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Précis Paper

Superannuation, Disability Claims and Regulatory Issues

Discussion Includes

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- The Royal Commission
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- Life and disability claims – The Jones Litigation
- The impact of *Hannover Life Re of Australasia Ltd v Jones*

Précis Paper

Superannuation, Disability Claims and Regulatory Issues

1. In this edition of BenchTV, Catherine Osborne (Principal – Meridian Lawyers, Sydney) and Bridie Nolan (Barrister – 12 Wentworth Selborne Chambers, Sydney) discuss some recent regulatory changes relating to superannuation, the Royal Commission's examination of issues relating to superannuation, and life and disability claims following the Court of Appeal's decision in *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233.

Recent regulatory announcements in the superannuation space

2. There have been major regulatory initiatives that have been brought about since 2017. In 2017, the Commonwealth Government introduced legislation creating the Australian Financial Complaints Authority (AFCA). From 1 July 2018, AFCA will replace the Financial Ombudsman Service (FOS), the Credit & Investments Ombudsman (CIO), and the Superannuation Complaints Tribunal (SCT). Those bodies will still exist and run off their work.
3. AFCA will have jurisdiction to deal with all disputes relating to financial services including superannuation - this is a significant increase in jurisdiction. For example, there is now an unlimited jurisdiction for complaints relating to superannuation. For non-superannuation complaints, the jurisdiction has increased to 1 million dollars.
4. Costs are not paid by the consumer in AFCA. The financial firms who have become members will pay the fees. Consumers will now have faster, fairer, and more efficient access to justice. In the new system, ASIC will have greater supervisory powers over AFCA to ensure it complies with its regulatory and legislative obligations. Further, member financial firms are to report to ASIC on their own dispute resolution processes and outcomes.

The Royal Commission

5. The terms of reference of the Royal Commission are looking at the conduct of super funds and their trustees. The Royal Commission is also examining community standards and expectations, the duty to act in the best interest of the members, cultural and governance practices, re-dress for people who have experienced bad behaviour or conduct, and whether there needs to be any legislative or governance reform.
6. At the moment, there is a request for information on any misconduct that has occurred dating back to 1 January 2008 by any entity, and director or officer of the entity, any employees of the entity, or anyone acting on its behalf. The funds have been asked to report any conduct that falls below community standards and expectations. Registerable superannuation entities (RSEs) are required to report any incident that they are aware of over the last ten

years where members' funds have been used other than for investment, the administration of the fund, or payment of benefit to the members. Where an alternative use has been made, the Commission will determine whether that use was in the best interests of the members.

7. The focus of any changes is to ensure that funds are acting in the best interests of their members and creating a financial system that is strong, has consumer confidence, and enables the economy to flourish.

8. In relation to superannuation, there are three areas on which the Royal Commission will focus:
   (1) Insurance in superannuation
   (2) Exiting the fund
   (3) Related party issues

9. APRA has produced and revised the credential standards and practice guides to ensure that funds and trustees of funds can respond appropriately to strategic and operational matters: See Australian Prudential Regulating Authority, Strengthening superannuation member outcomes, 13 December 2017 <http://www.apra.gov.au/Super/Documents/Discussion%20Paper%20-%20Strengthening%20superannuation%20member%20outcomes.pdf&gt>

Insurance in superannuation

10. Industry bodies have got together and formed a working group, The Association of Superannuation Funds of Australia Limited. The working group has published a code of conduct. The Code aims to provide greater accountability in the superannuation industry and consistency in delivery: see The Association of Superannuation Funds of Australia Limited, Insurance in superannuation voluntary code of conduct, December 2017, https://www.superannuation.asn.au/ArticleDocuments/498/Insurance_in_Superannuation_Voluntary_Code.pdf.aspx?Embed=Y&gt.

Life and disability claims – The Jones Litigation

11. The net profit after tax for life insurers has decreased dramatically partly as a result of experience in these claims.

12. In *Jones v United Super Pty Limited* [2016] NSWSC 1551, Mr Jones made a claim for "Total and Permanent Disablement" under his CBUS policy which involved the education, training or experience (ETE) clause. At [3] the New South Wales Supreme Court set out the relevant clause:
   What is Total and Permanent Disablement?
   1.3 Total and Permanent Disablement in respect of an Insured Person who was gainfully employed within the six months prior to the Date of Disablement where:
   1.3.1 the Insured Person is unable to follow their usual occupation by reason of accident or illness for six consecutive months and in our opinion, after consideration of medical evidence satisfactory to us,

is unlikely ever to be able to engage in any Regular Remunerative Work ..for which the Insured Person is reasonably fitted by education, training or experience ...

13. In *TAL Life Limited v Shuetrim; Metlife Insurance Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68, the Court of Appeal held that the term "unlikely ever" is whether there is a real chance that the person will return to work, which is not 50/50 chance.
14. At first instance, the main issues were whether or not Mr Jones suffered an illness or accident having a degenerative spinal condition. The Supreme Court stated at [94]:

    I do not accept that the plaintiff's degenerative disc disease is not an illness (that is to say, a state of bad health or disease). That it may be an aspect of the aging process which affects the population generally (or at least a substantial part of it) does not deprive it of that character: the same might be said of dementia...
15. In relation to the education, experience and training clause, the way that the insurer had informed itself as to whether Mr Jones would return to work was by obtaining a functional assessment and a vocational assessment report. In a functional assessment report, the plaintiff/claimant goes before an occupational therapist or physician and looks at what they are functionally able to do. Mr Jones had pain avoidance syndrome, a psychological somatic overlay where people who have suffered serious injury and experienced quite serious pain tend to guard themselves unnecessarily. Their functionality is accordingly diminished.
16. The functionality assessment took his pain avoidance syndrome into account. The vocational assessor created a series of "transferable" employment skills said to be possessed by Mr Jones, categorised as "Communication Skills", "Administrative Skills", "Computer Skills", "Adaptability and Flexibility", "Organisational Skills", "Occupational Health and Safety", "Logistic Skills", "Trade Specific Skills", and "Licenses/Tickets/Credentials". The Supreme Court considered these skills at [45]:

    The report then identified a number of employment options: retail sales assistant (particularly in hardware); console operator/service station attendant; light parcel/courier/delivery driver; and customer service advisor (including telemarketing), each of which was considered vocationally suitable and functionally appropriate for Mr Jones.
17. The report did not demonstrate that the insurer had asked itself the right questions with respect to the policy requirements. The focus was on the term "reasonably fitted by education, training or experience". In determining what a person is capable of doing it the future, is there is requirement to examine how had a person's education, training or experience shaped them? There seemed to be a resistance to the proposition that you could go into entry level positions because that is not what your education, training or experience has prepared you for. This is due to the fact that a policy insures you in circumstances where you are unable to do a role that your education, training or experience had shaped you.
18. At first instance, in obiter dicta, Brereton J considered the phase "unlikely ever to (be able to) engage" in the context of the policy. Brereton J considered whether the term mean "likely to be able to obtain" a job? Or if they have the capacity to participate in a job? Brereton J also considered the geographical aspect of Mr Jones' residential location and the availability of

proximal employment which he had also considered in *Chammas v Harwood Nominees Pty Ltd* (1993) 7 ANZ Ins Cas 61-175. The geographical aspect was not considered on appeal as it was obiter but it is a relevant consideration for insurers and litigators in this area of the law.

19. The Supreme Court found in favour of Mr Jones, and Hannover Life appealed to the New South Wales Court of Appeal (*Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233).

Reasonableness

20. The standard formulated by Brereton J of reasonableness by which the Court is able to step into the shoes of the insurer and make the decision for itself was an issue in on appeal. Where there is an insurer's opinion clause, it is not in the absolute discretion of the insurer even though it may read that way. Whether or not that discretion is exercised properly such that it is not amenable for review is predicated on the notion of reasonableness.

21. The appellant argued that the Court at first instance had formulated this question incorrectly because reasonableness was not just an idiosyncratic notion of reasonableness. The appellant argued that the High Court in *Minister of Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 had held that "Wednesbury unreasonableness" (as articulated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) was the relevant standard of reasonableness. This standard has been accepted and applied in an employment law by the New South Wales Court of Appeal in *Bartlett v Australia and New Zealand Banking Group Ltd* (2016) 92 NSWLR 639; [2016] NSWCA (applying the English case of *Braganza v BP Shipping Ltd* [2015] UKSC 17; 1 WLR 1661). However, the Court of Appeal rejected that the Wednesbury standard of reasonableness applied in *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233. Gleeson JA held at [120]-[121]:

> ...the court is undertaking a comparatively familiar task of evaluating the quality of the insurer's decision by reference to the insurer's contractual obligations to the claimant to act reasonably and fairly in considering the claim. As explained in TAL life Ltd v Shuetrim at [61], the implied term to act reasonably and fairly in considering and determining the claim has a long history.... The court can be expected to be more sensitive to an unreasonable formation of an insurer's opinion and more confident of its ability to detect error vitiating the insurer's decision,....the task for the court in the present case is not to assess what it thinks is reasonable and thereby conclude that any other view displays error. It may also be accepted that there can be a range of opinions available to an insurer acting reasonably and fairly on the material before it...

Gleeson JA held that McLelland J (as his Honour then was) in *Edwards v The Hunter Valley Coop Dairy Co Ltd* (1992) 7 ANZ Ins Cas 61-113 at [64] had articulated the meaning of unreasonableness appropriately for the purposes of these sorts of insurers' decisions.

22. McLelland J (as his Honour then was) in *Edwards* (at 77,536) had said that the notions to which that decision was referring was not arbitrary, not capricious, not so unreasonable that no reasonable person would decide. This is effectively the same premise as exists in Wednesbury unreasonableness.

23. In *Hannover Life*, Macfarlan JA identified at [1]-[3] that there would be very few circumstances where the decision of an insurer which was capable of being impugned for unreasonableness would be different to a decision being impugned for Wednesbury

unreasonableness as they are very similar concepts. However, there was a reluctance on the part of the Court of Appeal to impose the notion of Wednesbury unreasonableness (an administrative law concept) into the insurance law framework.

The Education, Training and Experience Clause

24. Another issue on appeal was the ETE clause. The appellant took issue with whether "reasonably fitted by education, training and experience" was properly considered at first instance. The Court of Appeal saw no error in the first instance decision: it was considered to be an appropriate reading of the policy.

The impact of *Hannover Life Re of Australasia Ltd v Jones*

25. There have not been many decisions handed down since the Jones litigation. However, there are a few decisions due to be handed down that do consider the issue.
26. In *Dotlic v Hannover Life Re of Australasia Limited* [2017] NSWSC 986, Pembroke J applied the High Court's reasoning in *Li* and found that the determination was not unreasonable and the proceedings were dismissed.
27. The Jones litigation has given consideration to the notion of a separate determination of the reasonable aspect of an insurer's decision. A lot of practitioners are now applying for separate determination. In doing so, the Court is only looking at the insurer's decision and the material that was before the insurer at the time, and whether they had given proper consideration to the relevant limbs of the policy and whether or not their decision could be impugned on the ground of unreasonableness. This saves the expenditure of trustee's and insurers funds.
28. There has been a reluctance to approach these matters by way of separate determination as it is only an interlocutory decision: there can be an appeal from the decision; there can be adverse findings; and potential questions of apprehension of bias.
29. Insurers themselves are looking at how they determine claims under the policy and perhaps are now being more generous in their determinations. We will see a lot more review, wordings and Total Permanent Disability definitions. It is difficult to rewrite a policy because policies are the subject of scrutiny of re-insurers. APRA is looking at why policy definitions are not being changes as quickly as they should be due to these re-insurance issues.
30. In relation to the notion of reasonableness post-*Hannover,* Robb J in *Hellessey v MetLife Insurance Limited* [2017] NSWSC 1284 opted for a more hands-on judicial role in scrutinising and analysing the insurer's decision. His Honour was effectively arguing for a type of a merits review. In the Jones litigation, the NSWCA had actively rejected this sort of approach. It is more an intuitive, judicial approach.

BIOGRAPHY

Catherine Osborne

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Catherine has more than 20 years' experience in insurance, reinsurance and commercial litigation. Catherine's expertise also extends to life insurance and superannuation. Catherine has been ranked since 2013 as a leading individual by Chambers Asia Pacific and listed by Best Lawyers' 2018 edition in Insurance Law. Catherine is a company director and recently completed 9 years as a Non-Executive Director of Zurich Australian Superannuation Pty Ltd. In 2017, Catherine was appointed as an Adjunct Associate Professor in the School of Law by the University of Notre Dame, Sydney in recognition of her work over many years for the Law School as an Advisory Board member and as a mentor for the law students.

Bridie Nolan

Barrister – 12 Wentworth Selborne Chambers, Sydney

Bridie was called to the bar in 2006 and was associate to the Honourable Justice James L. B. Allsop, then a Justice of the Federal Court, subsequently the President of the Court of Appeal of New South Wales, and now the Chief Justice of the Federal Court of Australia. Receiving her undergraduate education at the University of Sydney with a Bachelor of Arts (Honours), Bridie majored in Government and English. As a post-graduate, Bridie completed her Masters of International Studies where she was awarded first class honours and graduated first in the year. Bridie researched for two and half years, on scholarship, towards the degree of Doctorate of Philosophy in Economics. Bridie attained her Bachelor of Laws from the University of New South Wales, passing with Honours, and is now completing her Masters of Laws, majoring in Maritime Law at the University of London, Queen Mary College. Bridie is passionately dedicated to education and currently lectures in Advocacy, Planning Law and Administrative Law at the Australian College of Law and in Legal Professional Responsibility at the University of Sydney.

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Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_18-09-2017_insurance_banking_construction_government.pdf

Judgment Link

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