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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

By email: corporations.joint@aph.gov.au

Dear Sir/Madam,

Thank you for the opportunity to present to the Committee on Tuesday 19 June 2018.

From our reading of the transcript from that Public Hearing, we have determined that there are two Questions on Notice which we committed to responding to. Both questions were from Senator Keogh, and are interpreted as follows:

Question 1:
Does allowing insurers to make a payment for treatment make a difference at law as to whether the life insurer can ultimately make a call about whether that was mitigatory or not to then not pay out on, for example, the TPD claim?

Response:
Maurice Blackburn believes that the proposed changes would have a mitigatory impact regarding the decision as to whether to approve payment or not. This has significant ramifications.

In our area of the law, the majority of clients we advocate on behalf of find themselves in dispute with their insurer, particularly whether they meet the TPD definitions which appear in their policies. A long history of case law has clarified the interpretation of what constitutes the proper construction and meaning of particular clauses within a TPD policy.

Section 5.1.2(2) of the Total and Permanent Disablement in Superannuation and Insurance guide[1] can be summarised as follows:

[1] John A. Riordan, *Total and Permanent Disablement in Superannuation and Insurance* 2nd Edition 2017: p.36

The usual elements of any definition are that:

(a) The member must be unlikely to ever engage in future work for which he/she is reasonably qualified by education, training and experience.
(b) A member must have no realistic prospect of obtaining suitable employment other than theoretical employment, having regard to post accident disabilities and situation.

Life insurance policy clauses / contracts are subject to contracts law, specifically the *Insurance Contracts Act* (1984) (the ICA).

Should life insurers be granted the changes they are seeking as outlined in the submission from the FSC, we are concerned that the intention will be to use that information, such as completion of a particular course of rehabilitation, to argue that the claimant no longer meets the definition of TPD. In other words they will use the information as evidence to mitigate against or decline to pay a much needed TPD benefit to a worthy claimant. Already we see examples of:

- Clients being required to retrain into roles for which they have no experience. For example an injured truck driver with many years' experience as a truck driver being required to retrain in administrative functions.
- Insurers changing their policy wordings to toughen definitions. For example some insurers began adopting the term 'incapable ever' or 'unable ever' instead of 'unlikely' to provide a threshold for whether a claimant might ever work again. We are aware of one policy which lists 115 occupation categories, which are all assessed under the highly onerous Activities of Daily Living test.
- A move toward incremental payments rather than lump sum TPD payments, requiring claimants to undergo ongoing medical and other checks over a period of years. For example, Sunsuper for their TPD Assist policy (effective 1/7/16) pays the lump sum over five years, requiring the claimant to reapply each year. This often deprives seriously ill and injured people the opportunity to effectively retire debt and pay for much needed medical treatment. This is illustrated in the following case study:

  Following an injury, our client, a career baker, after many months finally persuaded Sunsuper to accept his claim for Total and Permanent Disability (TPD).

  Under any other scheme, our client would have received a lump sum payout from the insurer, and set about paying down debt, or investing the funds to provide for his and his family's future.

  Due to the fact that his insurance was through Sunsuper's TPD Assist product, our client was only paid an initial instalment of $40,000.

  Following receipt of the instalment, he received a telephone call from Sunsuper offering him rehabilitation training/vocational assistance, and asking him what work he wanted to get into in the future so they could help him.

  Our client responded that he had been a baker for the past 20 years and has never done anything else – and so he wasn't sure what they wanted him to say. He told the fund he was planning on maybe doing some Uber driving as he is a single dad and cannot get by on the instalment received from the fund.

  He was told by Sunsuper that if he works as an Uber driver, or in any type of work during this next 12 months he will be voiding the claim.

He reported feeling pressured by the fund to make a quick decision in relation to his future.

Our client is now stuck. He cannot return to his career, and he cannot work to supplement the meagre payout instalments.

Our experience highlights that, regardless of any potential legislative change, the insurance industry is already actively finding ways to influence the fair and proper treatment of claimants, with the view to mitigating payouts. In particular, as noted in our submission and evidence, their behavior towards claimants and the corporate culture of these institutions have all been closely examined in many forums and inquiries.

We believe that the loosening of the wordings of these Acts would have the effect of mitigating against the acceptance and payment of TPD claims, because the life insurer is likely to use the evidence of retraining/rehabilitation/further medical treatment to decline the claim on the basis that the claimant does not meet their definition of TPD rather than for the altruistic purposes outlined in their submissions and evidence

We believe that their decision making policies and procedures would also fail to take into account such things as the education, experience and real world prospects of work, which courts take into consideration when assessing these definitions. Our experience is that they are likely to subject the claimant to a stressful and lengthy appeal process that could include internal and external review, including litigation.

We also suggest the Committee consider that dignity plays an important role in the success of return to work processes. For example, retraining under the insistence of an insurer to an administrative role would make the driver mentioned above feel isolated and 'like a fish out of water'.

Maurice Blackburn submits that the main focus of any adjustment to insurance and other laws must be consumer protection. We note that earlier this year, Minister O'Dwyer in her address to the ASIC Annual Forum 2018, Sydney said:

> *"And, in the first half of this year, the Government will be consulting on changes to apply unfair contract term laws to life insurance contracts, as well as general insurance contracts. This is in response to the Senate Committee report on the general insurance industry and the Australian Consumer Law Review. While this will be a significant reform for industry, it is in the best interests of consumers and will bring the insurance industry into line with other financial services".*[2]

A Discussion Paper has been released by Treasury[3] detailing some of the considerations that will be required to apply unfair contract term laws to life insurance contracts. It describes the effects of Unfair Contracts Law terms as follows:

The effect of the legislation is to make void a term in a consumer or small business contract which is unfair. A term will be unfair if:

- *it would cause a significant imbalance in the parties' rights and obligations arising under the contract;*
- *it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and*

[2] http://www.kellyodwyer.com.au/address-to-the-asic-annual-forum-2018-sydney/

[3]https://static.treasury.gov.au/uploads/sites/1/2018/06/t284394_UCT_Insurance_Contracts_Proposals_Paper_Aug.docx

- *it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.*

In determining whether a term is unfair, a court may take into account such matters as it thinks relevant, but must take into account:

- *the extent to which the term is transparent (that is, expressed in reasonably clear language, legible, presented clearly and readily available to any party affected by the term); and*
- *the contract as a whole. (p.3)*

In some ways, the Senator's question pre-empts the Treasury inquiry which will implement the Minister's commitment noted above. We see great benefits to having insurance products come under unfair contract term laws, in ensuring that claimants can expect consistency and predictability in the terms and definitions of their policies.

Question 2:
Do you have any thoughts about the availability of life insurers being able to pay for rehabilitation in a context outside of workers' rehabilitation—so where an injury is suffered and they're not able to make a claim on workers comp.

Response:
The Senator's question goes to the distinction between how a treatment process is developed for a compensable claimant versus a non-compensable claimant.

For compensable claimants, rehabilitation processes (including medical treatment and retraining) are enacted through the various compensation schemes. Whilst these schemes have some differences from jurisdiction to jurisdiction in a structural sense, they have similar philosophical underpinnings. They are predominantly non-profit, non-commercial, and with a clarity of motivation unhampered by profit motive.

Non-compensable claimants have the publicly available safety nets such as Medicare and Centrelink available to them, along with any private health cover they may have.

The proposed changes, on the face of it, potentially provide an additional avenue of coverage for rehabilitation processes for non-compensable claimants. This, however, will almost certainly be through a private sector life insurance provider. As detailed in our initial submission, we believe that these providers do not have the same altruistic motivations underpinning their service provision.

Much of the discussion at the Public Hearing focused around the presence or otherwise of a conflict of interest, and whether that conflict would be more pronounced under the proposed changes, compared to the status quo. We argue that in order to be free of any possible accusation of a conflict of interest, the doctor or decision maker charged with the responsibility for determining what treatment is appropriate for a particular patient needs to be free from influence or financial incentive from the entity paying for that treatment.

We would submit that the FSC proposal does not describe what protections it would put in place to prevent against such conflicts occurring. The frameworks outlined do not provide adequate consumer protections.

The conflict of interest would be most acute if claimants were required to see the life insurers' appointed doctors, and that doctor had responsibility for determining appropriate treatment.

We remain concerned about comments made by the Financial Services Council (FSC) where, in their submission to the inquiry they say:

> *"Specifically, life insurers wish to offer targeted rehabilitation payment for medical treatment or therapy that **they** determine to be relevant, appropriate and necessary to assist the life insured return to work."*[4]

In their submission, the FSC notes that under their proposed policy framework:

1. *Customers and/or their treating physician would be required to provide consent for any early intervention payments;*
2. *Any early intervention treatment the life insurer offers to pay for, should be arranged through the customer and their treating physician(s);*
3. *Life insurers will not coerce or pressure customers to seek treatment or return to work;*
4. *Life insurers will not stop Income Protection (IP) or Total and Permanent Disability (TPD) insurance payments merely because a customer refuses any treatment that is offered; and*
5. *Decisions and processes relating to the offer and grant of early intervention payments would be subject to the usual internal dispute resolution and external dispute resolution processes. (p.2)*

These commitments are welcome, but we are still reliant on insurers not exploiting their position of power within the relationship. Assurances from the oral testimony of the FSC that the proposed changes would simply add a level of choice for the patient are fanciful. There must be clear, transparent, arm's length separation between the decision maker and the one who pays for the treatment.

With the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry providing daily headlines about how financial services organisations are exploiting those who rely on them, we do not believe it's a good time to be offering more power to part of that industry.

In our initial submission, we detailed our reasons for favouring the status quo over the proposed changes – and those reasons were far broader than the issue of conflict of interest. We remain concerned that allowing life insurers to be able to pay for rehabilitation would also:

- Give the insurance company access to client information they otherwise wouldn't be able to access,
- Give the insurance company access to additional means of surveillance,
- Give the insurance company access to additional data,
- Enable the insurance company to proliferate expert witnesses, and
- Enable the insurance company to delay or confound claims if they choose.

We note that the 'flavour' of the Senator's questions is based on the effects of potential legislative and regulatory changes on existing frameworks and schemes. We further note the Committee's ongoing quest to find information about the interaction of insurance products with the various pieces of legislation which underpin service delivery in the insurance industry. This was the major theme of ToR (b), which very few of the submissions (including our own) addressed directly. Perhaps the Committee could recommend the commissioning of specific independent research to give the information the Committee is looking for.

[4] Financial Services Council submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Life Insurance Industry. Submission 26. P.14. Our emphasis

We urge the Committee that, if it agrees that legislation should be amended to give insurers these new powers, significant consumer protections would need to be put in place to guard against the unintended consequences detailed in this response. We urge the Committee to be mindful of the inevitability of the increased cost of premiums for consumers that would result from the proposal.

In summary, for non-compensable claimants, the proposed changes and associated risks outlined above present an insurmountable obstacle to provision of rehabilitation processes by life insurers. We recommend that the Committee look to enhancing already available services in the public health sector rather than trusting the life insurers to do so.
We appreciate the Committee's patience in allowing us additional time to submit these responses.

If we can provide additional information to assist the Committee in its deliberations, please do not hesitate to make contact.

Yours sincerely,

Kim Shaw
Principal
Maurice Blackburn