuation entitlements including the exercise of fiduciary discretions, the SCT is in a unique position to resolve disputes equitably with its access to specialised resources and information.

Section 13(5) of the *Parliamentary Commissioner Act* excludes investigation of administrative action taken by a person in the capacity as trustee under the *Trusts Act 1973*. The Board decided to subject its decisions to review by the SCT because the QSuper Board has relied on the private sector trust model as an appropriate framework for managing the funds. While QSuper is technically a *statutory trust*, enabled under an Act of Parliament, the Trustees are required to make decisions of a fiduciary nature. As all other non-exempt superannuation trusts are scrutinised by the SCT, it was considered that QSuper members should not be denied the no-cost access to this specialised appeal forum which is generally available to other members of superannuation funds.

Given that Section 13 of the *Parliamentary Commissioner Act* recognises the distinctive nature of administrative action under the *Trusts Act*, it is believed that it would not be unreasonable to formally extend the exemption to the QSuper statutory trust.

If the investigatory role of the Commissioner were to be broadened or more precisely defined in light of the Wiltshire report, the QSuper Board is of the opinion that the review of matters involving the discretionary powers of the Board, such as decisions about members' entitlements under the Trust Deed rules, should be left to the SCT or the Court. This may avoid duplication of effort and would take advantage of the SCT's superannuation specialisation.

Response to Specific Recommendations

The Board's response to the recommendations of the Report, where applicable, are as follows:-

R.2. The Board endorses the recommendation that the Ombudsman's Office should be resourced to the extent which would enable the review of systemic issues at a more strategic level. This would be intuitively more productive in the long term than treating issues reactively on the request of individual complainants.

R.5 This recommendation suggests that all agencies be reminded of the Cabinet Ruling to

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consult with the Ombudsman's Office on relevant policy; the Board is of the view that, if the Ombudsman has input into the formulation and amendment of legislative provisions especially those relating to appeal provisions, subsequent confusion over appellants' rights might be avoided. This function might be more effectively discharged by the Parliamentary Counsel at the drafting stage. The Parliamentary Counsel is in a position to make independent judgements about which legislative matters might appropriately be referred to the Ombudsman.

- R.6. Again, this recommendation represents a more systemic and proactive approach and is endorsed by the Board.
- R.7. The Board would be pleased to consult with the Ombudsman's Office if this service is to be resourced and advanced.
- R.8. Regardless of the outcomes of the Report's recommendations, the Board would be prepared to nominate a formal contact officer who would actively participate in the proposed network.
- R.9. The Board would also be prepared to invite the participation of a representative of the Ombudsman's Office in any reference groups established to design policy initiatives. However, because of limited resources, it is suggested that judgements would need to be made about which initiatives would appropriately warrant such participation.
- R.10. It is agreed that a formal internal complaints procedure is appropriate. The Board already has in place a procedural system of managing complaints in terms of the *Superannuation Industry Supervision Regulations* (Cmwlth.). Complaints are monitored and responses benchmarked with regular summary reports provided for the Board's consideration. Where applicable, these procedures are conveyed in correspondence to members and are published in various communications. Should the Ombudsman establish internal complaints handling procedures, it is expected that these would be capable of incorporation into the Board's existing arrangement.
- R.11. The Board would support the proposal that the Ombudsman institute a formal secondment program. Naturally, an arrangement such as this would be dependent upon resources being available.
- R.15. As previously mentioned, the Board has been aware in the past of delays in finalising members' entitlements because of lengthy review by the Ombudsman's Office. The Board would fully support initiatives aimed at resolving complaints without delay.

R.29 and R.30

The Board endorses the proposal that there should be an overall review of appeal mechanisms. As indicated above, decisions of the Board and its delegate are currently subject to review by the Court and a number of State and Commonwealth review bodies. In particular, the Board is subject to scrutiny by the SCT and it is believed that this

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specialised tribunal is the most appropriate forum for the resolution of complaints relating to superannuation. It is appropriate that the Board's determinations should be tested through rigorous scrutiny but there are potential savings to be made through the cooperation of these authorities.

Glenn Poole
Acting Chair
On behalf of the QSuper Board of Trustees