

**2004 Pension Lawyers Association Conference**  
**15 - 17 February 2004**  
**Cape Town International Convention Centre**

**CHANGING TOMORROW**  
**SHARING KNOWLEDGE AND EXPERIENCE.**  
**PREPARING FOR THE FUTURE.**

**Topic: PENSION FUNDS DISPUTE RESOLUTION – AN  
ALTERNATIVE MODEL FOR THE FUTURE?**

**Speaker: Sue Myrdal**

**Employer /**

**Organisation: Deputy Adjudicator Office of the  
Pension Funds Adjudicator**

# STRUCTURE OF TALK

THE PRESENT MODEL

PROBLEMS WITH THE EXISTING MODEL AND  
JURISDICTION

PROPOSALS FOR NEW MODELS

- Specialised tribunal
- One fund, one arbitrator
- Ombudsman advocate
- Taylor Committee proposals

# THE PRESENT MODEL

## The Office of the Pension Funds Adjudicator

- Investigative administrative agency
- Functions performed by the Pension Funds Adjudicator
- Same remedial powers as court of law – binding decisions
- Complaints must relate to abuse of power, maladministration, disputes of fact of law, or employer dereliction of duty, in connection with pension funds

# THE PRESENT MODEL (cont.)

## Key Sections

- **Section 30D**: requires Adjudicator to dispose of complaints in “procedurally fair, economical and expeditious manner”, following any procedure deemed appropriate
- **Section 30E** grants Adjudicator power to investigate any complaint and to make the order which any court of law may make.
- These **s30E** powers may not be delegated – **section 30Q(f)**
- **Section 30P**: Aggrieved party may resort to the High Court within six weeks of date of determination

# PROBLEMS WITH EXISTING MODEL AND JURISDICTION

- Competing Jurisdictions
- Bargaining council jurisdiction unclear
- Employment dimension – jurisdiction ousted?
- Limited subject matter and party jurisdiction
- Proscription on delegation
- No express power to resolve disputes by negotiation and conciliation
- Section 30P court interventions over-judicialise system eg.
  - *Luiz v Old Mutual Life Assurance & Others* – must hold hearings for disputes of fact – only Adjudicator can do this
  - *Mine Employees Pension Fund & Another v Olivier* – Adjudicator constrained by pleadings (*obiter*)
- Complainants lack funds to fight in High Court
- Inappropriate for Adjudicator to intervene in High Court
- No jurisdiction to do equity
- Technical and jurisdictional problems detract from efficiency

# PROPOSAL FOR NEW MODELS

- Specialised tribunal
- One fund, one arbitrator
- Ombudsman advocate
- Taylor Committee proposals

# SPECIALISED TRIBUNAL

Single one-stop pension complaints tribunal with exclusive jurisdiction in relation to all pension fund matters – subject only to Constitutional Court's jurisdiction

- Staffed by a number of senior lawyers and actuaries
- Supported by an internal separate mediation service, staffed by investigative and administrative staff

# SPECIALISED TRIBUNAL (Cont.)

NB Would require expanded definition of “complaint” eg:

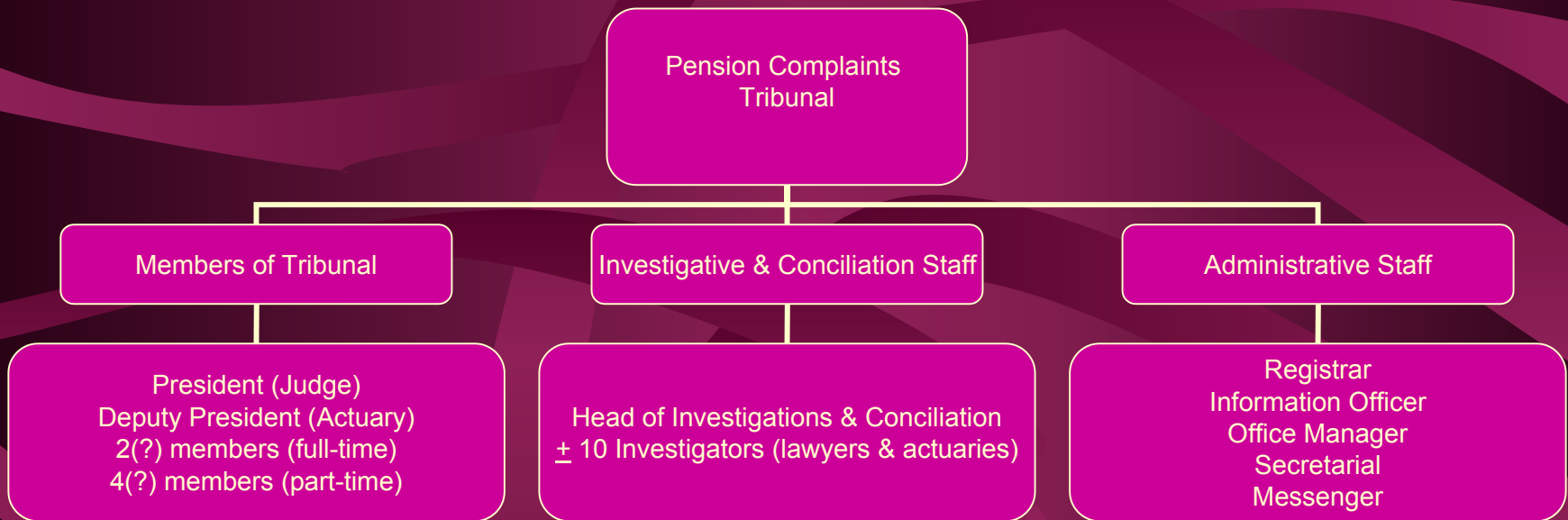
**“Complaint”** means

a complaint of a complainant alleging a dispute of fact or law, an improper or unreasonable decision or exercise of powers, maladministration causing prejudice, or any other breach of duty by a respondent relating to –

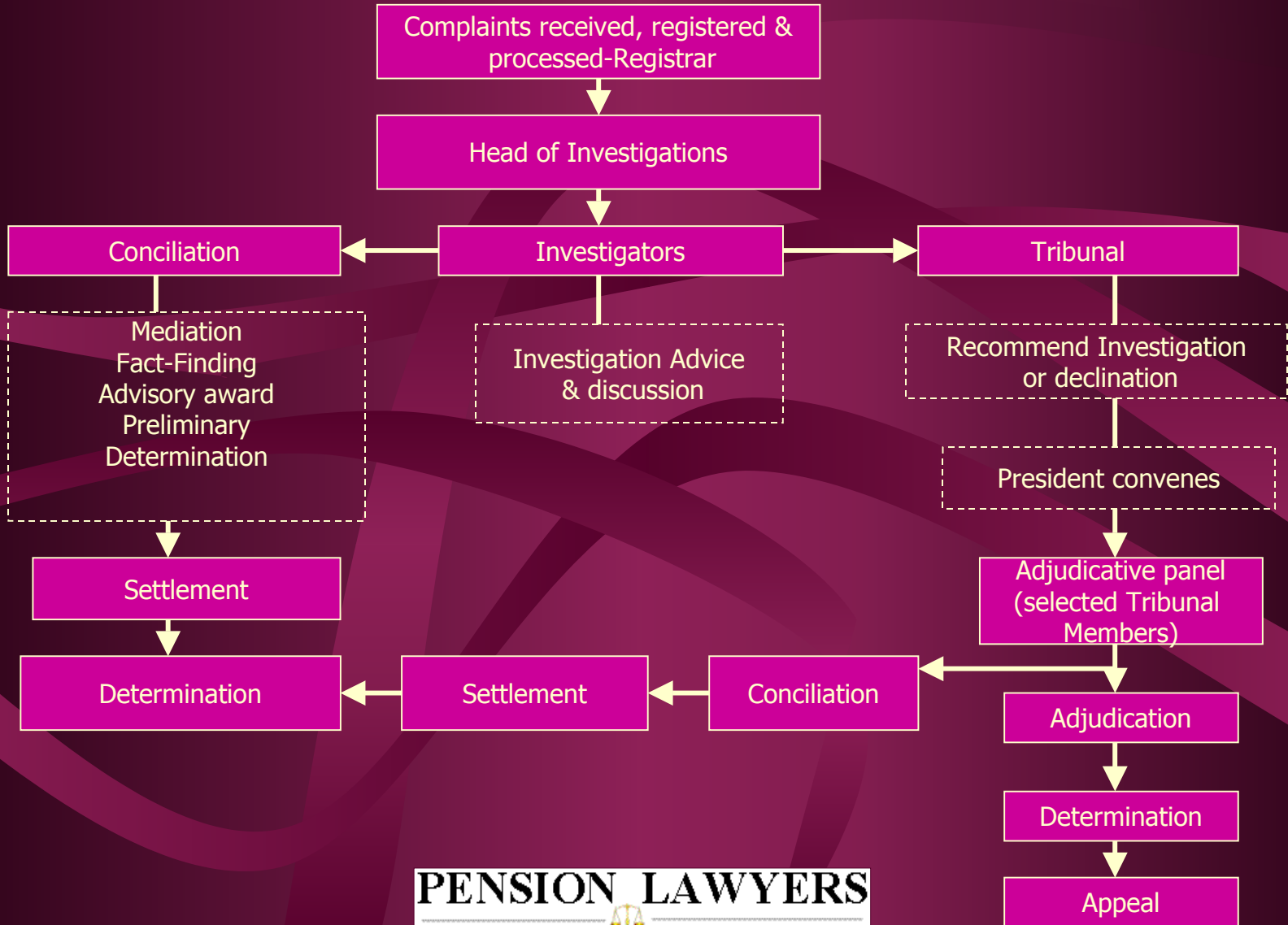
- (a) the affairs, administration, governance or regulation of a fund;
- (b) the apportionment, distribution, expenditure, utilisation or investment of a fund’s assets;
- (c) the validity, amendment, interpretation or application of a fund’s rules;
- (d) the interpretation or application of any applicable law, regulation, code of conduct, practice note or similar legal instrument pertaining to the affairs, administration, governance and regulation of funds;
- (e) a decision, ruling, regulation or any other conduct of the Registrar under a power conferred or a duty imposed upon him by or under this Act or any other law.

# SPECIALISED TRIBUNAL (Cont.)

## Structure



# SPECIALISED TRIBUNAL (Cont.)



# ADVANTAGES OF SPECIAL TRIBUNAL MODEL

- Exclusive jurisdiction streamlines lodging of complaints
- Wide definition of complaint – takes in all pension-related issues
- Tenure for tribunal members – independence institutionalised
- Separation of process of investigation/mediation from adjudication
- More than one person with power to make determinations – efficiency
- More effective development of jurisprudence – dissenting judgments possible
- Fewer problems with succession
- Develop body of independent actuaries holding public office

# ONE FUND, ONE ARBITRATOR

- Designated arbitrator with powers to arbitrate disputes within each fund
- Arbitrations final and binding; limited review only
- Independent arbitrator to be appointed within each fund from a statutory panel;  
OR
- Chairperson of board of management given power to arbitrate disputes – chairperson must be a professional fiduciary, appointed by and accountable to Registrar

# OMBUDSMAN ADVOCATE MODEL

## PENSION FUNDS ADVOCATE

Involves both:

- Systemic advocacy – identifying common problems, solving them on wholesale basis by administrative and legislative changes
- Case work advocacy – helping consumers to solve particular problems

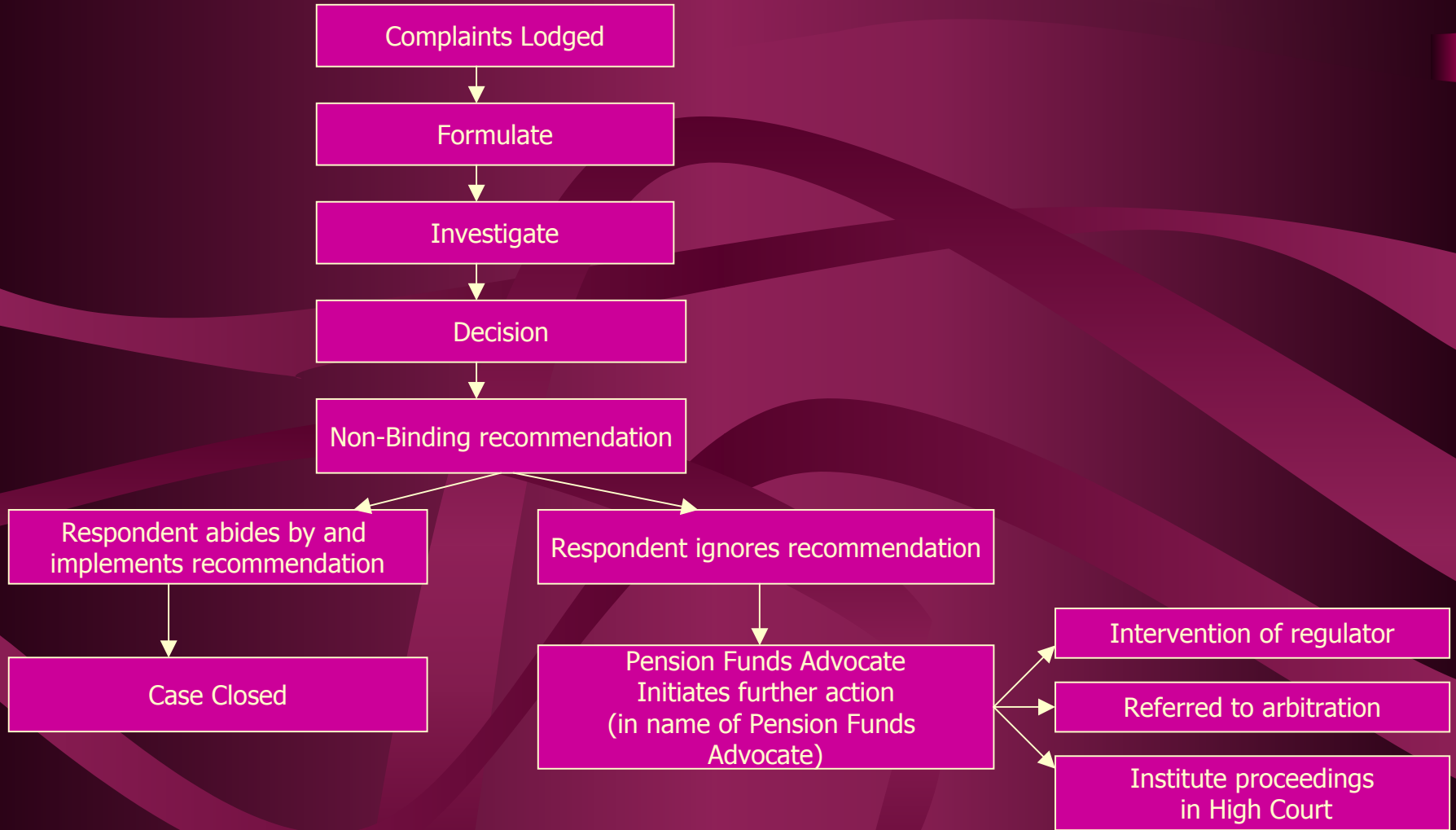
Rulings are recommendatory, not binding

- Avoids judicialisation
- Allows for considerations of equity

Pension Funds Advocate would need authority to initiate further action if recommendations ignored

- Referral to regulator
- Arbitration
- High Court Proceedings

# PENSION FUNDS ADVOCATE



# TAYLOR COMMITTEE PROPOSALS

Chapter 13 of Taylor Report recommends:

- Integrated organisational framework for social security arrangements
- Including a uniform adjudication system to deal with all social security claims
  - Firstly, independent internal review or appeal;
  - Secondly, a court with power to finally adjudicate all social security matters, with power to determine cases on basis of law and fairness
  - Jurisdiction to cover all social security claims eg. under UIA, RAFA, COIDA, Social Assistance Act, incl. claims currently under PFA