

SUPERANNUATION & INSURANCE UPDATE

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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

Overview

- ▶ Insurance in super
 - ▶ Death benefits
 - ▶ Total and Permanent Disablement (TPD)
 - ▶ Income Protection/Salary Continuance/Temporary Disability
 - ▶ Trauma/Critical Illness
- ▶ Issues & common areas of dispute
 - ▶ Death benefits - distribution between multiple beneficiaries
 - ▶ Rejected claims - conflicting medical opinion (mental health)
 - ▶ Non-disclosure/misrepresentation issues
 - ▶ Unpaid super

Insurance in Super *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

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

Income Protection Benefits

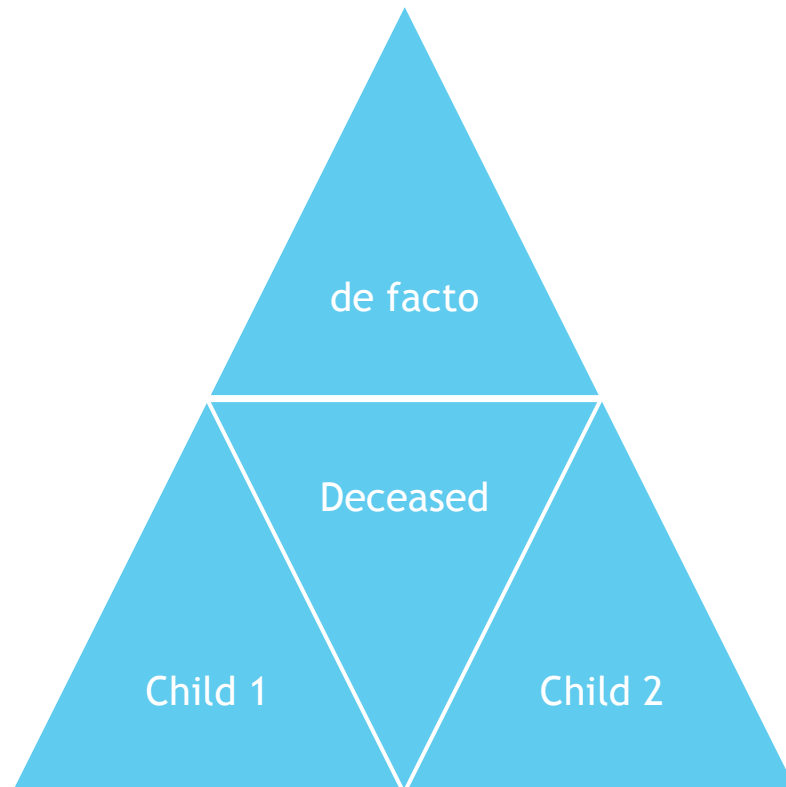
- ▶ If you become temporarily disabled, and can no longer do the work you once could (and you meet the definition of ‘Disability’):
 - ▶ An insured monthly benefit
 - ▶ Payable for a defined period (e.g. 2 years, 5 years, life)
 - ▶ Usually subject to offsets

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 Benefit distribution



Common Areas of Dispute Death Benefits

▶ Distribution of death benefits between beneficiaries

- E.g. The former de facto of the deceased is unhappy that his late partner's super fund decided to pay 100% of her death benefit to her three children (from her previous marriage) in equal share
- The deceased had not made a binding nomination
- There was no will
- What can the de facto do?

- ▶ 'dependant' within the meaning of the SIS Act?
- ▶ a spouse, child or in an interdependency relationship?
- ▶ *levers v Superannuation Complaints Tribunal* [2016] FCA 936
 - “disharmony, altercations and grievances ...”

Common Areas of Dispute

▶ Non-disclosure/misrepresentation

- E.g. insurance claim declined
- Or claim accepted but only part-paid



Common Areas of Dispute

▶ 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

- ▶ **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?
- ▶ Loss of contributions & insurance entitlements
- ▶ Action against employer?

Avenues of Redress

▶ Superannuation Complaints

Tribunal

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



Avenues of Redress (2)

▶ Financial Ombudsman Service

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



Avenues of Redress

- ▶ **Australian Financial Complaints Authority (AFCA)**
 - From 1 Nov. 2018, AFCA became 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

▶ Court

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

Avenues of Redress

- ▶ **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

- ▶ **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

Summary & Tips

- ▶ Always consider a super/insurance claim if a client has had time off work due to illness/injury
- ▶ Super claims are not compo claims
- ▶ Getting the right documents & evidence together early is crucial
- ▶ Know what to do when a claim is rejected

Questions?