



Royal Commission into Misconduct in the Banking,
Superannuation and Financial Services Industry

Group Life Insurance

Background Paper 28

The views expressed are the author's views and are not to be understood as expressing the views of the Commission.

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PART ONE – INTRODUCTION

1. Group market

- 1.1. An important feature of the modern life insurance market is that all products, except trauma or critical illness insurance, are sold both on an individual basis as well as a group basis. There are three sectors or sales channels for life insurance: through an advice provider (retail); directly from an insurer (direct); or through their superannuation fund and the group life cover offered by the fund (group).¹ The life insurance industry can be categorised into these three sectors.
- 1.2. In each of the three sectors or sales channels, there are different arrangements for selling and purchasing life insurance:
 - Direct or non-advised—provided directly by insurers or their distributors, partners or affiliates without any personal advice. The life insurance provided through this channel is often a simpler product. Consumers who choose not to seek advice may be able to understand and access this product themselves.
 - Group—provided as a group policy purchased by the trustee of a superannuation fund or an employer, with fund members ultimately given the benefit of the cover under the policy. The default nature of the cover provided through this channel gives access to life insurance to the largest number of consumers, many of whom would not be able to afford premiums if they were individually underwritten or the premiums were not paid from their superannuation fund account. Cover is not tailored to a particular member's circumstances.
 - Retail (advised)—provided by financial advisers. If appropriate personal advice is provided, consumers should be able to source a life insurance product through this channel that is based on their circumstances.²
- 1.3. The majority of life insurance policies are held within superannuation funds. In 2015, there were 14 million group policies, 4 million retail policies, and 3.9 million direct

¹ Australian Securities and Investments Commission (ASIC), Report 413, *Review of retail life insurance advice*, 9 October 2014, p. 4.

² Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the life insurance industry – Submission by the Australian Securities and Investments Commission (January 2017)* Pages 29-30 <<https://download.asic.gov.au/media/4537030/pjc-inquiry-life-insurance-industry.pdf>>.

policies.³ The proportion of total life insurance held within superannuation funds was 71 per cent for death cover, 88 per cent for Total and Permanent Disability (TPD) cover, and 59 per cent for income protection cover.⁴ Despite this coverage, it has been said that insurance at an individual level may be insufficient to meet the needs of members or their beneficiaries.⁵

- 1.4. About 12 million Australians have life insurance (life, total and permanent disability and/or income protection cover) through their superannuation. In 2016-17, Australians paid a total of \$9 billion in premiums (up 35 per cent in three years).⁶ The Productivity Commission Report stated that about a quarter of members do not know if they have (and are paying for) a policy.⁷
- 1.5. The inclusion of insurance within superannuation dates back to the 1950s and was legislated for in 2005. Life insurance in superannuation now accounts for just under half the total life insurance market.⁸

2. Structure and participants

Overview

- 2.1. The structure for group life insurance involves a policyowner which is either an employer or a superannuation fund, sometimes in a master trust.
- 2.2. The employer group schemes are structured on the basis that the life insured is an employee or a dependant of an employee; the employer is the policyowner and can be the agent of the life insured for the purposes of the insurance.⁹
- 2.3. The superannuation fund schemes are structured on the basis that the life insured is a member and beneficiary of a trust fund and these dual capacities shape important features of the law on group schemes. The policyowner is the trustee of the fund.¹⁰
- 2.4. It is the policyowner in group schemes, not the life insured, who enters into the contract, is obliged to pay the premium, has standing to claim and is entitled to receive

³ ASIC, Report 498, *Life insurance claims: An industry review*, October 2016, p. 35.

⁴ Rice Warner – Insurance in Superannuation 2016.

⁵ The Insurance in Superannuation Working Group (ISWG), *Discussion Paper: Account balance erosion due to insurance premiums*, Executive Summary, March 2017.

⁶ See Hanrahan, Royal Commission Background Paper 25, s. 5.1.

⁷ Australian Government Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness*, Draft Report, April 2018, p. 20.

⁸ *ibid.*, p. 20.

⁹ See the definition of group life contract in the *Insurance Contracts Act 1984* (IC Act), s. 11(1) and s. 32, on misrepresentation and non-disclosure in that context.

¹⁰ See the references to a superannuation or retirement scheme in ss. 23, 26 and 48A. This description, from *Sutton*, was cited with approval in *Montclare v Metlife Insurance Ltd* [2015] VSC 306, para. [63].

the benefit amounts paid by the life insurer.¹¹ The right to claim and receive a benefit is affected by the IC Act provisions on third party beneficiaries and the right to appoint a beneficiary.

Trust

- 2.5. The employee is a member and beneficiary of the fund. In the private sector, the rules of membership are determined by the relevant trust deed. The fund is sponsored, for industry funds by a trade union, and for corporate funds by an employer. The employer may be the agent of the trustee.¹² The sponsor is involved in establishing and maintaining the fund. The fund is a private express trust constituted by a trust deed and the trustee has legal title to the assets of the fund. The trustee is bound under the general law and statute by significant legal duties to act in the best interests of fund members.¹³ The structure and its participants are the subject of substantial laws and regulation.
- 2.6. The employee and the employer contribute money to the fund for the benefit of the employee member. In 90 per cent of cases, the monies are notionally remitted into a member 'account' – which operates like a bank account. Once the employee member reaches the prescribed or preservation age and retires from the workforce, the employee member is entitled to be paid the funds in the member account in the fund. It can be a lump sum, an income stream or a combination.
- 2.7. The employee customarily has life insurance cover through the fund, as an insured member. The trustee is the policyowner and the insured member is the life insured. The trustee buys and contracts for the insurance and pays the premium. The member's share of the premium is usually debited and paid from the member's account. If the employee has an insurance claim which is paid, the sum insured or benefit amount is paid and credited to the member account in the fund.¹⁴
- 2.8. The employee has two separate legal capacities or roles in relation to the fund and insurance: first as a beneficiary with rights against the fund trustee and second as a person who has life insurance cover with rights against the trustee and the insurer.¹⁵
- 2.9. Where there are inconsistencies between the disability payment terms under the trust deed and the disability claim terms under the insurance, difficulties arise.¹⁶ Most

¹¹ *Erzurumlu v Kellogg Superannuation Pty Ltd* [2013] NSWSC 1115; compare *Banovic v United Super Pty Ltd* [2014] NSWSC 1470 at [72].

¹² *Anderson v Effexseven* (1998) 10 ANZ Insurance Cases 61–424.

¹³ Trustee duties are beyond the scope of this Background Paper except in relation to insurance.

¹⁴ See Hanrahan, Royal Commission Background Paper 25, s. 5.1.

¹⁵ *McArthur v Mercantile Mutual Life Insurance Co Ltd* [2002] 2 Qd R 197; 11 ANZ Insurance Cases 61-501; [2001] QCA 317; *Goodin v Colonial Mutual Superannuation Pty Ltd* (2011) 16 ANZ Insurance Cases 61-883; *Erzurumlu v Kellogg Superannuation Pty Ltd* [2013] NSWSC 1115; compare *Banovic v United Super Pty Ltd* [2014] NSWSC 1470 at [72].

¹⁶ See, for example, *Auspine Staff Superannuation Pty Ltd v Henderson* (2006) 14 ANZ Insurance Cases 90-127; [2006] FCA 1281.

modern deeds are structured on a ‘look through’ basis so that the insured member has a claim against the trustee only if the claim is payable by the insurer under the insurance.

- 2.10. The *Life Insurance Act 1995*, section 201, requires the terms of the trust to be in a document other than the memorandum of transfer. If the life company has express written notice of a trust, sections 200 and 201 do not apply.¹⁷ On a change of trustee, the replacement trustee may give the life company notice of that change.¹⁸

3. Super account erosion

- 3.1. Australian Taxation Office data indicates that 40 per cent of people have more than one superannuation account, with 15 per cent having three or more. Thirty per cent of people under 25 have more than one superannuation account. The greatest proportion of multiple superannuation accounts is around 47 per cent for 36 to 50 year olds.¹⁹
- 3.2. The *Superannuation Industry (Supervision) Act 1993* (SIS Act) obliges superannuation funds to acquire or offer insurance of a particular kind or at a particular level only if the cost of the insurance does not inappropriately erode the retirement income of beneficiaries.²⁰
- 3.3. The unintended multiple accounts for a member collectively cost the members who hold them \$1.9 billion a year in excess insurance premiums.²¹ The Productivity Commission Report considered that the effects on retirement balances are worse for members on low incomes, especially those with intermittent labour force attachment who continue to have premiums deducted from their accounts while not contributing to their super. The retirement balance erosion for these members could reach 14 per cent (\$85 000) (cameo 5), and well over a quarter for some disadvantaged members with duplicate insurance policies (\$125 000).²²
- 3.4. The erosion issue also affects life insurance product suitability in superannuation: see Part Ten.

¹⁷ *Life Insurance Act 1995* (LI Act), s. 202; *Deep Sea Oils Ltd v K M Corp Pty Ltd* [2000] FCA 944 (Marshall J); *Rostirolla v Fiakos* [2002] FCA 1058; compare its predecessor s. 89 of the *Life Insurance Act 1945*: *Carter Bros v Renouf* (1962) 111 CLR 140; [1963] ALR 46.

¹⁸ LI Act, s. 203.

¹⁹ Australian Taxation Office, Super Accounts Data Overview, accessed 18 October 2017: <<https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/Super-accounts-data/Super-accounts-data-overview/>>.

²⁰ ISWG, *Discussion Paper: Account balance erosion due to insurance premiums*, Executive Summary, March 2017, citing SIS Act, s. 52(7)(c).

²¹ Australian Government Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness*, Draft Report, April 2018, p. 18.

²² *ibid.*, p. 21.

PART TWO – REGULATION

1. Introduction

- 1.1. There is a discussion of Regulation generally in the General Insurance Background Paper No. 14 (GIBP) and a discussion of regulation in relation to life insurance in the Life Insurance Background Paper No. 28 (LIBP).
- 1.2. This Part discusses regulation in relation to group life insurance, particularly for insurance in superannuation.

2. Sole purpose test

- 2.1. The provision of insurance by the superannuation fund must not violate the ‘sole purpose test’ contained in section 62 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act). Failure to satisfy this test has adverse licensing taxation consequences for the fund.
- 2.2. Section 62(1) provides that the fund must be operated solely for one or more of a number of purposes (the ‘core purposes’). These include the provision of benefits on or after the member's retirement;²³ the provision of benefits on or after the member's attainment of an age not less than the age specified in the regulations;²⁴ and provision of benefits to the member's dependents or personal legal representative if their death occurs before their retirement, or their attainment of an age not less than that specified in the regulations.²⁵
- 2.3. In addition, the fund may be operated for one or more of the core purposes and for one or more of the ancillary purposes.²⁶ These are the provision of benefits on or after the termination of the member's employment with an employer who contributed to the fund; the provision of benefits on or after the member's cessation of work where this is on account of ill-health (whether physical or mental);²⁷ providing benefits to the member's dependents or personal legal representative where their death occurs after their retirement;²⁸ and the provision of such other benefits as the Regulator approves in writing.²⁹
- 2.4. The consequence is that the superannuation trustee must not enter into, perform obligations of or exercise rights under a life insurance contract unless justified by the

²³ SIS Act, s. 62(a)(i).

²⁴ *ibid.*, s. 62(a)(ii).

²⁵ *ibid.*, s. 62(a)(iii)–(v).

²⁶ *ibid.*, s. 62(b).

²⁷ *ibid.*, s. 62(b)(ii).

²⁸ *ibid.*, s. 62(b)(iii)–(iv).

²⁹ *ibid.*, s. 62(b)(v).

sole purpose test. The test permits term life insurance covering death and disability, as well as income protection.

3. Superannuation classifications and MySuper

- 3.1. Superannuation funds can be classified in a number of different ways. For insurance purposes, the three most important categories are non-regulated funds, regulated funds and, as a sub-set of regulated funds, MySuper funds. Section 19(4) of the SIS Act provides that a superannuation fund must make an irrevocable election whether to be a fund regulated by the Act and therefore obtain concessional tax treatment or to remain outside the Act and therefore not be subject to its provisions. A fund not subject to the provisions of the SIS Act does not receive concessional tax treatment. It is worth noting that all pooled superannuation trusts and approved deposit funds are regulated funds.
- 3.2. The fourth distinction is between funds that fall within the MySuper category and those that do not. With the introduction of the *Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012* and related laws, there is now a class of superannuation fund with certain prescribed features and a simplified fee structure. This is especially important because MySuper, from 1 January 2014, became the default super product for employees that have not chosen a specified fund to receive relevant employer superannuation guarantee contributions.
- 3.3. The relevance of this category with regard to insurance is that, under section 68AA of the SIS Act, the trustee of a MySuper superannuation fund is, in the Australian Prudential Regulation Authority's (APRA) view, required to provide a permanent incapacity benefit and a death benefit, and these benefits must be provided by taking out life insurance. The effect is that the regulatory reforms which introduced the new class of MySuper fund have also created a discrete life insurance market.
- 3.4. A trustee applies for the authority to offer a MySuper product; it is not an automatic qualification, categorisation or authorisation. The APRA guide on applying for a licence to offer a MySuper product states that the regulated fund trustee which intends to offer a MySuper product must seek authorisation from APRA and must apply for authorisation for each MySuper product the licensee wishes to offer.³⁰ Funds with fewer than five members and eligible rollover funds are ineligible. Pooled superannuation trusts and approved deposit funds cannot accept superannuation guarantee contributions, and therefore they will not be able to contain a MySuper product.

³⁰ APRA Instruction Guide: Application Form, Authority to Offer a MySuper Product, 3 October 2012: <<http://www.apra.gov.au/Super/PrudentialFramework/Documents/Instruction-Guide-Application-form-MySuper-product-authority.pdf>>.

4. Authorisation

- 4.1. Authorisation is important because, from 1 January 2014, for employees who have not chosen a fund or have not elected in writing to have contributions paid to a specified choice product or products, employers can only make superannuation guarantee contributions on behalf of such employees into a fund which offers an authorised MySuper product.³¹ The Explanatory Memorandum states that under Stronger Super ‘employers must make superannuation guarantee contributions on behalf of employees that do not have a chosen fund to a superannuation fund that offers a MySuper product’.³² The implication is not that MySuper replaces every current super fund, but rather that it replaces current default superannuation products.³³
- 4.2. The MySuper laws regulate the minimum levels of cover and the cost of cover. From 1 January 2014, this was strengthened from the requirement of a trustee to ‘offer’ this insurance to the requirement that it actually provide this insurance at the minimum level set out in the MySuper laws. This cover is subject to the relevant trustee’s ‘reasonable conditions’, the member electing that the benefits not be provided or, if it is permitted by the fund, the member electing to hold a lower amount of life insurance. There is a view that MySuper has replaced many current superannuation products and that its terms set the standard for other superannuation funds.
- 4.3. Schedule 1 of the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations) specifies the conditions of release relating to the payment of death and permanent incapacity benefits to MySuper members under section 68AA of the SIS Act. These include retirement, death, terminal medical condition and permanent incapacity.³⁴ Under the Stronger Super reforms, regulation 4.07D prescribes operating standards for regulated superannuation funds that specify ‘the kinds of benefits that must not be provided other than by taking out insurance, or insurance of a particular kind’.³⁵ The effect of regulation 4.07D of the SIS Regulations is that, for members who join after 1 July 2014,³⁶ the trustee of a regulated insurance fund is prohibited from taking out insurance that provides benefits that are inconsistent with certain conditions of release contained in Schedule 1 of the SIS Regulations. These conditions

³¹ *ibid.*

³² Revised Explanatory Memorandum to the Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2012 at [2.3].

³³ To put this into context, fewer than 10 per cent of all employees actively choose a superannuation fund to receive their employer Super Guarantee (SG) contributions. Hence, MySuper products will receive over 90 per cent of all employer SG contributions.

³⁴ SIS Act, Sch 1, Items 101–103.

³⁵ *ibid.*, s. 31(2)(eb), inserted by the *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012*, Sch 2, Pt 1, item 5.

³⁶ This is because reg 4.07D of the SIS Regulations did not apply until 1 July 2014. Prior to this date, a trustee does not violate the provisions of the SIS Act by offering insurance inconsistent with the conditions of release contained in Sch 1 of the SIS Act regulations.

of release are: death, terminal medical condition, permanent incapacity or temporary incapacity.³⁷ The trustee may determine ‘reasonable conditions’ to be attached to the payment of these benefits, which may be ‘the same as the terms and conditions of the policy of insurance taken out to provide the benefit’.³⁸ The trustee is entitled to maintain policies of insurance that are inconsistent with the new regulations but that were entered into prior to the commencement date of the new regulations with regulator approval.

5. Insurance³⁹

- 5.1. The trustee of a superannuation fund is required to formulate, review regularly and give effect to an insurance strategy for the benefit of beneficiaries, addressing the kinds, levels, basis and method for insurances to be offered or acquired on behalf of beneficiaries, the costs of offering or acquiring insurances and to do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary, if that claim has a reasonable prospect of success.⁴⁰
- 5.2. In any assessment of reasonable conditions, the Registerable Superannuation Entity (RSE) licensee remains bound by its obligation to promote the financial interests of members with an interest in the MySuper product and its general covenants to perform its duties and exercise its powers in the best interests of the beneficiaries, and to act fairly in dealing with beneficiaries within each class of membership, including MySuper. The same obligations and considerations also apply when an RSE licensee is selecting and negotiating insurance.⁴¹
- 5.3. APRA has, with effect from 1 July 2013, required superannuation trustees to have an insurance management framework under Prudential Standard SPS 250 Insurance in Superannuation (SPS 250): a prudential standard which has the force of law.
- 5.4. As part of the Stronger Super reforms, APRA has been given power to issue binding Prudential Standards that must be complied with by all RSE licensees.⁴² SPS 250 sets out a number of additional requirements pertaining to insurance in superannuation. These include the requirement to have an ‘insurance management framework’;⁴³ an

³⁷ SIS Regulations, reg 4.07D, items 102, 102A, 103 and 109 respectively.

³⁸ SIS Act, s. 68AA(3)–(4).

³⁹ See Hanrahan, Royal Commission Background Paper 25, s. 5.4.

⁴⁰ SIS Act, s 52(7).

⁴¹ For more information, see s. 68AA and 2.14-2.22 of the Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012: <<http://www.apra.gov.au/Super/Pages/MySuper-FAQs.aspx#faq30>>.

⁴² *Superannuation Industry (Supervision) Act 1994*, s. 34C. Applicable from 1 January 2013.

⁴³ Prudential Standard SPS 250 Insurance in Superannuation, at [8]–[16].

‘insurance strategy’;⁴⁴ and a process for monitoring and selecting the insurance provided, which process is accountable to and reviewable by APRA.⁴⁵

- 5.5. APRA has required, from 1 July 2013, each superannuation fund to have an insurance strategy document, adopted by and binding on the fund. In general parlance, this document is referred to as the insurance management framework (IMF). APRA sets out the objectives and key requirements of SPS 250 as follows:

The Board of a [superannuation trustee] is ultimately responsible for having an insurance management framework that reflects the risks associated with making available insured benefits that is appropriate to the size, business mix and complexity of the [superannuation trustee's] business operations. The insurance management framework must include the insurance strategies for each registrable superannuation entity required in the Superannuation Industry (Supervision) Act 1993. The key requirements of this Prudential Standard are that a [superannuation trustee] must also:

- i. ensure that insurance arrangements adequately address the minimum requirements set out in this Prudential Standard; and
 - (A) formulate and give effect to appropriate selection processes for, and due diligence of, insurers and monitor relationships with insurers on an ongoing basis.

- 5.6. The IMF is to manage ‘making insured benefits available to beneficiaries’.⁴⁶ The IMF is the ‘totality of structures, policies, processes and people to manage making insured benefits available to beneficiaries.’⁴⁷ The superannuation trustee must ensure that: ‘all persons in roles relevant to the insurance activities of the RSE licensee are made aware of, and have processes and controls for monitoring compliance with the IMF.’⁴⁸ The IMF must be reviewed every 3 years.⁴⁹ The superannuation trustee must also have processes for the selection of insurance products, insurers and to monitor and review them.⁵⁰

- 5.7. The SPS 250 IMF obligations are obligations on the superannuation trustee. They are not direct obligations on the life insurer. It is rational to think that the insurers would be consulted about the superannuation trustee's IMF but SPS 250 does not so oblige them.

⁴⁴ *ibid.*, at [17].

⁴⁵ *ibid.*, at [22]–[24].

⁴⁶ *ibid.*, at [8].

⁴⁷ *ibid.*, at [9].

⁴⁸ *ibid.*, at [14].

⁴⁹ *ibid.*, at [25], [26].

⁵⁰ *ibid.*, at [22]–[24].

6. ISWG Code

- 6.1. The Insurance in Superannuation Working Group (ISWG) Code sets out standards for superannuation trustees in relation to group life insurance but also deals with life insurers.⁵¹ The Financial Services Council (FSC) Life Insurance Code of Practice (Life Code) sets out standards for life insurers but also deals with superannuation trustees.⁵²
- 6.2. The Productivity Commission Report considered that superannuation fund trustees should adopt the insurance code of practice immediately and stated:⁵³

In response to some of these outcomes — and after Government prompting — the industry has developed a voluntary code of practice. This is a small first step at addressing some of the most egregious problems. For example, the premium caps in the code will limit balance erosion for some members, as will the requirement to stop deducting insurance premiums from inactive accounts (in certain conditions).

There are some encouraging early signs of funds adopting the code, but how rigorously they will comply with the rules in practice remains unclear. The code is unenforceable and falls well short of what is needed, and of best practice for an industry code of conduct. Its effectiveness will depend on the extent of voluntary take-up and the strength of its provisions (which are yet to include implementation of standard definitions and a short-form annual insurance statement for members). In its current state, it will only herald modest improvements in member outcomes.⁵⁴

7. Productivity Commission Report

- 7.1. The Productivity Commission Report Terms of Reference included considering the appropriateness of the insurance arrangements inside superannuation,⁵⁵ in particular ‘whether policy changes could improve default cover through superannuation, so that default cover:
 - a) provides value-for-money
 - b) does not inappropriately erode the retirement savings of members of all ages

⁵¹ ISWG Code, ss. 3,12,3.13, 4.22, 5.7–5.8, importantly s. 6 on Claims, 7.6, s. 8 on Premium, and ss. 9.4, 10.14, 12.3, 13.2 & 13.8.

⁵² Life Code, s. 2.20, importantly in s. 3 on Product Design and s. 8 on Claims.

⁵³ Australian Government Productivity Commission - Superannuation: Assessing Efficiency and Competitiveness, Draft Report, April 2018, p. 37.

⁵⁴ *ibid.*, p. 22.

⁵⁵ *ibid.*

c) delivers consistent outcomes across the system.’⁵⁶

7.2. The Productivity Commission Report made the following key points:

- A third of accounts (about 10 million) are unintended multiple accounts. These erode members’ balances by \$2.6 billion a year in unnecessary fees and insurance.
- The system offers products and services that meet most members’ needs, but members lack access to quality, comparable information to help them find the best products.
- Not all members get value out of insurance in super. Many see their retirement balances eroded — often by over \$50 000 — by duplicate or unsuitable (even ‘zombie’) policies.⁵⁷

7.3. The Productivity Commission Report recommended a new way of allocating default members to products. The Commission recommended that those changes would need to be implemented in parallel to other essential improvements, including, for insurance:

Funds need to do more to provide insurance that is valuable to members. The industry’s code of practice is a small first step, but must be strengthened and made enforceable.⁵⁸

⁵⁶ *ibid.*, pp. v–vi.

⁵⁷ *ibid.*, pp. 2 & 7.

⁵⁸ *ibid.*, p. 2.

PART THREE – DISCLOSURE AND REPRESENTATIONS⁵⁹

1. Eligibility

- 1.1. A life insurer and a life reinsurer are concerned to discern the health and physical status of the life insured and whether any pre-existing sickness or injury might affect the risk (health risks). That status affects the terms and price for any contract they might enter into.
- 1.2. For retail business, a life insurer and a life reinsurer have three principal ways of dealing with health risks. The first is through remedies for misrepresentation and non-disclosure. The second is through terms which define the scope of cover, subject to the effect of the *Insurance Contracts Act 1984* (IC Act), section 54 in particular. The third is through exclusions from the scope of cover subject to the effect of the IC Act and section 47 in particular. The direct effect of the IC Act is on the life insurance policy of the life insurer. All of these matters affect the underwriting of the risk and the decision whether or not, and if so on what terms, to insure or reinsure.
- 1.3. The practice in group insurance is not to take personal applications or statements from a life insured. Accordingly, there is no process by which disclosure by the life insured is invited. Notices given pursuant to the IC Act, section 22, are not used in group life insurance. Therefore, while the normal non-disclosure and misrepresentation remedies may continue to apply as a matter of law, the life insurer has no practical access to these remedies against the insured. The practice constitutes a waiver of the life insurer's rights and the absence of a section 22 notice makes the remedies for non-disclosure unavailable in the absence of fraud.⁶⁰
- 1.4. The functional device used in group life insurance to deal with health risks is the concept of eligibility. A person must be eligible for insurance to receive cover under a group policy. Eligibility can involve particulars of a relevant employment contract or trust deed and at times be determined by whether the person was 'at work' on the relevant day at the commencement of the policy.⁶¹ In underwriting and commercial terms, that involves the person being actively at work and carrying out normal duties.
- 1.5. It has long been a part of insurance and reinsurance law and practice to distinguish between the disclosure obligation and the effect of exclusions on contractual obligations. Eligibility criteria and exclusion clauses are commonly understood, both in insurance law and practice, to have different purposes. The eligibility tests serve to

⁵⁹ There is a discussion of this topic generally in the General Insurance Background Paper No. 14 (GIBP), Part Eight and a discussion of this topic in relation to life insurance in the Life Insurance Background Paper No. 28 (LIBP), Part Five.

⁶⁰ IC Act, s. 22(3).

⁶¹ *Verinder v Australian Institute of Steel Construction Ltd* (2003) 13 ANZ Insurance Cases 61-589; [2003] NSWSC 975.

operate as a substitute for disclosure. If the member is not eligible, the insurer does not grant or issue cover at all, and the eligibility criteria serve to exclude from membership unacceptable risks.

- 1.6. There is no underwriting of individual life insureds generally in group life insurance or reinsurance.⁶²

2. Life insured – group life contract

- 2.1. The IC Act, section 32, originally applied the IC Act's remedies for non-disclosure and misrepresentation to blanket superannuation insurance.⁶³ A blanket superannuation contract was defined as a contract of life insurance that was maintained for the purposes of a superannuation or retirement scheme where the insured was a trustee and where there was more than one life insured.⁶⁴
- 2.2. Section 32 was further amended⁶⁵ to apply to a group life contract including the former 'blanket superannuation contract'. A 'group life contract' is defined in section 11(1) to mean 'a contract of life insurance that is maintained for the purposes of:
 - a) a superannuation or retirement scheme under which there can be more than one life insured; or
 - b) another kind of group life scheme (including a scheme that is not related to employment) under which there can be more than one life insured.'
- 2.3. The group life contract is between the trustee of the superannuation fund trust deed and the insurer. The member of the superannuation fund becomes the life insured and the life insurer issues life insurance cover to the trustee for the life insured. In such a case, the member/life insured may be guilty of non-disclosure or misrepresentation, but he or she is not a party to the contract as an insured; therefore the disclosure and representation duties sections did not apply to non-disclosure or misrepresentation by the life insured.
- 2.4. There was the additional complication that normally the group life contract would be in existence before the proposed member joined the superannuation fund so that failure to comply with the duty of disclosure or the making of a misrepresentation (as the proposed life to be insured in respect of her or his membership) would occur after the group life contract was entered into between the trustee and the insurer. In such a case, without section 32, these members would owe no obligations of proper disclosure to the insurer under sections 21 and 26 which apply only pre-contractually.

⁶² Except where the group life policy eligibility criteria or automatic acceptance limits are exceeded but that aspect is beyond the scope of this Background Paper.

⁶³ Insurance Contracts Amendment Bill 2013, Explanatory Memorandum, pp. 44–46.

⁶⁴ IC Act, s. 11(4)(c).

⁶⁵ *Insurance Contracts Amendment Act 2013*, commencing on 28 June 2014.

- 2.5. Section 32 now provides that the provisions of the IC Act relating to remedies for non-disclosure or misrepresentation apply as if the cover were provided under an individual life insurance contract in respect of the relevant member alone and that contract had been entered into at the time the member joined the superannuation fund.⁶⁶ The section extends to a superannuation contract that was made before the commencement of the IC Act, but only in so far as the contract relates to persons who became members of the superannuation fund after that date.⁶⁷
- 2.6. The provisions of the IC Act, Division 3, apply to a retirement savings account holder as if the holder were an insured with an individual insurance contract.⁶⁸

⁶⁶ See Part Five, s. 1, below.

⁶⁷ IC Act, s. 4(2).

⁶⁸ IC Act, s. 32A.

PART FOUR – LIFE INSURANCE IN SUPERANNUATION⁶⁹

1. Death

- 1.1. A superannuation fund trustee is entitled to enter into term life insurance as policyowner to provide for the payment of death benefits on the death of a life insured who is an insured member.⁷⁰ Under section 32C of the *Superannuation Guarantee (Administration) Act 1992*, an employer is required to make contributions to a fund that complies with the requirements of the *Superannuation Guarantee (Administration) Act 1992* regulations ‘in relation to offering insurance in respect of death’ including a minimum level of life insurance as set out in the *Superannuation Guarantee (Administration) Regulations 1993*.⁷¹
- 1.2. From 1 January 2014, this was strengthened from the requirement to ‘offer’ this insurance to the requirement actually to provide this insurance at the minimum level set out in the *Superannuation Guarantee (Administration) Regulations 1993*.⁷² This amount is subject to the member electing that the benefits not be provided or, if it is permitted by the superannuation fund, the member electing to hold a lower amount of life insurance.⁷³
- 1.3. A trustee of a regulated superannuation fund is required to pay a member's death benefit as soon as practicable after their death.⁷⁴ In some cases, the member will have made a permitted binding death benefit nomination.⁷⁵ Provided this nomination meets the requirements of the regulatory scheme, the trustee will be bound to pay the benefit to the member's dependents or legal personal representative. This scenario is an exception to the rule contained in the *Superannuation Industry (Supervision) Act 1993* (SIS Act), section 58, that the trustee must not be subject to direction or exercise their discretion automatically.

⁶⁹ See Hanrahan, Royal Commission Background Paper 25, s. 5.4.

⁷⁰ SIS Act, s. 68AA(1) Revised Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012, at [2.12], [2.14].

⁷¹ *Superannuation Guarantee (Administration) Act 1992*, s. 32C(2)(d) and (e); *Superannuation Guarantee (Administration) Regulations*, reg 9A; Revised Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012, at [2.13].

⁷² This is contained in the new s. 32C(2)(d) and (e) of the *Superannuation Guarantee (Administration) Act 1992*.

⁷³ *Superannuation Guarantee (Administration) Regulations*, reg 9A; Revised Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012, at [2.13].

⁷⁴ SIS Regulations, reg 6.21.

⁷⁵ SIS Act, s. 59(1A), and SIS Regulations, reg 6.17A. See *Donovan v Donovan* [2009] QSC 26.

- 1.4. Other than in this situation, the trustee of the superannuation fund has a discretionary power in relation to distributing the deceased member's benefits to his or her dependents. This discretion must be exercised in accordance with the superannuation legislation and trust deed. A dependent includes the spouse or child of the member, as well as any person with whom the member has an interdependency relationship.⁷⁶ The SIS Act provides that two persons have an interdependency relationship if they have a close personal relationship, they live together, one or each of them provides the other with financial support and one or each of them provides the other with domestic support and personal care.⁷⁷ The relevant factors to be taken into account in determining whether this relationship exists include the duration of their relationship, the degree of their mutual commitment to a shared life or reputation and public aspects of the relationship (such as whether the relationship is publicly acknowledged).⁷⁸

2. Trauma or critical illness

- 2.1. The SIS Act provides that the regulations may prescribe standards applicable to the operation of regulated superannuation funds.⁷⁹ Previously, the superannuation fund trustee was entitled to determine whether the provision of trauma insurance by a superannuation fund is acceptable, having regard to all the circumstances of the fund. The amendments to the SIS Regulations that commenced on 1 July 2013, with application from 1 July 2014, provided that a trustee of a regulated superannuation fund must not provide an insured benefit to a member unless it was consistent with specified conditions of release.⁸⁰ These conditions of release are relevantly death, terminal medical condition, permanent incapacity or temporary incapacity.⁸¹ This amendment has the effect of no longer permitting the superannuation fund trustee to offer trauma insurance.⁸²

⁷⁶ SIS Act, s. 10. See *Petrohilos v Hunter* (1991) 25 NSWLR 343; *NIB Health Funds Ltd v Hope* (unreported, NSWSC, 15 November 1996); *Edwards v Postsuper Pty Ltd* [2007] FCAFC 83; *Faull v Superannuation Complaints Tribunal* [1999] NSWSC 1137; *Dohnt v Green* [2006] FCA 30; *Harris v Trustee Commonwealth Superannuation Scheme* (2006) 151 FCR 169; 91 ALD 30; [2006] FCA 373; *Webb v Teeling* (2009) 3 ASTLR 186; [2009] FCA 1094.

⁷⁷ SIS Act, s. 10A.

⁷⁸ SIS Regulations, reg 1.04AAAA.

⁷⁹ SIS Act s 31(1).

⁸⁰ SIS Regulations, reg 4.07D(2); and unless the member joined the fund before 1 July 2014 and was covered in respect of that insured benefit before that date: reg. 4.07D(3).

⁸¹ SIS Regulations, schedule 1 items 102, 102A, 103 and 109.

⁸² The trauma conditions that were within the meaning of terminal medical condition, permanent incapacity or temporary incapacity, could technically be offered and held.

3. TPD/permanent incapacity

- 3.1. The questions for Total and Permanent Disability (TPD) are whether the trustee must offer or contract for TPD life insurance and, if so, whether the terms are prescribed by the statutory definition of a ‘permanent incapacity benefit’.
- 3.2. Superannuation law restricts the character, timing and amount of benefits – by the sole, core or ancillary purpose and by the reasonable benefit limits – that a trustee is entitled to pay to or for a member.⁸³ The restrictions are for licensing and taxation purposes. If the trustee breaches the purpose tests or the reasonable benefit limits, it is in breach of its licence conditions and there are adverse licensing and taxation consequences. These purposes and reasonable benefit limits also apply to insurance sourced benefits. The public policy purpose is that a superannuation benefit, including an insurance sourced benefit, is paid when the member both reaches a certain age, the ‘preservation age’, and retires from the workforce. The statutory permanent incapacity benefit, a benefit subject to the statutory purposes and the reasonable benefit limits, must be interpreted in that context.
- 3.3. ‘Permanent incapacity’ is defined by the statute to mean, in relation to a member, where ‘a trustee of the fund is reasonably satisfied that the member’s ill-health (whether physical or mental) makes it unlikely that the member will engage in gainful employment for which the member is reasonably qualified by education, training or experience’⁸⁴ – the statutory permanent incapacity benefit.⁸⁵

4. Permanent incapacity benefit – pre-MySuper position

- 4.1. Restrictions apply to all regulated funds regarding the payment of benefits.⁸⁶ The condition of release relevant to permanent incapacity benefit is the definition of ‘permanent incapacity’ set out above.⁸⁷ It is possible for a member to meet the requirement for payment stipulated in an insurance policy but nevertheless fail to meet

⁸³ Revised Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 at [2.12].

⁸⁴ SIS Act, s. 10(1); SIS Regulations, reg 1.03C.

⁸⁵ There is an abundance of case law relating to trustees’ determinations of whether a member has suffered total and permanent disablement. The cases generally seem to discuss the meaning of the term under the governing rules of the fund contained in the trust deed, without reference to the SIS Act, the leading case being *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254; [2010] HCA 36.

⁸⁶ The rules relating to payment of benefits are contained in Divs 6.2 and 6.3 of the SIS Regulations. The conditions of release relevant to these rules are contained in Sch 1 to the SIS Regulations. This is supplemented by APRA’s SPG 280, Payment Standards for regulated superannuation funds and approved deposit funds, June 2017.

⁸⁷ *Superannuation Industry (Supervision) Regulations 1993*, item 103 of Sch 1. According to *Superannuation Industry (Supervision) Regulations 1993*, reg 1.03C.

the condition of release requirement in the SIS Act, Schedule 1. In these circumstances, the trustee is not permitted to pay the benefit from the relevant fund.

- 4.2. Before 1 July 2014, the permanent incapacity benefit applied to certain superannuation funds. From 1 July 2014, the permanent incapacity benefit applies to MySuper funds only.

5. Permanent incapacity benefit – post-MySuper position

- 5.1. The permanent incapacity benefit works on two levels. The first is in the contract between the member and the superannuation fund trustee. The second is in the contract between the superannuation fund trustee and the insurer.
- 5.2. The statutorily prescribed permanent incapacity benefit affects legally the member-trustee contract. The statutorily prescribed permanent incapacity benefit does not affect legally the trustee-insurer contract but it is commercially relevant to that contract because a superannuation fund trustee would seek permanent incapacity benefit insurance from an insurer on the basis of, and to conform with, the statutory permanent incapacity benefit.⁸⁸ Because of its status as a ‘condition of release’ an insurer is entitled to offer a permanent incapacity insurance to a superannuation fund trustee which is more restricted than the prescribed permanent incapacity benefit.
- 5.3. A superannuation fund trustee is not compelled to offer a permanent incapacity benefit in certain circumstances.⁸⁹ First, a member may elect that a permanent incapacity benefit will not be provided to the member by the superannuation fund.⁹⁰ Second, a superannuation fund trustee may consider ‘reasonable conditions’ for offering a permanent incapacity benefit.⁹¹ The trustee of a regulated superannuation fund may determine reasonable conditions to which the provision of a permanent incapacity benefit is subject.⁹² These reasonable conditions may include eligibility criteria⁹³ and criteria for entitlement to the permanent incapacity benefit:⁹⁴

APRA would expect reasonable conditions to be based on the RSE licensee's assessment of the availability and cost of third-party

⁸⁸ See *Superannuation Industry (Supervision) Regulations 1993*, reg 68AA(1). See also the SIS Explanatory Memorandum, at 2.16: the types of insurance, particularly TPD insurance, that *may be* offered within superannuation emphasis added; Revised Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 at [2.12], [2.14].

⁸⁹ SIS Act, s. 68AA(2),(8).

⁹⁰ *ibid.*, s. 68AA(5)–(8).

⁹¹ SIS Act, ss. 68AA(3)–(4); Revised Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 at [2.16].

⁹² SIS Act, s. 68AA(3); the SIS Explanatory Memorandum at [2.17].

⁹³ The SIS Explanatory Memorandum, at [2.17].

⁹⁴ The SIS Explanatory Memorandum, at [2.18].

insurance cover, for example, in relation to age or pre-existing medical conditions.⁹⁵

- 5.4. Conditions in relation to a benefit are reasonable if they are the same as the terms and conditions of the policy of insurance taken out to provide the benefit.⁹⁶ The relevant Explanatory Memorandum states that:

Where a trustee has taken out insurance, a condition is also considered to be reasonable if it is the same or corresponds with the terms and conditions of the underlying insurance policy.⁹⁷

- 5.5. The superannuation fund trustee is not compelled to offer a permanent incapacity benefit nor is an insurer compelled to offer a cognate permanent incapacity insurance:

In APRA's view, RSE licensees cannot choose to exclude broad categories of members, such as those who do not have a standard employer-sponsor, from being provided with death and TPD insurance on an opt-out basis unless they can demonstrate that third party insurance which includes the specified group is not available, or is not available at a reasonable cost.⁹⁸

- 5.6. But once the reasonable conditions are met and the insurance is taken out by the trustee, the trustee is required to offer compulsory insurance for any member who holds the MySuper product.⁹⁹ The exception to this is if the trustee certifies in writing that the trustee is reasonably satisfied that the risk to be insured cannot be placed with an insurer at a reasonable cost or be provided on an opt-out basis. The statutory permanent incapacity benefit terms refer expressly to the trustee but not to the insurer.¹⁰⁰

- 5.7. A superannuation fund trustee, although not required to do so by the SIS Act,¹⁰¹ is required implicitly by the *Superannuation Industry (Supervision) Regulation 1994*¹⁰² to, and must, because a prudent trustee should, ensure that the permanent incapacity

⁹⁵ APRA FAQ 30: <<http://www.apra.gov.au/Super/Pages/MySuper-FAQs.aspx#faq30>>.

⁹⁶ SIS Act, s. 68AA(4); Revised Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 at [2.15]

⁹⁷ See SIS Act, ss. 68AA(3) – (4); Revised Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 at [2.15], [2.16]; SIS Act, Explanatory Memorandum at [2.17].

⁹⁸ APRA FAQ 30: <<http://www.apra.gov.au/Super/Pages/MySuper-FAQs.aspx#faq30>>.

⁹⁹ SIS Act, s. 68AA(1) and (8); Revised Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 at [2.20].

¹⁰⁰ SIS Act, s. 68AA(7); *Superannuation Industry (Supervision) Regulations*, reg. 9.49.

¹⁰¹ *ibid.*, s. 68AA.

¹⁰² *Superannuation Industry (Supervision) Regulation 1994*, reg 4.07D, from 1 July 2014; SIS Act, s. 31(2)(eb), inserted by the *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012*, Sch 2, Pt 1, item 5.

benefit it offers is supported by permanent incapacity insurance that the superannuation fund trustee enters into for the superannuation fund and its members.¹⁰³

- 5.8. If the superannuation fund trustee does consider and implement reasonable conditions which reflect the permanent incapacity benefit and seeks insurance accordingly, what is the position of the permanent incapacity benefit and, inferentially, the insurance in relation to the statutory permanent incapacity benefit? The permanent incapacity benefit should be consistent with the terms prescribed by statute for a permanent incapacity benefit. It follows that the insured permanent incapacity benefit is not required to be the same as the superannuation fund permanent incapacity benefit. It also follows that a trustee is entitled to offer a permanent incapacity benefit on a more, but not less, restricted basis than the prescribed one. It also follows that the test for ‘consistency’ between the prescribed permanent incapacity benefit and the insured permanent incapacity benefit should be interpreted on the same principle. The terms in the prescribed permanent incapacity benefit have been interpreted by the courts in the context of specific insurance contracts and their wider context; an insured permanent incapacity benefit may be SIS Act compliant even with its own definitions of the prescribed term.
- 5.9. If the superannuation fund trustee offered permanent incapacity benefit is *more* restricted then the insurer's permanent incapacity insurance, the superannuation fund trustee may have a liability to a member for a permanent incapacity benefit without a cognate right to claim an equal amount from the insurer. If the trustee offered permanent incapacity benefit is *less* restricted than the insurer permanent incapacity benefit, for example an ‘own occupation’ test or a ‘loss of limbs’ cover, a life insured may satisfy the definition and terms of the insurance but not the statutory permanent incapacity benefit. The trustee would likely in these circumstances not satisfy the sole purpose test.
- 5.10. It therefore follows from the sole purpose test, the conditions of release and the SIS Act, section 68AA, that if a superannuation fund trustee considers that disability insurance is too expensive or on unsatisfactory terms, the superannuation fund trustee is entitled either not to offer a permanent incapacity benefit or to offer a permanent incapacity benefit which is on more restrictive terms than the statutory permanent

¹⁰³ SIS Act, s. 68AA(1); *Superannuation Industry (Supervision) Act 1993*, s. 68AA(5); Revised Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 at [2.12], [2.14].

incapacity benefit, subject to any contrary term of the relevant superannuation fund trust deed.¹⁰⁴

- 5.11. An RSE licensee has the discretion whether to provide MySuper members benefits for temporary incapacity, under income protection insurance.¹⁰⁵

¹⁰⁴ Compare ISWG, *Discussion Paper: Account balance erosion due to insurance premiums*, Executive Summary, March 2017, citing SIS Act, s. 52(7)(c): ‘Currently all MySuper products are required to automatically provide Death and Permanent Incapacity (commonly referred to as Total and Permanent Disablement Insurance or TPD) to members on an opt out basis. They may also choose to provide Income Protection insurance automatically.’

¹⁰⁵ See Revised Explanatory Memorandum to the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 at [2.18].

PART FIVE – LIFE POLICY AND COVER¹⁰⁶

1. Member life cover

Introduction

- 1.1. The member and beneficiary of the scheme becomes a life insured under the scheme's group life policy. The expression cover or life cover is used generally, and here, to describe the member and beneficiary's interest in the group life policy but there is some complexity underneath this label.
- 1.2. The member and beneficiary has two sets of rights in relation to the group life policy. The first is in relation to the superannuation fund trustee who is the policyowner of the group life policy. The second is in relation to the group life insurance company.

Superannuation fund trustee

- 1.3. The superannuation fund trustee holds the group life policy on trust for the members and beneficiaries. Each member and beneficiary has a beneficial interest in the group life policy under the terms of the life cover issued by the group life insurance company to the trustee in relation to that member and beneficiary.
- 1.4. The trustee has the obligation to consider and deal with the member and beneficiary's claim under the superannuation fund trust deed in relation to the member and beneficiary's cover under the group life policy.
- 1.5. The member and beneficiary has the ordinary right to institute proceedings to compel the trustee to perform the trustee's duty,¹⁰⁷ either to consider the claim lawfully or to claim, in turn, on the group life policy.

Group life insurance company

- 1.6. The member and beneficiary has a beneficial interest in the group life policy under the terms of the cover issued by the group life insurance company to the trustee in relation to that member and beneficiary. The member and beneficiary's beneficial interest and cover entitles the member and beneficiary to make a life insurance claim directly against the group life insurance company, on three independent bases.

¹⁰⁶ There is a discussion of this topic generally in the GIBP, Part Ten, and a discussion of this topic in relation to life insurance in the LIBP, Part Eight.

¹⁰⁷ *Jacobs' Law of Trusts in Australia*, 8th Edition, J.D. Heydon and M.J. Leeming, para. 23-03, see also paras. 2-16 to 2-25.

- 1.7. First, the member and beneficiary has a right under the *Trident* principle¹⁰⁸ to proceed directly against the group life insurance company on the basis that the group life policy intended to confer benefits on the member and beneficiary. However, in *Shuetrim*, the NSW Court of Appeal considered that *Trident* was inapplicable in this context.¹⁰⁹ The right is now, in the context of the other two rights below, largely irrelevant.
- 1.8. Second, the position is now clear that the beneficiary and trustee relationship in the context of a group life policy means that the member and beneficiary has a right to proceed directly against the group life insurance company.¹¹⁰ The Court in *Shuetrim* rejected the generality of the proposition that the beneficiary was not entitled directly to enforce the policy, because it was the trustee, not the beneficiary, who was entitled to payment pursuant to the policy, because it failed to have regard to the facts that the trustee held the benefit of the group life insurers' obligations¹¹¹ on trust for its members and that in 'special' or 'exceptional' circumstances a beneficiary may bring proceedings in the beneficiary's own name which ought otherwise to have been brought by the trustee. There were special or exceptional circumstances because the claimant was the only member of the superannuation fund with an interest in the choses in action against the group life insurance companies to the extent they involved the assessment and determination of the claims made by him under the group life policies. In such a case, the requisite special or exceptional circumstances are satisfied by a failure by the trustee to sue on a cause of action in the performance of the duties owed by the trustee to the beneficiary to protect the trust estate or to protect the interests of the beneficiary.¹¹²
- 1.9. Third, the *Insurance Contracts Act 1984* (IC Act), sections 48A and 48AA, provide the member and beneficiary, as a third party beneficiary, with the right to make a life insurance claim directly against the group life insurance company under those sections: Part Six below.
- 1.10. These rights, particularly given the limitations in the IC Act rights which distinguish a third party beneficiary from a party, mean that the cover is not, of itself, a life insurance contract.
- 1.11. The relationship between insurance and superannuation is regulated by the *Superannuation Industry (Supervision) Act 1993* (SIS Act). The insurance benefits

¹⁰⁸ *Trident General Insurance Co. v McNiece Bros. Pty Ltd* (1987) 165 CLR 107; the principle was supported by the Australian Law Reform Commission's draft IC Act, section 48; see *Sutton*, paras. 11.330-11.350. The principle is criticized in *Jacobs' Law of Trusts in Australia*, 8th Edition, J.D. Heydon and M.J. Leeming, paras. 2-16 to 2-25.

¹⁰⁹ *MetLife Insurance Ltd v Shuetrim* [2016] NSWCA 68, paras. 52-58.

¹¹⁰ *MetLife Insurance Ltd v Shuetrim* [2016] NSWCA 68, paras. 52-58.

¹¹¹ The relevant duty in *Shuetrim* was to act in utmost good faith.

¹¹² *MetLife Insurance Ltd v Shuetrim* [2016] NSWCA 68, paras. 52-58; see also *Jacobs' Law of Trusts in Australia*, 8th Edition, J.D. Heydon and M.J. Leeming, para. 23-03.

provided by a superannuation fund are often referred to as ‘life insurance’ and the money paid by the member of the fund to attain these benefits is often referred to as ‘premiums’ but, as the superannuation trustee is not a registered life insurance company for the purposes of the *Life Insurance Act 1995* (LI Act), they cannot properly be characterised as life insurance or premiums. The benefits acquired are, under the SIS Act, superannuation interests and are therefore an incident of the member's participation in the trust.

- 1.12. This approach is supported not only by the principles set out above but by the provisions of the IC Act,¹¹³ authority¹¹⁴ and commentary.¹¹⁵ There are two qualifications to this general position.
- 1.13. The first qualification is that the IC Act has the effect of deeming the superannuation fund trust deed to be, at least in relation to the terms of insurance, a life insurance contract. Section 10(2) has the effect that a contract of insurance includes a contract that includes provisions of insurance. A superannuation fund trust deed has terms which provide for the trustee to enter into the group life policy and to be liable to the member and beneficiary in relation to benefits received by the trustee under the group life policy for the benefit of the member and beneficiary.
- 1.14. Section 10(3) has the effect of deeming a provision of a contract that would not ordinarily be regarded as a contract of insurance which affects the operation of a contract of insurance, to be a provision included in the contract of insurance. The above terms of the superannuation fund trust deed which deal with insurance affect the operation of the group life policy and therefore are deemed to be included in the group life insurance contract.
- 1.15. In *United Super Pty Ltd v Built Environs Pty Ltd*¹¹⁶ (*United Super*), Gray J held that there was a contract of insurance between the trustee and the member. His Honour stated that ‘United Super agreed to pay a sum of money on the happening of a specified event, namely total and permanent disability. Mr Hollier secured the benefit of that payment by making arrangements for contributions to be made from moneys held in trust by United Super...The relevant terms of the agreement between Mr Hollier and United Super providing for disability cover are properly characterized as being within s 10 of the *Insurance Contracts Act* ... Even if the overall contractual arrangements were not to be regarded as a contract of insurance, s 10(2) of the

¹¹³ IC Act, ss. 26(3), 32 and 32A assume that the cover is not an insurance contract.

¹¹⁴ *MetLife Insurance Ltd v Shuetrim* [2016] NSWCA 68, paras. 52–58.

¹¹⁵ Hill, The Honourable Justice Graham, ‘The True Nature of a Member's Interest in a Superannuation Fund’, *Journal of Australian Taxation*, vol. 5, no. 1, 2002.

¹¹⁶ *United Super Pty Ltd v Built Environs Pty Ltd* (2001) 12 ANZ Insurance Cases 90-113; 80 SASR 513; [2001] SASC 339.

Insurance Contracts Act had application and the agreement should be treated as a contract of insurance for the purposes of the Act.’¹¹⁷

- 1.16. United Super held out to Mr Hollier that he had disability cover but the member's life insurance had lapsed because the trustee failed to pay the premium and the trustee took no steps to advise the member or rectify the position. The consequence of finding a contract of life insurance between the member and the trustee was to invoke the statutory duties of utmost good faith.
- 1.17. The second qualification is that the process and documents by which the member and beneficiary is granted life cover might constitute or evidence a life insurance contract between the superannuation fund trustee and the member and beneficiary.¹¹⁸ There are a number of cases in which the courts have found there to be a contract of insurance between the member and the trustee.¹¹⁹
- 1.18. In *Green v AMP Life Ltd*¹²⁰ (*Green*), Campbell J held in the context of a contractual claim by a member of a fund against AMP, the insurer, that the relationship was a life policy because it provided for the payment of money on the happening of a contingency which depended on the death or continued life of the member.¹²¹

2. Duration¹²²

- 2.1. A group life policy usually has a duration or policy period of three years.

3. Transfer

- 3.1. A person may become insured under a group life insurance scheme by transferring an existing life policy into the group scheme. A transfer policy or life insurance cover is life insurance on the life insured where the life insured had a prior life policy or cover

¹¹⁷ *United Super Pty Ltd v Built Environs Pty Ltd* (2001) 12 ANZ Insurance Cases 90-113; 80 SASR 513; [2001] SASC 339 at [51]–[56].

¹¹⁸ See the discussion in Hill, the Honourable Justice Graham, ‘The True Nature of a Member's Interest in a Superannuation Fund’, *Journal of Australian Taxation*, vol. 5, no. 1, 2002, s. 5.

¹¹⁹ See, for example, *United Super Pty Ltd v Built Environs Pty Ltd* (2001) 12 ANZ Insurance Cases 90-113; 80 SASR 513; [2001] SASC 339; *Green v AMP Life Ltd* (2005) 13 ANZ Insurance Cases 90-124; [2005] NSWSC 370.

¹²⁰ *Green v AMP Life Ltd* (2005) 13 ANZ Insurance Cases 90-124; [2005] NSWSC 370.

¹²¹ *Green v AMP Life Ltd* (2005) 13 ANZ Insurance Cases 90-124; [2005] NSWSC 370. Note, an appeal from this decision was dismissed in *Green v AMP Life Ltd* (2005) 13 ANZ Insurance Cases 90-125; (2005) ASAL 55-147; [2005] NSWCA 354, and Special Leave to appeal to the High Court was dismissed in *Green v AMP Life Ltd* [2006] HCATrans 133; the conclusion was that the s. 48 did not apply because it applied only to general insurance.

¹²² There is a discussion of this topic generally in the GIBP, Part Ten, and a discussion of this topic in relation to life insurance in the LIBP, Part Seven.

in relation to which the same life insured is eligible to be insured under a group life policy or applies for or is granted life insurance cover under the group life policy to replace the prior life cover.

- 3.2. A life cover is cover provided to a life insured under a contract of life insurance issued by a life insurance company.

4. Continuation policies and options

- 4.1. When a life insured ceases to be a member of a group scheme, the person might wish to continue the same or similar insurance cover on an individual basis with the same life insurance company. The life insurance company might offer a continuation option. A continuation option and policy is usually offered for equivalent benefits and levels of cover as applied for the life insured under the group life insurance at the time of exercising the continuation option.

5. Insured Life Event

- 5.1. The Life Insurance Background Paper No. 28 (LIBP) discussed the Insured Life Event as a condition, illness, injury, accident, disability or death which entitles the claimant to the relevant and specified amount or benefit. Some of the elements of the Insured Life Event must occur within the period of the life insurance contract in order for the life insurance company to be liable to pay the sum insured or benefit. The same principle applies in group life insurance but it manifests itself in different ways and there are different approaches to dealing with it.
- 5.2. There is some doubt about what the trigger is for Total and Permanent Disability (TPD) or trauma life insurance. The common form TPD insurance creates complexity for this issue.¹²³ The trigger depends on the terms of the life policy. But the trigger for the common form TPD insurance in a life insurance contract has been held to be variously: the date of the causative illness or injury; the first day off work and the end of a six month waiting period.
- 5.3. The first day 'off work' is widely accepted by insurers as the trigger. It features as the point which determines, when there is a change of life insurance company in group insurance, whether the incoming or outgoing life insurance company is liable for the TPD – it is the life insurance company which is on risk on the first day off work.¹²⁴ However, this date has none of the advantages of the injury or illness as the trigger and all of their disadvantages. The end of the waiting period as the trigger has the

¹²³ See LIBP, Part Eight, ss. 4 and 5.

¹²⁴ Financial Services Council, Guidance Note 11, *Group Insurance Takeover Terms*, 9 May 2013; compare a GSC case: *Mulchrone v Swiss Life (UK) Plc* [2005] EWHC 1808 (Comm); [2006] Lloyd's Rep IR 339.

advantage that it is possible for the life insured to be TPD on this date, at the earliest;¹²⁵ but it does not have the advantage of being causative, providing continuity between outgoing and incoming life insurance companies or industry acceptance. The date of determination may occur at any time and is therefore too uncertain and open to manipulation. There are authorities which support each of these positions and it is not possible to state a general rule for that reason as well as the determinative importance of the specific wording.

- 5.4. The issue was considered recently in *MLC Nominees Pty Ltd v Daffy*.¹²⁶ Mr Daffy was employed by Southern Star Designer Windows PL (SSDW). He was a third party beneficiary under a group life policy with the insurer. The insurer's nominee was the policyowner. Mr Daffy suffered a prolapsed disc on 14 October 2010. SSDW terminated his employment on 24 May 2011. From late July 2011, Mr Daffy was unable to work. Mr Daffy was covered under the common form TPD insurance only if his TPD benefit 'accrued' before his employment was terminated. If the common form TPD insurance did not apply to Mr Daffy, then he did not meet the alternative definition. Mr Daffy argued that the benefit accrued on the date he was injured and that the common form TPD insurance applied. The court held that the TPD benefit did not accrue until the end of the six months waiting period.¹²⁷ That period had not begun or ended before the employment was terminated. Mr Daffy was not entitled to a TPD benefit.

6. Takeover terms

- 6.1. When a group life policy expires or is cancelled, the trustee of the fund might enter into a group life policy with a different life insurance company. The insurance industry was concerned that it might not be clear whether it was the outgoing or the incoming life insurance company which was responsible for a claim made around the time of the cancellation and entry into the new group life policy.
- 6.2. In order to address industry concern, the Financial Services Council (FSC) developed a guidance note dealing with 'takeover terms'.¹²⁸ Clearly the issue does not arise for death claims¹²⁹ nor often for trauma claims because for the former, the trigger is certain and for the latter the trigger is usually clear. The issue arises usually, and often, for disability claims¹³⁰ because a disability claim might have, depending on the term of the life insurance contract, up to four different triggers: illness or injury; first day off

¹²⁵ *Halloran v Harwood Nominees Pty Ltd* (2007) 16 ANZ Insurance Cases 90-142; [2007] NSWSC 913 at [34].

¹²⁶ *MLC Nominees Pty Ltd v Daffy* [2017] VSCA 110.

¹²⁷ *MLC Nominees Pty Ltd v Daffy* [2017] VSCA 110, paras. 63, 72-80.

¹²⁸ FSC, Guidance Note No 11, *Group Insurance Takeover Terms*, 9 May 2013.

¹²⁹ *ibid.*, para. 10.

¹³⁰ *ibid.*, paras. 12 & 13.

work; the end of the waiting period, the ‘as at’ date or the date of assessment or determination. The FSC Guidance Note provides that if the ‘off work’¹³¹ date for the claim falls in the period of insurance with the outgoing life insurance company, the outgoing life insurance company is liable for the claim. If the ‘off work’ date for the claim falls in the period of insurance with the incoming life insurance company, the incoming life insurance company is liable for the claim.

- 6.3. The FSC Guidance Note cannot as a matter of law affect the rights that the member, beneficiary or life insured has under the terms of person’s life cover under the group life policy with the life insurance company: it is no defence to a claim for a life insurance company to rely on the FSC Guidance Note to make another insurer liable for the claim unless the terms of the FSC Guidance Note are incorporated expressly or by reference into the group life policy. The FSC Guidance Note acknowledges this issue¹³² but it is axiomatic that each and every life insurance contract has a trigger and on that basis, the acknowledgement is ineffective. But if the FSC Guidance Note is incorporated expressly or by reference into the group life policy, it would usually conflict with the life policy trigger: most life policy triggers are injury or illness and the FSC Guidance Note trigger is the ‘off work’ date.
- 6.4. The Guidance Note similarly has the stated purpose: ‘to ensure that there is a seamless transition of a *transferring member’s* cover from the *outgoing insurer* to the *incoming insurer* and that there are no gaps in the *transferring member’s* cover.’ But if the member, beneficiary or life insured does not have a valid claim under either the outgoing or the incoming group life policy, the FSC Guidance Note cannot have the effect in law of creating such a right to a claim.

¹³¹ Or last ‘at work’ date.

¹³² FSC, Guidance Note No 11, *Group Insurance Takeover Terms*, 9 May 2013, para. 3.2.

PART SIX – PARTIES¹³³

1. Policyowner, life insured and trustee

Policyowner, life insured and trustee

- 1.1. The legal title to a life insurance contract is in the policyholder or policyowner, who can have any legal personality: individual, corporation or partnership. The policyowner's capacity can be as: an agent, often an employer in a group life insurance; or as a trustee, often a superannuation trustee.¹³⁴ The person whose life is insured is the life insured. It is the policyowner, not the life insured, who enters into the life insurance contract, is obliged to pay the premium and is entitled to receive the benefit amounts paid by the life insurer. It is the policyowner who is entitled to assign the life insurance contract.

2. Third party beneficiaries

Introduction

- 2.1. There is a range of persons who by common law, but mostly by statute, have rights under a life insurance contract. A person may also have rights under a policy as the nominated beneficiary of the insured. In the event of a dispute between beneficiaries, the insurer may take advantage of section 215 of the *Life Insurance Act 1995* and pay the money into court so that the parties can resolve their dispute without any risk to the insurer of finding that it has paid the wrong person and of facing liability to pay the proper beneficiary.¹³⁵

Section 48A(1)

- 2.2. The original *Insurance Contracts Act 1984* (IC Act), section 48, did not apply to life insurance. Section 48A, which was introduced in 1995, extended the principle in section 48 to life insurance.¹³⁶ Section 48A was substituted by the *Insurance Contracts Amendment Act 2013*,¹³⁷ and applies to life policies originally entered into after 28 June 2014 or varied by agreement after that date to increase the sum insured or the scope of cover. The revised provision makes a number of significant changes to the

¹³³ There is a discussion of this topic generally in the GIBP, Part Five, and a discussion of this topic in relation to life insurance in the LIBP, Part Six.

¹³⁴ *Erzurumlu v Kellogg Superannuation Pty Ltd* [2013] NSWSC 1115 at [73].

¹³⁵ *HCF Life Insurance Co Pty Ltd v Lamb* [2000] FCA 573; *Challenger Life Company Ltd v Estate of the late Robert John Real* [2014] FCA 1325.

¹³⁶ IC Act, s. 11(1): a life policy within the meaning of s. 9(1) of the LI Act.

¹³⁷ See the Explanatory Memorandum for the 2013 Bill, para 1.149. The proposals date back to the Cameron-Milne Report of 2004.

original version. Section 48A(1) as amended applies if the policy is expressed to be for the benefit of a third party beneficiary (who may be the life insured).¹³⁸

2.3. By section 48A(1):¹³⁹

- a) the third party beneficiary has a right to recover from the insurer any money that becomes payable under the contract even though the third party beneficiary is not a party to the contract; and
- b) if the third party beneficiary is not the life insured, any money paid to the third party beneficiary under the contract does not form part of the estate of the life insured.

2.4. The effect of section 48A(1)(a) is to give the third party beneficiary a direct claim without intervention by the policyowner. If the beneficiary is entitled at law or equity to the money payable but is not specified in the contract, it must be that the section does not affect the rights of such a person, for example a principal or beneficiary under a trust. Section 48A(1)(a) is extended by section 48(1A) – a new provision – to a contract of life insurance that is maintained for the purposes of a superannuation or retirement scheme, subject to: (a) the terms of the contract and the scheme; and (b) any other law; relating to the payment of money under the contract or the scheme. Section 48A(1)(b) clarifies an ambiguity in the earlier version, confirming that the sums payable to the beneficiary do not form any part of the estate of the life insured only where the beneficiary is not the life insured.

Section 48A(2)

2.5. The most important change to the IC Act, section 48A, by the 2013 Amendment was the introduction of a new provision, section 48A(2), which is in the following terms;

2. Subject to the contract, the third party beneficiary:

- (a) has, in relation to the third party beneficiary's claim, the same obligations to the insurer as the third party beneficiary would have if the third party beneficiary were the insured; and
- (b) may discharge the insured's obligations in relation to the payment of any money to the third party beneficiary under the contract.

¹³⁸ Under the original version of the IC Act, s. 48A, the section applied only if the beneficiary was a third party. On the wording of the IC Act, s. 48A(1), it could include the situation where A insures B's life for the benefit of A but there would be little point in invoking the section in such a case. The section would not apply to a group policy providing for disability insurance for specified third party beneficiaries for, assuming such a policy came within the definition of a contract of life insurance under the IC Act, s. 11(1), it is not a contract effected on the life of a person expressed to be for the benefit of a third party beneficiary within the meaning of the IC Act, s. 48A(1).

¹³⁹ Reworded, but without substantive change, from the original version.

- 2.6. The effect of the IC Act, section 48A(2)(a), is to extend to the third party beneficiary the same obligations to the insurer as were owed by the insured. Perhaps the most significant aspect of this provision is to place the third party beneficiary under a duty of utmost good faith, as well as the duty to disclose relevant facts and not to misrepresent relevant facts, imposed upon a proponent. The earlier version of the section was silent on the matter, meaning that only the insured was under such a duty. Misrepresentation and non-disclosure by a third party beneficiary could not, therefore, affect the policy. Under the earlier version of the section, it was accordingly necessary to determine whether the third party beneficiary was an insured or simply a person beneficially entitled to the proceeds. That was the issue in *Montclare v Metlife Insurance Ltd*,¹⁴⁰ decided after the amendments but on facts arising before the amendments so that the original section 48A remained applicable. The claimant in this case was the beneficiary of an insured under a group life master policy, and so was a further step removed from the policy. However, the court was satisfied that certificates issued to the beneficiary constituted contracts of insurance for the purposes of the IC Act in that they stated that cover was provided under the certificates as well as under the master policy, and that the beneficiary was insured ‘under this Certificate’, and the certificates themselves replicated the most important terms of the master policy. That meant that the beneficiary was subject to the fair presentation rules relating to non-disclosure and misrepresentation, and on the facts had broken them. It is to be noted that under the revised provision, the initial inquiry would not be necessary, and the beneficiary would be subject to the relevant duties whether or not an insured person under the policy.
- 2.7. Section 48A(2)(b), a new provision, is designed to confirm that the third party beneficiary may give a valid discharge to the insurers for sums payable under the policy: the beneficiary’s claim can be made without joining the insured to the proceedings.

Section 48A(3)

- 2.8. Section 48A(3) is in the following terms:
3. Nothing in this section restricts the capacity of a person to exercise any right or power under a contract of life insurance to which the person is a party. In particular, nothing in this section restricts the capacity of a person:
- (a) to surrender a contract of life insurance to which the person is a party; or
 - (b) to borrow money on the security of a contract of life insurance; or

¹⁴⁰ *Montclare v Metlife Insurance Ltd* [2015] VSC 306.

(c) to obtain a variation of a contract of life insurance, including a variation having the result that the contract ceases to be a contract to which this section applies.

2.9. This reflects the original version of the IC Act s 48A. The insured may thus 'surrender' the contract, borrow money on the security of the contract and obtain a variation of the contract.

Section 48AA

2.10. Section 48AA is along similar lines to the IC Act, section 48, permitting a third party beneficiary of a contract of life insurance entered into in connection with a Retirement Savings Account (RSA) to recover a benefit from the insurer directly. The section applies where the policyowner is an RSA provider. The specified person would often be an RSA holder.

PART SEVEN – CLAIMS¹⁴¹

1. Introduction

- 1.1. The position on claims is set out in the Life Insurance Background Paper No. 28 (LIBP), Part Nine.¹⁴² This section deals with them to the extent that there are different issues in relation to group life insurance.
- 1.2. In group insurance, the life insured as a beneficiary has a direct claim against the fund trustee; the policyowner of the disablement insurance.¹⁴³ The claim is under the fund trust deed. The trustee has two functions here: first, to determine whether the beneficiary has a good claim under the trust deed and, second, to determine whether the trustee, as well as the life insured, has a good claim against the insurer under the life insurance contract. The Insurance in Superannuation Working Group (ISWG) states: ‘People claiming should be made aware that the superannuation fund acts as the member’s advocate in assessing the decision of the insurer and pursuing the insurer when they are of the view that the claim has a reasonable prospect of success.’¹⁴⁴

2. Insurance management framework

- 2.1. The Prudential Standard SPS 250 Insurance in Superannuation (SPS 250) prescribes a set of minimum standards the insurance arrangement must address, including: aspects of claims: procedures for notification and payment of claims; dispute resolution arrangements; agreed service standards; reporting requirements for monitoring agreed service standards; the provision of complete claims information to the Registrable Superannuation Entity (RSE) licensee on an annual basis which, at a minimum, includes the information required to be maintained by the RSE licensee under paragraph 15; liability and indemnity arrangements.¹⁴⁵
- 2.2. The insurance management framework (IMF) includes a guideline on how to manage claims. The IMF is to manage making insured benefits available to beneficiaries.¹⁴⁶ The IMF is the totality of structures, policies, processes and people to manage making insured benefits available to beneficiaries.¹⁴⁷ The IMF must include claims assessment

¹⁴¹ There is a discussion of this topic generally in the GIBP, Part Fourteen and a discussion of this topic in relation to life insurance in the LIBP, Part Nine.

¹⁴² See also *Sutton*, paras. 15.150, 15.290, 14.440. See also para. 16.710.

¹⁴³ *McArthur v Mercantile Mutual Life Insurance Co Ltd* [2002] 2 Qd R 197; 11 ANZ Insurance Cases 61-501; [2001] QCA 317.

¹⁴⁴ ISWG, *Discussion Paper: Claims Handling*, April 2017, s. A.2.

¹⁴⁵ SPS 250, at [19].

¹⁴⁶ *ibid.*, at [8].

¹⁴⁷ *ibid.*, at [9].

policies and procedures.¹⁴⁸ The IMF must also include the trustee's approach to managing conflicts of interest in claims management;¹⁴⁹ these could arise in the trustee's decision on an insured claim.

- 2.3. The Australian Prudential Regulation Authority (APRA) intended that the IMF must include claims assessment policies and procedures and that it will set an industry benchmark for a better approach to claims management in the life insurance industry.

3. Direct claims

- 3.1. A member of a group scheme is now entitled to claim directly against the group life insurance company.¹⁵⁰ In *Verinder v Australian Institute of Steel Construction Ltd*,¹⁵¹ all relevant benefits under the policy accrued to the employees of the employer policyowner so that, if the employer made a claim, the claim would have been made for the benefit of the sick or injured employee.¹⁵² Similarly, in *Hannover Life Re Australasia Limited v Sayseng*¹⁵³ a superannuation fund member was held to have rights directly enforceable against the relevant life insurer notwithstanding that the trustee of the superannuation fund was the actual policyowner.¹⁵⁴
- 3.2. The third party beneficiary statutory right of recovery under a life insurance applies to contracts originally entered into, and to the extent of certain variations, after 28 June 2014.¹⁵⁵ A member of a group scheme is likely to meet the definition of third party beneficiary.¹⁵⁶

¹⁴⁸ *ibid.*, at [12(b)(iv)] and [17(c)].

¹⁴⁹ *ibid.*, at [17(d)].

¹⁵⁰ See Part Five, s. 1, above. *Green v AMP Life Ltd* (2005) 13 ANZ Insurance Cases 90-124; [2005] NSWSC 370; *Verinder v Australian Institute of Steel Construction Ltd* (2003) 13 ANZ Insurance Cases 61-589; [2003] NSWSC 975; s. 48 does not apply to life insurance but the case is after the IC Act 1995 Amendment Act which extends s. 48 to life insurance by s. 48A.

¹⁵¹ (2003) 13 ANZ Insurance Cases 61-589; [2003] NSWSC 975 *Verinder v Australian Institute of Steel Construction Ltd*,

¹⁵² *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; [1988] HCA 44. *Green v AMP Life Ltd* (2005) 13 ANZ Insurance Cases 90-124; [2005] NSWSC 370; *Verinder v Australian Institute of Steel Construction Ltd* (2003) 13 ANZ Insurance Cases 61-589; [2003] NSWSC 975; s. 48 does not apply to life insurance but the case is after the 1995 Amendment Act which extends s. 48 to life insurance by s. 48A.

¹⁵³ *Hannover Life Re Australasia Limited v Sayseng* (2005) 13 ANZ Insurance Cases 90-123; [2005] NSWCA 214.

¹⁵⁴ *Hannover Life Re Australasia Limited v Sayseng* (2005) 13 ANZ Insurance Cases 90-123; [2005] NSWCA 214; *Erzurumlu v Kellogg Superannuation Pty Ltd* [2013] NSWSC 1115; compare *Banovic v United Super Pty Ltd* [2014] NSWSC 1470 at [72].

¹⁵⁵ *Insurance Contracts Amendment Act 2013*, s. 2, Sch 6, at [3]; s. 48A.

¹⁵⁶ See Part Six above.

4. Claims time limit term

- 4.1. An insured group scheme trustee, concerned about late notification of disability claims, might include a term in the trust deed or group life policy which limits the time within which a claim must be made. A claims time limit term in a group life policy would clearly attract the application of the *Insurance Contracts Act 1984* (IC Act), section 54.¹⁵⁷
- 4.2. The inclusion of the claims time limit term in the trust deed is designed to preclude the application of the IC Act, section 54, to a late notified claim. It is most unlikely that such a term could be effective to impose such a limit, for two reasons. First, the trust deed, including the claims time limit term in it, would be treated, in its relevant terms, as an insurance contract or part of an insurance contract under the IC Act, section 10. The courts have applied section 10 to the Total and Permanent Disability (TPD) cover under a super fund in the *United Super v Built Environs (United Super)* case.¹⁵⁸ The effect is that section 54 would apply to the contractual matrix formed by the trust deed and the group life policy.
- 4.3. Second, the trustee itself is liable for the life insurance benefit. There are three separate issues: the IC Act, section 10, the third party beneficiary's direct rights against the insurer and the scope of section 54 itself.
- 4.4. On the first issue, the IC Act, section 10(1), provides that contracts of insurance which contain provisions that are not by way of insurance are contracts of insurance for the purposes of the Act. Section 10(2) stipulates that provisions, which are by way of insurance, contained in contracts that are not contracts of insurance are also regarded as contracts of insurance for the purposes of the Act. Section 10(3) provides that provisions which affect the operation of a contract of insurance and are contained in collateral contracts are regarded as included into the contract of insurance. In *United Super*, the Supreme Court of South Australia considered the trust deed contained provisions of a contract of insurance between the trustee and the member. The court considered that the provisions of the Act applied to the trust deed by operation of section 10(2). On the basis of the findings of this case, it may be that the trust deed could be considered a contract of insurance for the purposes of the Act. Generally, trust deeds stipulate that benefits are payable under a policy of insurance in the event of TPD. In *United Super*, the court found it to be important that the trust deed suggested the member was entering into a contract of insurance with the trustee. The court also considered that section 10(3) would apply as the trust deed is a contract linked to a policy of insurance.¹⁵⁹ *Green v AMP Life* is a case, appealed to the High Court on this point, to the same effect.¹⁶⁰

¹⁵⁷ See LIBP, Part Eight, s. 10.

¹⁵⁸ See Part Five, s. 1, above.

¹⁵⁹ *Sutton*, para. 2.270.

¹⁶⁰ *Sutton*, para.21.510.

- 4.5. Section 10(3) of the Act would have the effect of incorporating the claims time limit term into the group life policy. It is clear that the only reason the claims time limit term would be introduced in the trust deed is to limit the liability of the insurer under the policy of insurance and as such this provision in the trust deed affects the operation of a contract of insurance to which the Act applies.
- 4.6. On the second issue, a claimant under an insurance policy who is a beneficiary of a trust has three different and independent bases for a direct right against the insurer. The first is as a beneficiary, the second is as a *Trident* claimant and the third is under the IC Act, section 48A.
- 4.7. A beneficiary, by that status alone, has a right in relation to the insurer. There is responsible doubt about whether the right is limited to compelling the trustee to take action for the insured member beneficiary claimant and whether the claims time limit term as a term of the trust deed would preclude the claim.¹⁶¹
- 4.8. Whatever doubt there might be about the position of the insured member beneficiary claimant as a mere beneficiary, in the insurance context, *Trident* sets out an additional common law right, separate from the IC Act, for such a direct right. It is not limited to compelling the trustee to act nor would it be limited by the claims time limit term in the trust deed. *Trident* is now generally accepted for insurance contracts.¹⁶²
- 4.9. The Explanatory Memorandum describes the operation of section 48A as follows:
- While a third party beneficiary has the right to recover from an insurer any money that becomes payable under a contract of insurance, for life insurance contracts maintained for the purposes of a superannuation or retirement scheme, the payment of money under the contract or the scheme is subject to the terms of the contract and the scheme and any other relevant laws.¹⁶³
- 4.10. Section 48A applies to the policy of insurance and provides that a third party beneficiary who has a claim over moneys payable under a contract of insurance is able to bring an action against the insurer without the intervention of the trustee policyowner. Section 48A (1A) stipulates that the third party beneficiary rights are subject to the terms of the contract and the scheme related to the payment of money under the contract or the scheme.

¹⁶¹ Compare *Jacobs' Law of Trusts in Australia*, 8th Edition, J.D. Heydon and M.J. Leeming, paras. 2-16 to 2-25, with *Sutton*, paras. 11.330 – 11.350 and 11.670 and Mann, paras. 48.10, 48.30.5.

¹⁶² See footnote above.

¹⁶³ Schedule 6, item 16, subsections 48A(1A).

5. Utmost good faith

- 5.1. The duty is at least honesty; a repository of a contractual discretion is bound to exercise it honestly and the duty of utmost good faith implied into the contract by the operation of section 13 leads to the same conclusion.¹⁶⁴
- 5.2. The IC Act, section 13 applied only to a party to a policy, but the obligation of good faith extended to a life insured under a group policy: the structure of a group policy, as well as the approach of Mahoney JA in *CE Heath Casualty & General Insurance Ltd v Grey*¹⁶⁵ supported that extension so that a fair decision on the entitlement of the trustee to insurance cannot be made without dealing fairly with the claimant.¹⁶⁶ The extension was an incident of the relationship.¹⁶⁷ The Court of Appeal differed and held that the insurer did not have a good faith duty to the claimant who was not a party to the insurance contract.¹⁶⁸

6. SIS cashing restrictions

- 6.1. The *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations) specify various cashing restrictions. The cashing restrictions apply to the superannuation fund trustee and specify what amounts can be paid out of the fund to the member. For example, if a member is temporarily incapacitated, the cashing restrictions specify that the amount paid out of the superannuation fund to the member must not exceed the gain or reward which the member was receiving before the temporary incapacity (SIS Restriction).
- 6.2. Ordinarily, group life insurance companies pay group salary continuance (GSC) benefits in accordance with the terms of the group life policy and the superannuation fund trustee ensures that payments to the member do not breach the cashing restrictions. If the amount of GSC benefits payable under the group life policy exceeds the SIS Restriction, the group life insurance company is still required to pay the full amount of GSC benefits, but the member is only paid the portion of the GSC benefit that does not exceed the SIS Restriction. The balance of GSC benefits remain in the superannuation fund until the member meets another condition of release, commonly death or retirement.

¹⁶⁴ *McArthur v Mercantile Mutual Life Insurance Co Ltd* [2002] 2 Qd R 197; 11 ANZ Insurance Cases 61-501; [2001] QCA 317 at [11] (Qd R 197).

¹⁶⁵ *CE Heath Casualty & General Insurance Ltd v Grey* (1993) 7 ANZ Insurance Cases 61-199; (1993) 32 NSWLR 25.

¹⁶⁶ *Sayseng v Kellogg Superannuation Pty Ltd* [2003] NSWSC 945 at [89]; on s. 13 generally see the GIBP, Part Nine and the LIBP, Part Eight, s. 9.

¹⁶⁷ *Wyllie v National Mutual Life Association of Australasia Ltd* (1997) 217 ALR 324 at 341.

¹⁶⁸ *Hannover Life Re of Australasia Ltd v Sayseng* (2005) 13 ANZ Insurance Cases 90-123; [2005] NSWCA 214 at [37].

7. Claims review committees

- 7.1. Group insurance features two types of claims review committees (CRC). The first is the superannuation fund trustee's. The insured member has a claim under the superannuation fund trust deed against the superannuation fund trustee for TPD. The CRC is used to help the superannuation fund trustee assess first whether the insured member has a claim against the superannuation fund trustee. Second, the superannuation fund trustee uses a CRC to assess whether there is a claim against the superannuation fund's group life policy. But the group life policy often also provides for a CRC to review and, in some policies, determine whether the group life insurance company must pay the sum insured or benefit. This CRC is usually comprised by a trustee representative, an insurer representative and an independent chairman. It works, or should work, separately from the superannuation fund trustee CRC.
- 7.2. In the event of a claim, the employee/member/life insured has two separate but linked claims. The first is against the superannuation fund trustee for payment of the member's account proceeds if the disability meets the terms of the trust deed which allow for the member to be paid in the circumstances, with or without funds credited from the insurance payments. The second is against the group life insurance company for payment of the sum insured or the benefit if the disability meets the terms of the group life insurance contract.¹⁶⁹

ISWG Code

- 7.3. The ISWG Code, section 7, contains standards on handling claims.

¹⁶⁹ *McArthur v Mercantile Mutual Life Insurance Co Ltd* [2002] 2 Qd R 197; 11 ANZ Insurance Cases 61-501; [2001] QCA 317; *Goodin v Colonial Mutual Superannuation Pty Ltd* (2011) 16 ANZ Insurance Cases 61-883; *Erzurumlu v Kellogg Superannuation Pty Ltd* [2013] NSWSC 1115; compare *Banovic v United Super Pty Ltd* [2014] NSWSC 1470 at [72]; *Shuetrim v FSS Trustee Corporation* [2015] NSWSC 464.

PART NINE – DISPUTES¹⁷⁰

1. Disputes

- 1.1. A superannuation fund trustee is required to have an internal dispute resolution procedure in place.¹⁷¹
- 1.2. A superannuation fund member can make a complaint to a third body, the Superannuation Complaints Tribunal (SCT) established under the *Superannuation (Resolution of Complaints) Act 1993*. As it is a statutory tribunal, the SCT is not directly subject to the Australian Securities and Investments Commission's (ASIC) oversight. The SCT can review decisions and the conduct of superannuation providers, including:
 - a) trustees of regulated superannuation funds and approved deposit funds;
 - b) retirement savings account providers; and
 - c) life companies providing annuity policies.
- 1.3. The Insurance in Superannuation Working Group (ISWG) states:

It is also noted that the processing delays being experienced by the Superannuation Complaints Tribunal (SCT) may be driving people claiming towards litigation as a faster alternative to progress a claim than the SCT. The recent interim report of the review into the financial system external dispute resolution and complaints framework (the Ramsay Review) highlighted that in 2015-16, the average time to resolve a complaint from lodgment to determination through the SCT was 796 days (more than 2 years). This was an increase of 25 per cent from 2010-11.¹⁷²
- 1.4. The SCT is also to be replaced by the Australian Financial Complaints Authority (AFCA) with effect from 1 November 2018. The SCT will continue to operate to resolve outstanding complaints lodged with it up to and including 31 October 2018.

¹⁷⁰ There is a discussion of this topic generally in the GIBP, Part Fifteen and a discussion of this topic in relation to life insurance in the LIBP, Part Ten.

¹⁷¹ *Corporations Act 2001* (Cth), ss 912A(1)(g), 912A(2)(a)(i), 1017G; see *Corporations Regulations 2001* (Cth), regs 7.6.02, 7.9.77, ASIC Regulatory Guide 165.

¹⁷² ISWG, *Discussion Paper: Claims Handling*, April 2017, s. A.4, citing Australian Government Treasury, *Interim Report – Review of the financial system external dispute resolution and complaints framework*, 2016.

GLOSSARY

AFCA: Australian Financial Complaints Authority

ALRC: Australian Law Reform Commission

APRA: Australian Prudential Regulation Authority

ASIC: Australian Securities and Investments Commission

Cameron-Milne Report: Alan Cameron and Nancy Milne, *Review of the Insurance Contracts Act 1984 – Final Report on Second Stage*, June 2004.

Conditions of release: see Part Two, sections 2 and 4

CRC: claims review committees

FSC: Financial Services Council

GIBP: General Insurance Background Paper No. 14

Green: *Green v AMP Life Ltd*

GSC: group salary continuance

IC Act: *Insurance Contracts Act 1984*

IMF: insurance management framework

ISWG: Insurance in Superannuation Working Group

LI Act: *Life Insurance Act 1995*

LIBP: Life Insurance Background Paper No. 28

Life Code: Life Insurance Code of Practice

Mann: Peter Mann and Candace Lewis, *Mann's Annotated Insurance Contracts Act*, 7th edition.

Master trust: a trust with a number of sub-trusts or funds each of which is exclusively for one corporate superannuation scheme

RSA: Retirement Savings Account

RSE: Registrable Superannuation Entity

SCT: Superannuation Complaints Tribunal

SIS Regulations: *Superannuation Industry (Supervision) Regulations 1994*

SIS Act: *Superannuation Industry (Supervision) Act 1993*

SG: Super Guarantee

SPS 250: Prudential Standard SPS 250 Insurance in Superannuation

Sutton: Ian Enright and Robert Merkin, *Sutton on Insurance Law*, 4th edition.

SSDW: Southern Star Designer Windows PL

TPD: Total and Permanent Disability

United Super: *United Super Pty Ltd v Built Environs Pty Ltd*

Further Reading

Ian Enright and Robert Merkin, *Sutton on Insurance Law*, 4th edition

Greg Pynt, *Australian Insurance Law: A First Reference*, 4th edition

Peter Mann and Candace Lewis, *Mann's Annotated Insurance Contracts Act*, 7th edition

APPENDIX A

Productivity Commission draft findings¹⁷³

Insurance

DRAFT FINDING 8.1

The deduction of insurance premiums can have a material impact on member balances at retirement. This balance erosion is highly regressive in its impact — it is more costly to members with low incomes. It also has a larger impact on members with intermittent attachment to the labour force, and those with multiple superannuation accounts with insurance (the latter comprise about 17 per cent of members).

Balance erosion for low-income members due to insurance could reach a projected 14 per cent of retirement balances in many cases, and in extreme cases (for low-income members with intermittent work patterns and with multiple income protection policies) could be well over a quarter of a member's retirement balance.

DRAFT FINDING 8.2

In terms of premiums paid, default insurance in superannuation offers good value for many, but not for all, members. For some members, insurance in superannuation is of little or no value — either because it is ill-suited to their needs or because they are not able to claim against the policy. Income protection insurance and unintended multiple insurance policies are the main culprits for policies of low or no value to members.

Younger members and those with intermittent labour force attachment — groups which commonly have lower incomes — are more likely to have policies of low or no value to them.

DRAFT FINDING 8.3

The fiscal effects of insurance in superannuation are complex, and the net effects are uncertain. Existing (public) fiscal estimates overestimate the net fiscal benefits as they do not consider the impact of balance erosion on Age Pension eligibility.

¹⁷³ Australian Government Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness*, Draft Report, April 2018, pp. 53–54.

APPENDIX B

Productivity Commission draft recommendations¹⁷⁴

DRAFT RECOMMENDATION 14 **OPT-IN INSURANCE FOR MEMBERS UNDER 25**

Insurance through superannuation should only be provided to members under the age of 25 on an opt-in basis. The Australian Government should legislate to require trustees to obtain the express permission of younger members before deducting insurance premiums from these members' accounts.

DRAFT RECOMMENDATION 15 **CEASE INSURANCE ON ACCOUNTS WITHOUT CONTRIBUTIONS**

The Australian Government should legislate to require trustees to cease all insurance cover on accounts where no contributions have been obtained for the past 13 months, unless they have obtained the express permission of the member to continue providing the insurance cover.

DRAFT RECOMMENDATION 16 **INSURANCE BALANCE EROSION TRADE-OFFS**

APRA should immediately require the trustees of all APRA-regulated superannuation funds to articulate and quantify the balance erosion trade-off determination they have made for their members in relation to group insurance, and make it available on their website annually.

As part of this, trustees should clearly articulate in their annual report why the level of default insurance premiums and cover chosen are in members' best interests. Trustees should also be required to provide on their websites a simple calculator that members can use to estimate how insurance premiums impact their balances at retirement.

¹⁷⁴ Australian Government Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness*, Draft Report, April 2018, pp. 62–64.

DRAFT RECOMMENDATION 17 INSURANCE CODE TO BE A MYSUPER CONDITION

Adoption of the *Insurance in Superannuation Voluntary Code of Practice* should be a mandatory requirement of funds to obtain or retain MySuper authorisation.

DRAFT RECOMMENDATION 18 INSURANCE CODE TASKFORCE

The Australian Government should immediately establish a joint regulator taskforce to advance the *Insurance in Superannuation Voluntary Code of Practice* and maximise the benefits of the code in improving member outcomes. The taskforce should:

- monitor and report on adoption and implementation of the code by funds
- provide guidance on and monitor enhancements to strengthen the code, particularly implementation of standard definitions and moving to a short-form annual insurance statement for members
- advise the industry what further steps need to be taken for the code to meet ASIC's definition of an enforceable code of conduct.

The code owners should be given two years to strengthen the code and make it binding and enforceable on signatories before further regulatory intervention is considered.

The taskforce should annually report findings on industry progress on the code.

Both ASIC and APRA should be members of the taskforce, with ASIC taking the lead.

DRAFT RECOMMENDATION 19 INDEPENDENT REVIEW OF INSURANCE IN SUPER

The Australian Government should commission a formal independent review of insurance in superannuation. This review should evaluate the effectiveness of initiatives to date, examine the costs and benefits of retaining current insurance arrangements on an opt-out (as opposed to an opt-in) basis, and consider if further regulatory intervention or policy change is required. The review should be initiated within four years from the completion of this inquiry report, or earlier if the strengthened code of practice is not made enforceable within two years.