

Submission to the Productivity Commission

**Superannuation:
Assessing Competitiveness
and Efficiency**

JULY 2018

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Introduction

- (1) Slater and Gordon Limited is a leading consumer law firm in Australia. We employ over 800 people in 40 locations across Australia. Slater and Gordon's mission is to give people easier access to world class legal services.
- (2) As Australia's leading trade union and labour movement law firm, we also have a proud history of partnering with trade unions to defend workers' rights. The firm provides specialist legal and complementary services in a broad range of areas.
- (3) Our Superannuation and Disability Insurance practice has been dedicated to assisting claimants for more than 20 years. The area of disability insurance, whether through a group life policy within a superannuation scheme or through a retail policy, can be challenging and daunting for people suffering from an injury or illness.
- (4) The struggle to cope with the difficulties and frustrations that an illness or injury can bring to them and their families' drives us support and guide them through this complex area both legally and through our dedicated in house social work services.
- (5) The majority of the claims made by our clients are based upon the essential group life insurance default cover provided through their superannuation membership. This cover provides our clients with financial stability during their hardest times, when they are trying to cope with the pain and frustration from an injury or illness that has disrupted their lives and changed their future.

Slater and Gordon's Submission to the Inquiry

- (6) Slater and Gordon appreciate the opportunity to provide submissions to the Productivity Commission on its draft report into the efficiency of the superannuation system.
- (7) Through the provision of support and guidance to clients with disability insurance claims, Slater and Gordon has extensive experience and exposure to the variety of obstacles faced by working Australians, both for clients with insurance coverage through their super and those that in fact do not have cover or are ineligible to claim on the cover they have.
- (8) There remains a substantial issue with underinsurance in Australia.¹ This issue needs to be balanced with appropriate methods to address the problem of erosion of superannuation account balances. The engagement of working Australian's with their superannuation fund, and in particular, their insurance needs to ensure financial security should the worst happen is vital to this balance. Also essential to this is the adequacy and enforceability of obligations on trustees by the Insurance in Superannuation Voluntary Code of Practice ("the Code").²
- (9) The spotlight on the financial and life insurance industries has raised the awareness of some Australians to their insurance through super. Despite this, many injured or ill workers still do not know that they have insurance or whether their level of cover is sufficient to protect their family and their financial future.
- (10) Of the many injured or ill Australians that Slater and Gordon support in claiming upon their disability insurance entitlements each year, the majority of claims are made based upon default cover provided through their superannuation membership. This system has been fundamental in addressing the underinsurance issue, and allowing working Australians access to affordable and broader cover than would otherwise be available.

¹ Rice Warner *Underinsurance in Australia 2017* report. See also <http://www.ricewarner.com/life-insurance-adequacy/>

² See http://www.aist.asn.au/media/1099546/insurance_in_superannuation_voluntary_code.pdf

The Erosion of Superannuation Account Balances

Opt-in Insurance for under 25's

- (11) Slater and Gordon support the Commissions inquiry into the erosion of superannuation retirement savings of working Australians. However, we are concerned with recommendation 14 of the report that *all* forms of group life insurance be provided on an opt-in basis for members under the age of 25.
- (12) While we support the recommendation with respect to death cover, we consider that any legislative change requiring superannuation trustees to obtain the express consent of young Australians under 25, before providing any form of default insurance cover may leave many in this age group vulnerable, especially those in high risk or heavy manual occupations or those with young families. This risk is heightened by the current level of disengagement with superannuation.
- (13) It may be that employees in this age bracket are lower risk and in the minority rather than majority when it comes to claims. However, statistics have shown that the level of insurance cover is dramatically less on an 'opt-in' basis than an opt-out³ model, which will be relevant to insurance post age 25.
- (14) While the median age for marriage, parenthood and home ownership is currently above the proposed age 25 for opt-in insurance, under 25's are over-represented in the national averages in relation to road accident trauma.⁴ We see the majority of our younger clients claiming based upon serious injury resulting from motor vehicle accidents, or accidents from high risk activities.

Case Study 1.1

Our client was significantly injured in a single vehicle accident at the age of 19, which left him with significant physical injuries as well as an acquired brain injury. He has been unable to return to work since, and his mum is his guardian and carer.

In his case, there was no common law entitlement. His TPD through his super fund is the only large lump sum benefit he has received, which provides some financial security for his future.

Case Study 1.2

One of our younger clients was only 19 when she was injured in a rock-climbing accident and was left paraplegic. She was working multiple jobs in the hospitality industry to support herself while she completed her Bachelor degree at Melbourne University.

Her TPD claim was approved, as was her income protection claim, which provides cover until age 60.

Case Study 1.3

Our client became paraplegic following a serious motor cross bike accident. He was 22 years of age at the time. The circumstances of the accident were not compensable.

He had undertaken work with several different employers leading up to his accident and made enquires on two super fund accounts, both with the same super fund. The insurance on the first account had concluded the day before his accident in accordance with the policy terms (13 months), however, premiums had continued to be deducted.

³ Financial Services Council submission to the Parliamentary Joint Committee on Corporations and Financial Services Report on the Life Insurance Industry (March 2018), Submission 26, p. 20.
Australian Institute of Superannuation Trustees and Industry Super Australia submission to the Parliamentary Joint Committee on Corporations and Financial Services Report on the Life Insurance Industry (March 2018), Submission 23, pp. 5, 12.

⁴ See https://bitre.gov.au/publications/2013/files/is_051.pdf

Because of this, he had not considered the question of insurance at the time of commencing his new employment, as it was with the same fund and he assumed the cover had continued.

- (15) There is a real risk that this scenario will become more prevalent in light of the recommendation for legislative requirements on trustees to cease insurance on accounts without contributions for 13 months, which we address below.
- (16) To balance this risk with the issue of unnecessary erosion of retirement savings requires appropriate, responsible and engaged communications by superannuation trustees with their members. Concerns have been validly raised about how information on group life insurance is currently presented to consumers.⁵ At a time when consumers are directed to lengthy and legally worded PDS documents, there is a real risk that consumer decisions on the need for and level of insurance will be not be made on an informed basis.
- (17) Stringent procedures need to be entrenched to ensure that upon reaching 25, appropriate group life insurance cover becomes automatic to avoid underinsurance as consumers in this age group approach the median age for increased financial commitments and responsibilities. This will ensure that a situation is not created where they face the adverse implications of unaffordable insurance, underinsurance or no cover at all.
- (18) Noting the concerns and recommendations of both this Commission and the Parliamentary Joint Committee⁶ on the ability of the industry to self-regulate under the Code, action in the form of removal of insurance protections for those under 25, without first ensuring enforceable communication requirements are in place, could leave young working Australians at risk.
- (19) The cost and affordability of group life insurance could adversely impact those that do not in fact fall into this category (under 25) by virtue of the reduction in the size of the pooled risk within a fund. The result being that while the erosion will reduce / cease for those members under 25, it could potentially increase for others in the fund.
- (20) Slater and Gordon urge the Commission to ensure that its recommendations with respect to an 'opt in' model of insurance, is balanced with the risks that accompanies it. This is particularly critical in an industry where such a large number of members are currently disengaged with their super, and the protections afforded by a voluntary code are currently inadequate and unenforceable

Multiple Superannuation Accounts

- (21) Slater and Gordon also welcome the Commission's inquiry relating to the consolidation of lost and inactive accounts as a further proactive step to reduce super balance erosion.
- (22) However, there are several potential consequences with respect to this action that need to be appropriately considered prior to the introduction of any specific legislative requirements on fund trustees regarding inactive accounts.
- (23) Insurance cover and therefore insurance premiums on inactive accounts should not be viewed as a barrier to consolidation of accounts, but as an opportunity to engage with members, to enable informed and considered decisions to be made about their insurance needs.

⁵ CHOICE submission to the Parliamentary Joint Committee on Corporations and Financial Services report on the Life Insurance Industry (March 2018), Submission 49, pp. 10–11

⁶ Parliamentary Joint Committee on Corporations and Financial Services Report on the Life Insurance Industry (March 2018)

- (24) Ineligibility for cover is often not realised until an actual claim is made. Policies are worded in such a way that eligibility will not be automatically known by a trustee until a claim is made. On this basis, it is crucial that trustees are compliant with the obligation under the Code⁷ in this respect.
- (25) Many of the clients we assist that have multiple accounts have a primary account with a substantial balance, while other accounts may have very minimal balances. However, the insurance entitlements on smaller accounts can be substantial. In circumstances where the member cannot work again due to illness or injury, this has enabled afforded an ability to remain financially independent of government support.
- (26) The level of group life cover offered to members differs from fund to fund. As is demonstrated by these examples, it is not uncommon for superannuation accounts with lower balances to offer more advantageous insurance cover. This validates the importance of members being informed about the insurance ramifications of merging super accounts before any automatic consolidation occurs.
- (27) We submit that it is essential that there are appropriate consumer protection mechanisms in place to accompany any consolidation of superannuation account balances to ensure that insurance entitlements are not forgone, and that appropriate insurance cover remains in place. We do not consider that the Code in its current form adequately provides this protection.

Case Study 2.1

This client was a 32 year old tree lopper who sustained horrendous injuries in an accident including multiple spinal, upper limb and lower limb fractures, a degloving injury and resulting internal injuries.

Our client's continuous medical treatment will be required for the rest of his life due to the severity of his injuries. All three of his TPC claims were approved for a total of \$462,000. This money has made a significant difference to his future, providing financial security and enabled him to purchase a small unit:

- Fund A: \$226,000 (nil account balance at time of claim)
- Fund B: \$142,000 (less than \$4,000 at time of claim)
- Fund C: \$94,000 (less than \$200 at time of claim)

In this client's case, his primary superannuation account did not provide any insurance cover.

Case Study 2.2

This client was 38 at the time of ceasing work due to a significant back injury. He had only ever worked manual laboring roles, which he now cannot return to. He has a young family with three children. Initially, following his injury he could not afford the heating costs in the home, and the family had to wear additional clothing to stay warm. His policies total just over \$1million:

- Fund A: \$387,000 (no account balance at time of claim)
- Fund B:\$ 130,000 (primary account)
- Fund C: \$215,000 (less than \$20,000 at time of claim)
- Fund D: \$329,000 (less than \$300 at time of claim)

⁷ Clause 11, page 20.

- (28) If trustees are required by legislation to automatically cease TPD and death cover once the account balance drops below \$6000, and the requirements of the Code⁸ are not adequately complied with, our client in case study 2.1 would have potentially lost all of his insurance entitlements, and in case study 2.2, the client's entitlements may have reduced by more than \$700,000.
- (29) Further, there are also situations where the automatic cessation of insurance after a period of non-contribution may thereafter preclude a worker from having any cover in circumstances where they would not be covered under a new superannuation funds group life policy due to a pre-existing condition.

Case Study 2.3

Upon commencing a new full time role, our 45 year old client rolled the account balance of his former fund over to the super fund of his new employer. He did not make any enquiries regarding the insurance attached to his former fund, which was cancelled as a result. He had suffered from some back soreness prior to undertaking his new employment.

Our client subsequently suffered a disc prolapse following an accident at work, which required a fusion surgery. When he was told he could not go back to his manual work by his surgeon, he subsequently made a claim for TPD under his current super fund's group life policy.

His claim was rejected on the basis that the injury was 'pre-existing' and within the first two years of joining the fund. He was not aware that his new policy had a two-year exclusion on pre-existing conditions.

With legal assistance and support, he was ultimately successful in obtaining the full TPD benefit.

Case Study 2.4

Twelve months after sustaining serious injuries in a motor vehicle accident, our client attempted a return to work with his employer on light, modified duties. Unfortunately, he was unable to cope with the modified duties and ceased work again.

Several years later, following retraining, he obtained employment with a new employer, in a different role. He remained in this role for two years, before he aggravated his previous injury in a fall, and again had to cease work. He made a claim on his new super fund, but was advised by the fund that he did not satisfy the definition of active employment.

Poor Value Policies – Members value for money

- (30) We have highlighted some of the more generous policies for super members above, through our experience in assisting injured or ill workers; however we also see policies which offer little or no value to fund members. This problem is not limited to those in the under 25 age demographic. The problem extends far into the industry, affecting many working Australians and in many instances, with little awareness of the limited benefit of their cover.
- (31) For example, one fund offer an income protection policy until age 60 or 65, but the default level of cover is less than \$1000 per month. This is less than payments procured from Centrelink for Newstart or the Disability Support Pension.⁹

⁸ See http://www.aist.asn.au/media/1099546/insurance_in_superannuation_voluntary_code.pdf - clause 4.25 (f).

⁹ See <https://www.humanservices.gov.au/individuals/services/centrelink/disability-support-pension/payments/payment-rates>

- (32) A further example are funds which offer default TPD and life insurance, but widely exclude a number of occupations on the basis that they are 'hazardous' or 'special risk'. This changes the policy definition of TPD from the standard 'unlikely ever' test to an Activities of Daily Living ("ADL's") definition, which precludes the majority of injured workers who under an ordinary policy, would be entitled and successful at obtaining a TPD benefit.
- (33) Slater and Gordon therefore support recommendation 16 of the Commissions draft report as benefit design and affordability will be central to addressing the issue of poor value policies which contribute to the erosion of super account balances.

Case Study 3.1

This client was employed as a cleaner. He had a forklift licence from a previous role, and as such would occasionally be asked to jump on the forklift by his employer. This was not an inherent duty of his occupation and was less than 1% of his overall role / duties.

However, upon making a claim for TPD following a bad back injury and psychological consequences, his claim was rejected by the insurer and trustee who determined to change his occupation category based on the occasional use of the forklift. This changed the definition for assessment from standard to an ADL definition.

With legal advice and assistance, he challenged the decision.

Case Study 3.2

Three years ago, our client was injured in a motor vehicle accident and sustained multiple fractures and an acquired brain injury.

His claim for TPD was initially declined as his level of travel was equivalent on occasion to a long distance truck driver, and thus fell into the hazardous occupation definition, requiring the ADLs test to be applied.

Following a challenge to the decision, we were successful in having the insurer and trustee re-assess his claim under the standard TPD definition, and pay out his TPD benefit.

Case Study 3.3

Our client was a 50 year old plant operator who injured his knee and shoulder after a fall at a friend's house. Due to a previous knee injury, he has significant difficulty with mobility, and his wife is now his carer.

He made a claim on his TPD policy, but was rejected on the basis that he did not satisfy the arduous ADL's definition. He was unaware that his occupation was considered 'special risk' and therefore excluded under the policy. He instructs that had he been aware, he would have sought insurance elsewhere.

- (34) The importance of effective and relevant communication and engagement of members with their superannuation fund benefits and shortcomings is paramount to avoid policies of limited value and unnecessary account erosion.
- (35) We strongly support the recommendation by the Australian Lawyers Alliance in its submission to this Commission¹⁰ that there is a tiered rating system to assist consumers to understand the implications of the varying products of insurance and make an informed decision on their insurance needs.

¹⁰ Australian Lawyers Alliance submissions to the Productivity Commission - Superannuation: Assessing Competitiveness and Efficiency, 11 July 2018, paragraph 28, page 8.

- (36) To this end, we support the Commission's recommendation requiring superannuation trustees to articulate why the level of default insurance premiums and cover chosen is in fund member's best interests.

Strengthening of the Code

- (37) The Code, in its current self-regulatory and voluntary form, is ineffective at accurately protecting consumers. Slater and Gordon strongly advocate for and support recommendations for the Code to require mandatory participation, approval by ASIC and have binding and enforceable consequences for breach.
- (38) These recommendations have been extensively canvassed by the Parliamentary Joint Committee Report.¹¹
- (39) This must be a priority before any significant legislative changes are made to ensure adequate consumer protection from the potential prejudices outlined above. To this end, we support the Commission's recommendation that an Insurance Code Taskforce be established imminently to address and advance the benefits of the Code to member outcomes.

Standardised Definitions

- (40) Slater and Gordon support recommendations in relation to the standardisation of insurance definitions for transparency and consumer protection. In particular, we would advocate for TPD definitions to be consistent with the definition of 'permanent incapacity' as provided in the relevant regulations.¹² This would address concerns raised about complex and diverse policy terms and conditions.¹³
- (41) However, we strongly caution the proposal for the Code to deal with standardisation of definitions without extensive consultation with relevant industry participants. This is due to the inherent risk that while the standardisation of terms may mean greater transparency, it may not result in 'consumer friendly' definitions being implemented, particularly in light of the significant shift in TPD definitions away from the 'permanent incapacity' definition towards 'retraining' and 'incapable ever' tests.

Conclusion

- (42) We take this opportunity to thank the Productivity Commission for the opportunity to provide feedback on the Draft Report including the provision of the experiences of some of our clients.
- (43) In summary, our primary concerns relate to:
- a. the potential consequences associated with the opt-in model for members under 25;
 - b. the potential consequences of a the requirement for cancelation of insurance in circumstances where consumers are disengaged with their super, and there are inadequate protections in place;
 - c. poor value policies;
 - d. the immediate need for the inadequacies of the currently voluntary Code to be rectified;
 - e. Standardised definitions.
- (44) We would welcome any further opportunity to provide further assistance to the Commission on this important topic for every working Australian.

¹¹ Parliamentary Joint Committee on Corporations and Financial Services Report on the Life Insurance Industry, March 2018

¹² *Superannuation Industry (Supervision) Regulations* 1994, Reg. 1.03C.

¹³ CHOICE submissions to the Parliamentary Joint Committee on Corporations and Financial Services report on the Life Insurance Industry (March 2018), Submission 71, p. 11.