

# SUPERANNUATION

## *Awakening the Sleeping Giant*

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Howells' List

Barristers

# About me

- ▶ **Victorian Bar (2013 - present)**

Barrister: Commercial and Common law (Super. & Insurance)

- ▶ **ASIC (2011 - 2012)**

Senior Lawyer: Financial Services Litigation (Storm Financial)

- ▶ **Maurice Blackburn (2004 - 2011)**

Associate: Super. & Insurance, claims and litigation

**What could you be doing for your clients that you're currently not?**

# Overview

- ▶ **The Giant: Insurance in super (6 mins)**
  - ▶ Death benefits
  - ▶ Total and Permanent Disablement (TPD)
  - ▶ Income Protection/Salary Continuance/Temporary Disability
  - ▶ Trauma/Critical Illness
- ▶ **Common areas of dispute (10 mins)**
  - ▶ Death benefits - distribution between multiple beneficiaries
  - ▶ Rejected claims - conflicting medical opinion (mental health)
  - ▶ Non-disclosure/misrepresentation issues
  - ▶ Unpaid super

# Insurance in Super (1)

## *Death Benefits*

- ▶ **Death cover generally available for super fund members as:**
  - ▶ A lump sum
  - ▶ A pension payable to the deceased member's beneficiaries
- ▶ **Death benefits generally consist of:**
  - ▶ The deceased's account balance (net of fees and taxes)
  - ▶ Any insured benefit



# Insurance in Super (2)

## *Total & Permanent Disablement Benefits*

- ▶ If you've suffered an injury or illness, and can no longer do the work you once could (and you meet the TPD definition):
  - ▶ A lump sum
  - ▶ A pension
- ▶ TPD benefits generally consist of:
  - ▶ The member's account balance (net of fees and taxes)
  - ▶ An insured TPD benefit

# Insurance in Super (3)

## *Income Protection Benefits*

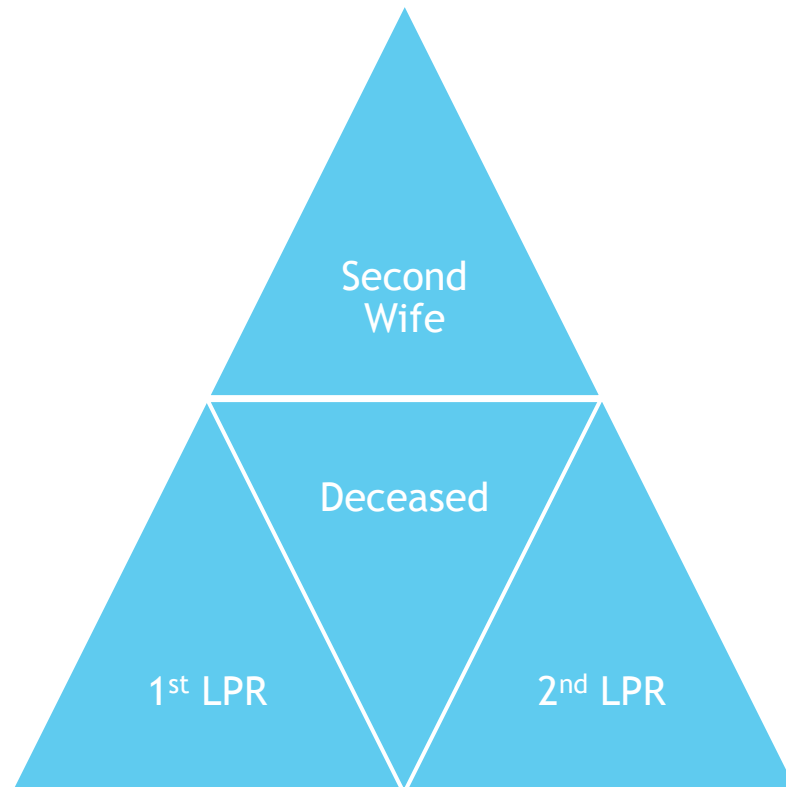
- ▶ If you become temporarily disabled, and can no longer do the work you once could (and you meet the definition of ‘Disability’):
  - ▶ An insured monthly benefit
  - ▶ Payable for a defined period
  - ▶ Usually subject to offsets

# Early Release

- ▶ Super contributions generally preserved until retirement
- ▶ Exceptions:
  - ▶ Permanent Incapacity
  - ▶ Temporary resident permanently leaving Australia
  - ▶ Terminal Illness
  - ▶ Preserved amount is \$200 or less
  - ▶ Financial hardship
  - ▶ Compassionate grounds



# Common Areas of Dispute Death Benefits (1)



# Common Areas of Dispute Death Benefits (1)

- ▶ Distribution of death benefits between beneficiaries
  - E.g. A woman is unhappy that her late husband's super fund decided to pay 100% of his death benefit to his LPR's (two children from his first marriage)
  - The deceased had made a binding nomination in his second wife's favour
  - Trustee did not accept the validity of the deceased's nomination
  - What can the woman do?

# Common Areas of Dispute Death Benefits (2)

## ▶ Non-disclosure/misrepresentation

- E.g. Deceased's LPR makes a death claim with the deceased's super fund
- Claim is accepted but only part-paid, on the basis that the deceased allegedly failed to disclose his health history
- What can the LPR do?

**NON-DISCLOSURE**

# Common Areas of Dispute

## Death Benefits (3)

### ▶ Exclusion clauses

- E.g. Deceased's wife claims a death benefit
- Claim rejected on the basis that death resulted from use of an illegal drug
- What can the wife do?



# Common Areas of Dispute TPD Benefits (3)

- ▶ **Conflicting medical opinion**
  - ▶ Involves formation of an opinion
  - ▶ E.g. Claimant's treating doctor's support claim
  - ▶ Super fund Drs unsupportive
  - ▶ Claim rejected

# Unpaid Super

- ▶ If you earn => \$450 (before tax) per month in Aus. your employer is required to pay into your super fund at least every 3 months
- ▶ What happens when contributions are not paid?
  - migrants and other vulnerable workers
- ▶ Loss of contributions & insurance entitlements
- ▶ Action against employer?

# Avenues of Redress (1)

## ▶ Superannuation Complaints

### Tribunal

- Independent tribunal established under Fed. Statute
- Free; decisions not binding on members
- Slow; soon defunct



# Avenues of Redress (2)

## ▶ Financial Ombudsman Service

- Industry funded EDR scheme
- Wide jurisdiction
- Free; non-binding on claimant
- Slow





# Avenues of Redress (3)

## ▶ Australian Financial Complaints Authority (AFCA)

- *Treasury Laws Amendment (Putting Consumers First - Establishment of the AFCA) 2017 Bill* passed the Parliament on 14 February 2018
- By 1 Nov. 2018, AFCA will be operational as a ‘one-stop shop’ External Dispute Resolution (EDR) scheme for the financial services industry - SCT and FOS to be phased out

# Avenues of Redress (4)

## ▶ Court

- Magistrates' Court (claims < \$100,000)
- County Court (claims > \$100,000)
- Supreme Court
- Federal Court (on appeal from the SCT)

# Avenues of Redress (4)

## ▶ Court - action against trustee - breach of trust

- Duty to apply trust assets in accordance with the deed. In performing that duty, required to inform itself properly of relevant facts: *Finch v Telstra Super Pty Ltd* [\(2010\) 242 CLR 254](#) at [\[30\]](#).
- Act in good faith, on a real and genuine consideration of the material before it and for sound reasons, although it is not obliged to give reasons for its decision: *Hannover Life Re of Aus. P/d v Sayseng* [2005] NSWCA 214.

# Avenues of Redress (4)

- ▶ **Court - action against insurer - breach of contract**
  - ▶ *Edwards v The Hunter Valley Co-op Dairy Co Ltd* (1992) 7 ANZ Ins Cas 61-113 at 77,536, McLelland J
  - ▶ Duty to consider and determine correct question
  - ▶ Duty to act in good faith and fairly
  - ▶ Duty to take into account relevant considerations
  - ▶ Duty not to take into account irrelevant considerations

**What could you be doing for your clients that you're currently not?**

# Summary & Tips

- ▶ If a client has had time off work due to illness or injury - always consider a super insurance claim
- ▶ Super claims are not compo claims
- ▶ Get the right documents early & evidence which addresses the relevant definitions of TPD, IP etc
- ▶ Know what to do when a claim is rejected

**Questions?**