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LIFE INSURANCE BULLETIN

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Note from the Editor

Welcome to the 2nd edition of this year's Life Insurance Bulletin.

Everyone I trust is now a Zoom warrior and working remotely, well, it seems like we have been doing it all our lives.

Speaking of which, our Life Matters series is now in webinar format and the winter session returns on Thursday 16 July. My business partners, Sofia Papachristos and Peter Murray have prepared a great presentation on LICOP, past, present and future which is not to be missed. If you would like to register, please email our Marketing team who will organise your registration.

Also, the ALUCA Turks Scholarship is returning bigger than ever for 2020 with a late July launch date. I urge all of you eligible to enter to consider entering. Like the Melbourne Cup, the Scholarship is a great leveller noting that you don't need an MBA or to be a senior 'techie' to win it. Rather, you just need a passion for life insurance and making a difference, oh and a free weekend (or if you are really fast, a free night) between July and September to write the entry. Our past winners have all gone on to do wonderful things in life insurance so don't delay, seize the day! Details on how to enter and the application form will be available on the Turks and ALUCA websites from late July. Stand by.

Turning to this quarter's edition, we have a nice little preview of Sofia and Peter's session on the LICOP as well as reviews of recent cases which as ever, are impactful on life and superannuation business. We also have a summary of Covid related legislative changes to the witnessing and execution of documents which we trust you will find helpful.

As always please reach out to your favourite Turks life expert if you have any questions about what we have written about or indeed anything about life insurance. We #lovelife!

Finally, I would just like to note the retirement from the Turks partnership of John Myatt. John is a well-known life figure having practiced in Life Insurance and Financial Services since the mid-1980s. He is also of course the former practice head of our Life Insurance, Superannuation and Advice group and has been a significant figure in the development of this practice. John will be moving on to other challenges (no doubt involving a lot of sailing!) and he goes with our best wishes and fond memories.

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COVID-19

Summary of legislative changes to remote witnessing and electronic execution of documents in response to COVID-19

Key Takeaways

Whilst the life insurance industry has adjusted relatively smoothly to remote working during the current medical emergency, one aspect of dealing with disputes that does not sit well with this new way of doing things is the execution and witnessing of formal documents such as defences, deeds and affidavits.

In response, the Commonwealth and the larger states have implemented temporary regulations to permit remote witnessing and in some cases, electronic execution of documents.

Below is our summary of the key changes.

New Legislation

Commonwealth

The *Corporations (Coronavirus Economic Response) Determination (No.1) 2020 (Cth) modified the Corporations Act 2001* (Cth) (**the Corporations Act**) to expressly permit the electronic execution of documents under s127 and allow persons dealing with companies to assume that documents signed electronically have been duly executed.

In circumstances where execution requires signatures of multiple company officers, such signatures can be provided in counterpart. Unfortunately, there remains some controversy as to whether the Determination permits the electronic execution of deeds by corporations. This stems from the long-standing common law rule that requires deeds to be written on paper, parchment or vellum.

New South Wales

The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* amended the *Electronic Transactions Regulation 2017* (**NSW Regulation**) to permit remote witnessing of the execution of documents via audio visual link (**AV link**) and electronic attestation of documents required to be witnessed under NSW law, such as affidavits and deeds.

In order to witness a document via AV link, the NSW Regulation requires the witness to:

- observe the signing (whether electronically or by wet signature) of the document in real time via AV link; and
- sign a scanned copy or identical counterpart of the document; and
- endorse the witnessed copy or counterpart of the document with a statement specifying the method used to witness the signatory's signature and that the document was witnessed in accordance with the Regulation. For example, the endorsement can use words to the following effect: 'This document was signed in counterpart and witnessed over audio-visual link in accordance with clause 2 of Schedule 1 to the Electronic Transactions Regulation 2017'.

The NSW Regulation does not limit the ways in which a witness can confirm the signature was witnessed. Our view is that this means that confirmation of witnessing may occur via electronic signature, provided the signature satisfies the conditions required by the NSW Regulation.

It is important to note that the NSW Regulation does not alter the current law with respect to the electronic execution of documents. Regardless, NSW law permits the electronic execution of a deed by an individual or any other entity that is not regulated by the Corporations Act, pursuant to s38A of the *Conveyancing Act 1919* (NSW).

The law with respect to affidavits is less clear, as it does not expressly permit or preclude the electronic execution of affidavits. However, it is our view that it is permitted and

in practice, for example, the NSWSC has been accepting electronically executed affidavits.

The NSW Regulation will expire on 26 September 2020, unless this date is changed by further regulation or resolution of the parliament.

Queensland

In Queensland, the *Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Regulation 2020* and the *Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020* (**the Queensland Regulations**) permit among other things, electronic execution and witnessing of affidavits and other documents requiring witnessing. Remote witnessing can be done via AV link provided it complies with the method required by the Queensland Regulations, which includes the requirement that a document be witnessed by a 'special witness' (which is defined to include an Australian legal practitioner or a notary public).

In order to witness a document via AV link, the Queensland Regulations require:

- the witness to observe the signatory signing the document in real time; and
- the signatory to sign each page of the document (affidavits excluded); and
- the witness, upon verifying the signatory and being satisfied that the signatory is freely and voluntarily signing, sign each page of the document signed by the signatory or each page of a true copy of the document signed by the signatory; and
- the witness sign a certificate stating the process used to sign and witness the document, the steps used to verify the identity of the signatory and that the document was signed and witnessed in accordance with this regulation.

The Queensland Regulations permit an affidavit to be made and signed electronically provided it complies with the requirements set out in the Queensland Regulations. It also provides that the Court may admit an affidavit that does not comply with the *Oaths Act 1867* (Qld) or another law.

Further, and unlike other state jurisdictions, the Queensland Regulations have explicitly removed the requirement for a deed to be created on paper or parchment. This means that a deed can be created in the form of an electronic document and signed electronically. Further, the legislation removes the requirement for a deed to be witnessed.

The regulations will expire on 31 December 2020.

Victoria

In Victoria, the *COVID-19 Omnibus (Emergency Measures) Act 2020* (VIC) (**the Victorian Act**) amended certain acts for the purpose of responding to COVID-19 and created temporary regulation making powers for the same purpose.

Relevantly, it amended the *Oaths and Affirmations Act 2018* (VIC) to permit the electronic signing, initialling, witnessing (via AV link) and attestation of affidavits. The affidavit taker is permitted to sign a scanned hard copy or an electronic copy of the affidavit. The affidavit taker must also include a statement specifying the method used to sign, initial and witness the affidavit and confirm that it complies with the *Oaths and Affirmations Act 2018* (VIC).

For example, the statement might include words to the following effect: 'This affidavit was signed and initialled by electronic means and witnessed over audio visual link in accordance with ss49E of Division 2, Part 5A of the *Oaths and Affirmations Act 2018* (VIC)'. Additionally, the amendments provide that the Court may admit unsworn or purported 'affidavits' if it is satisfied that it was not reasonably practicable to file a compliant affidavit.

In addition to the Victorian Act, the Victorian parliament has implemented the *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (**the Victorian Regulation**) which temporarily permits remote witnessing via AV link of transactions and other documents that require witnessing under Victorian law. The Victorian Regulation also expands the list of documents which can be electronically executed under the *Electronic Transactions Act 2000* (VIC), by expressly including deeds. It is important to note that deeds are not required to be witnessed under Victorian law.

The relevant parts of the Victorian Act will be repealed six months after commencement date, being 25 October 2020. All regulations made under it, including the Victorian Regulation, are impliedly revoked on that same date.

States And Territories Without Temporary Remote Witnessing Regulations

Northern Territory, Western Australia and South Australia have not implemented temporary regulations in light of COVID-19 to allow for electronic execution or witnessing of documents. However, as noted above, companies that fall within the Corporations Act, irrespective of where they are based within Australia, may (noting the countervailing views discussed above) still be able to electronically execute documents (including deeds) in compliance with s127 of the Corporations Act.

Filing Documents With The Court

The FCA has released the practice note *Special Measures in Response to COVID-19 (SMIN-1)* which states that to the extent possible, all documents must be lodged to Court electronically. The Court will accept electronically signed documents and unsworn affidavits on the understanding that, if required, these will later be sworn or affirmed when possible. This practice note continues until revoked or replaced.

At a state level, the NSWSC requires where possible, all Court documents to be provided by electronic means, as does the WASC and the SASC. The VSC also accepts electronic filing of all Court documents in civil cases. Meanwhile, the QSC does not have an avenue for electronic filing of Court documents.

Implications

Practically speaking, a company regulated by the Corporations Act can electronically execute documents, including agreements. As noted above however, the position with respect to electronic execution of a deed is not without debate. Owing to this, companies may instead choose to electronically sign an agreement to execute a deed and proceed to executing the deed physically, when possible.

In any event, there is no requirement for the execution of a deed by a company to be witnessed. Meanwhile, deeds can be electronically executed by individuals or other bodies that are not bound by the Corporations Act and remotely witnessed via AV link, provided the deeds are made under the laws of Queensland, NSW or Victoria (in which case, witnessing is not required).

Generally speaking, most other documents (including affidavits) can be electronically executed under the law of NSW, Victoria or Queensland and where document witnessing is required under these states' respective laws, this can also be done remotely via AV link.

Our life experts will of course be able to assist with all of this as the need arises.

IMPENDING LEGISLATION

LICOP Post Hayne FSRC – A recap and update

The Story So Far

The Life Insurance Code of Practice (**LICOP**) was introduced from 1 July 2017 following input from a broad range of industry stakeholders and is one of a handful of regulatory measures introduced following a period of negative publicity for the industry which culminated in the Hayne Royal Commission into misconduct in the banking, superannuation and financial services industry.

Among other things, the LICOP was developed to '*protect consumer interests by promoting high standards of service, providing a benchmark of consistency within the industry, and establishing a framework for professional behaviour and responsibilities.*'[1] This included setting minimum standards around policy definitions, product disclosure requirements, sales practices and claims handling. In short, the LICOP was designed to improve the customer experience by ensuring industry wide compliance. Whilst it is compulsory for companies who are members of the FSC, non-members can also opt into the LICOP.[2]

We also saw the establishment of the Life Code Compliance Committee (**LCCC**) '*to make determinations in relation to reports of alleged Code breaches which the LCCC has investigated*' and '*impose, at its discretion, sanctions for a breach of the Code where a breach is not corrected*'[3] among other things. Compliance with the LICOP is monitored and enforced by the LCCC[4] which also investigates self-reported breaches and referrals from consumers of alleged breaches.

Initially, there was cause for optimism. ASIC's Report 587 of August 2018 noted a general improvement within the industry, stating that '*many firms, conduct had improved, and the introduction of the Code by the FSC appears to have played a role in improving sales standards, particularly where it sets clear and specific expectations.*'[5] Nevertheless, there were calls for the LICOP to be more comprehensive and cover those areas missed by the initial iteration of the LICOP such as '*clearer questions on application forms*' and '*plain language explanations for non-standard terms such as exclusions.*'[6] In November 2018, the FSC released the new draft of the LICOP 2.0 for public consultation.[7] However to date, the LICOP 2.0 has not been implemented in any capacity.

By the time the final report of the Hayne Royal Commission was tabled in early 2019, life insurers had been grappling with the LICOP's compliance regime for over two years. However, the Royal Commission's final report made several key recommendations as to how the LICOP could be improved and enforcement capabilities enhanced. Firstly that ASIC, in approving industry codes of conduct, may take into consideration whether particular provisions of an industry code of conduct have been designated as '*enforceable code provisions*'.[8]

To this end, the provisions of the LICOP that govern the terms of the contract made between the life insurer and the policy holder should be designated as enforceable provisions[9], meaning that a breach of certain provisions of the LICOP would constitute a breach of law. Furthermore, the LCCC should have the power to impose sanctions on insurers in breach of the LICOP.[10] Notwithstanding, it was envisaged that any further iteration of the LICOP containing enforceable provisions, although subject to ASIC approval, will be largely left in the hands of the industry itself.

Proposed Legislation

Accordingly, in February 2020, Treasury commenced a consultation process with regards to proposed legislation to implement the enforceability of industry codes such as the LICOP. The legislation was to be introduced to Parliament by 30 June 2020 but has been delayed and is now set to be introduced to Parliament by December 2020.[11]

The draft legislation released by Treasury, being the 'Financial Sector Reform (Hayne Royal Commission Response - Protecting

Consumers (2020 Measures) Bill 2020: Fsrc Rec 1.15 (Enforceable Code Provisions)' enables ASIC to make certain provisions of industry codes enforceable. Relevantly, it is proposed that s1101A of the *Corporations Act 2001* be amended to provide that ASIC, in the approval process, may identify a provision of any code of conduct submitted for approval, as an enforceable code provision. Furthermore, to broaden the key criteria for code approval.

For example, under the proposed change, among other things ASIC must not approve a code of conduct unless it is satisfied that each enforceable code provision is legally effective and that subscribers to the code have effective administrative systems for monitoring compliance with the code and making information obtained as a result of monitoring publicly available.

The proposed legislation also requires an independent review, every five years, of any approved industry code of conduct. The intention here is to ensure that any approved code is kept up to date with changes and fresh concerns within the industry. In the absence of an approved code of conduct, the proposed legislation provides that ASIC may prescribe its own code of conduct and declare it to be a '*mandatory code of conduct*' to which subscribers must comply or face a pecuniary penalty not exceeding 1000 penalty units. Similarly, if a subscriber holds itself out as compliant with its own code (approved by ASIC) but then breaches an enforceable code provision, the subscriber would be liable to a civil penalty of 300 penalty units.

The Way Forward

Whilst the LICOP is here to stay, it seems the life insurance industry will have a degree of control over any further iteration of the LICOP to be approved by ASIC. Indeed, the Hayne Royal Commission considered it '*important for the life insurance industry to continue to identify opportunities for improvement*' and that industry '*commit in its codes, to making those improvements.*'[12] As a result, the life insurance industry will have the opportunity to implement more practical and achievable standards within the LICOP and have some degree of input with respect to what might be identified as '*enforceable code provisions'*. Indeed, meeting the LICOP's current compliance standards has been the principal challenge for life insurers since its inception in 2017.

However, if ASIC were not to approve of any further version of the LICOP proposed by the life insurance industry, this would leave open the possibility of a mandatory code being imposed by the ASIC regulations. As indicated in the explanatory memorandum, a mandatory code may be imposed when *'efforts between ASIC and industry to develop an approved code of conduct have not been successful or because industry has not put forward a proposed code in a timely manner.'*

Whilst the proposed legislation does not directly alter the LICOP, it is likely that many of the provisions will be legally enforceable. Further, there is pressure on the life insurance industry to update the LICOP to promote higher standards. As a result, the LICOP will need to be continually reviewed, at least once every five years in accordance with the proposed legislation, which means that the enforceable provisions are unlikely to remain static and the industry can expect continual change and development in the future. We will be keeping a keen eye on the developments of LICOP 2.0 and ASIC's approval process once these legislative changes come into effect.

[1] Life Insurance Code of Practice pg2

[2] https://www.fsc.org.au/policy/life-insurance/code-of-practice/

[3] Life CCC Charter – FSC 2019

[4] https://lifeccc.org.au/insurers/

[5] https://download.asic.gov.au/media/4853336/rep587-published-30-august-2018-1.pdf

[6] https://www.fsc.org.au/resources/1342-life-code-consultation-launch-12-november-2018/file

[7] https://www.fsc.org.au/policy/life-insurance/code-of-practice/code-2-0

[8] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, final report, Recommendation 1.15

[9] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, final report, Recommendation 4.9

[10] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, final report, pg 33

[11] https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/update-implementation-banking-superannuation-and

[12] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, final report, pg 314

LIFE AND SUPERANNUATION CASES

Federal Court rules on 'casual' employment with potential implications for group life cover

WorkPac Pty Ltd v Rossato (FCA 2020)

Key Takeaways

In group policies where benefit levels are determined by an insured's formal employment classification, the term '*casual employment*' is often a critical (but often undefined) concept.

In the absence of a clear and complete definition of '*casual employment*' in the relevant policy, this FCA decision indicates that employment type (and consequently cover type) will be determined having regard to the true nature and characteristics of the employment rather than its stated title. Consequently, a much broader class of insureds may be entitled to more expansive levels of cover under group policies which still rely on employment type to determine the level of cover.

Brief Facts

Between 28 July 2014 and 9 April 2018, the employer, WorkPac (a labour hire company) employed Mr Rossato (a production employee in the mining industry) and supplied his labour to various mining companies. The three and a half years of Mr Rossato's employment was performed pursuant to six separate contracts of employment. The contracts were in writing and included a document entitled 'Casual or Maximum Term Employee Terms & Conditions of Employment – Employee Declaration' signed by Mr Rossato.

The employer considered Mr Rossato to be a casual employee and did not pay him any leave entitlements. During his employment, Mr Rossato worked 38 hours per week in shifts pursuant to a roster, save for where the mine was shut down over Christmas or occasions where his crew was not required to work due to inclement weather, for example.

On 2 October 2018, Mr Rossato claimed from the employer outstanding entitlements to be paid annual leave, personal/carer's leave, compassionate leave and public holiday pay under the *Fair Work Act 2009* (Cth) (**FW Act**) and the enterprise agreement made under the FW Act (**EA**). The employer denied any such entitlement on the basis that Mr Rossato was a casual employee within the meaning of s86, s95 and s106 of the FW Act and a 'Casual Field Team Member' under the EA. The employer commenced proceedings in the FCA and sought declarations to that effect.

Judgment

The Court found that Mr Rossato was '*other than a casual employee*' for the purposes of the FW Act and a Permanent (not Casual) Field Team Member under the EA. Mr Rossato was therefore entitled to payment of all his leave entitlements.

In considering the question of whether Mr Rossato was a casual employee, the Court confirmed that casual employment (as opposed to full-time or part-time employment) is generally characterised by the absence of a '*firm advance commitment*' from either the employer or the employee to continuing and indefinite work according to an agreed pattern of work. WorkPac contended that without an express term in the employment contract (which was in writing), no such commitment can exist and the employment must be casual. The Court rejected such a narrow focus on the contract. Bromberg J noted that the dynamic nature of employment relationships which evolve over time, means that the indicia which characterise the type of employment are often found in the dealings between the parties, rather than in the written contract alone. Similarly, White J held that a firm advance commitment does not have to be express but can be discerned from the employment arrangement as a whole. The Court adopted the approach of the FCA in *WorkPac Pty Ltd v Skene* (FCA 2018):

> '*…whether any particular employee is a casual employee depends upon an objective characterisation of the nature of the particular employment as a matter of fact and law having regard to all of the circumstances.*'

Noting that continuity of service alone is not a defining characteristic of non-casual employment (a casual employee may be engaged on a long term basis), the Court confirmed that the indicia of casual employment include the following:

- irregular, intermittent, uncertain, discontinuous and unpredictable work patterns;
- the employer's ability to elect whether or not to offer work on a particular day and an employee's ability to elect whether or not to work;
- where an employee works only on demand or as required;
- a short notice period.

The Court ultimately concluded that Mr Rossato's employment, other than having a short notice period (which is relevant but not determinative), did not bear any of the above hallmarks of casual employment. It did so on the basis that the employment contracts showed a '*firm advance commitment*' with the parties having agreed on employment of indefinite duration which was stable, regular and predictable. Significantly, the contract provided that work would be allocated to Mr Rossato via a roster and performed in accordance with the pattern of work required by a '*standard work week*' and '*ordinary hours*' of 38 hours per week. The contract anticipated that Mr Rossato's service would be utilised on a continued and pre-programmed basis and there was no provision for either party to elect whether or not to offer or accept the work, or for Mr Rossato to be notified of availability of work on a regular basis.

The Court rejected arguments that an hourly rate of pay, payment of a casual loading and the requirement to submit timesheets indicated that the work was irregular. Rate of pay, unless it indicates employment on an hourly basis, was found to be of little or no significance to the type of employment. Similarly, the requirement of timesheets was not an indicator of irregular work as its purpose was to confirm the hours worked in order to calculate pay.

Importantly, when considering the various types of employment referred to in the FW Act – full-time, part-time, shift work and casual – White J noted that not all work types are mutually exclusive. For example, an employee may be casual but work 38 hours per week and a shift worker may be full-time, part-time or casual. This he found, limits the implications to be drawn from the various work categories under the legislation and directs attention to the character of the employment.

Whilst their Honours reached their conclusions based on the written contracts, had the firm advance commitment not been obvious from the contract, the conduct of the parties would have been taken into account to discern the nature of the agreement. In this case, their Honours noted that in addition to the contract, the conduct of the parties also supported the conclusion that Mr Rossato was given a firm advance commitment of employment and was therefore not a casual employee.

Implications

Many group life policies still determine the type of TPD cover ('*any occupation*' or ADL) an insured receives based on their prevailing employment classification.

Often in these types of policies, '*casual employment*' is the trigger for less expansive coverage. Further the term '*casual employment*' is more often than not, not defined and takes its ordinary meaning as generally understood in the employment context.

Against that background, this widely commented on FCA decision is significant in that it indicates that the formal branding of employment as being '*casual*' in a contractual/ employment document is not determinative of whether such employment is indeed casual.

Rather, where the issue of casual employment is to be determined, such as in the certain group life policies we have mentioned above, the courts will be required to look beyond the label and drill down to see if the true indicia of casual employment is present, being the matters listed above.

Absent some or all of this indicia being present and absent a definitive definition of casual employment in the relevant policy, one would suspect that some or many persons labelled as '*casual*' employees, probably are not.

Obviously there are wider industrial relations ramifications here but this decision is impactful in group life insurance. Specifically, whilst the industry might be generally moving away from determining benefit levels on the basis of such imprecise concepts as casual employment, there remain many group life products which have this distinctive feature.

It follows that when grappling with this issue, insurers will need to ensure that they look beyond the label an employee might be given in an employment contract, a pro forma claim form or other document, and determine if such employment truly is casual having regard to the indicia identified in this case.

LIFE AND SUPERANNUATION CASES

AFCA disregards policy trauma definition – 'fairness' to the insured was again the determinative factor

Case 658132

Key Takeaways

Once again, in considering a trauma policy, AFCA has demonstrated that it is not constrained by the terms of the actual policy in its pursuit of fairness for the consumers of insurance products.

It follows that insurers seeking to argue a defence of a declined trauma claim based on the failure to meet a policy definition before AFCA must do more than simply argue the law of *Larwint*[1] and *O'Neill*[2]. Rather (and obviously this is easier said than done), the argument must also show that it was always understood between the parties that the policy would not respond to this medical scenario and further that such a position is inherently fair in the context of the trauma policy as a whole.

Brief Facts

The claimant held trauma cover with the life insurer. He suffered a mass in his testicle which was feared to be malignant. A definitive diagnosis of cancer before surgery was impossible for medical reasons, and on expert medical advice the testicle was removed. After surgery, the mass was biopsied and found to be non-cancerous.

The policy definition provided that the insurer would pay 20% of the trauma benefit on diagnosis of a carcinoma in situ (defined as being confirmed by biopsy) and an additional 80% of the benefit on surgery to arrest the spread of malignancy.

The insurer rejected the claim on the basis that the claimant did not have carcinoma in situ and the surgery to remove the testicle was not required to arrest the spread of the cancer i.e. there was no cancer.

The claimant lodged a complaint with AFCA.

Determination

AFCA found that:

- the claim was not payable under the policy because the claimant's condition did not meet the definition of trauma under the policy (i.e. he did not have cancer or carcinoma in situ)
- LICOP would not operate to assist him (i.e. he did not meet the code's minimum standard definition of cancer either).

AFCA nonetheless found that the insurer should pay 80% of the benefit because the surgery to remove the testicle, which was undertaken in anticipation of a finding of malignancy, was essentially the same as the treatment which would have been undertaken had malignancy been found. AFCA stated:

> *Taking these things into account, I am satisfied that a reasonable person would expect to be covered for the removal of a testicle to arrest the spread of malignancy, even where it is later established that there was no malignancy to begin with. The distinction between the complainant's situation and that of a person who had a testicle removed after a diagnosis of carcinoma in situ is so fine that it would be unfair to refuse to pay a benefit to the complainant.*

In others words, in AFCA's view, it was the surgery to remove the testicle which triggered the major portion of the trauma entitlement and that had occurred, cancer or no cancer.

Implications

Our April 2020 Bulletin highlighted AFCA's divergent path to the courts when it came to contentious trauma claims (link to article). This decision continues this divergence.

This wasn't a case in which the adoption of a newer or different definition of cancer or carcinoma in situ would have brought the claimant within the policy terms. This was a case in which the claimant simply did not have the specified condition, but in which there was no difference in treatment and prognosis for those with the condition and those investigated for it in this way. Given the very specific wording in this policy which allocated a proportion of the benefit upon diagnosis of the condition, and a proportion to undergoing the treatment for it, AFCA concluded that a reasonable person would expect at least the treatment/ investigation element to be covered.

It may well be that the unusual facts of this matter mean one should not draw too much out of it. After all, AFCA did acknowledge the legitimacy of the trauma concept and that insurers could define which conditions a policy would respond to:

> *Using definitions to precisely describe what is covered and what is not is standard practice in the insurance industry. All trauma policies use definitions in this way.*

That said, AFCA still ordered that most of the benefit be paid notwithstanding that the policy clearly did not respond, on the basis that fairness required it so. The fairness consideration here being that the event insured against and the actual event which befell the insured i.e removal of the testicle, were one in the same in all material respects. That is, close enough is good enough.

Many might consider that applying a doctrine of close enough is good enough to meticulously priced and defined trauma conditions is a slippery slope. Perhaps this is so but once again when it comes to concepts of fairness and community and consumer expectation specifically in relation to trauma, insurers would be well advised to ensure that trauma definitions as well as being of the absolute moment in terms of medical thinking, also do not contain anomalies and perceived unfairness bubbles which can trigger the response we saw from AFCA here.

Additionally as indicated above, insurers need to ensure, when arguing their case before AFCA in relation to trauma declines, that their argument framework shows:

- a decline in the present circumstances, was always the result of fair reading of the policy and all related communications envisaged; and
- the result was fair having regard to the policy structure and the concept of trauma insurance at large.

[1] *Larwint Pty Ltd v Norwich Union Life Australia Ltd* [2007] VSCA 21

[2] *MLC Limited v O'Neill* [2001] NSWCA 161

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LIFE AND SUPERANNUATION CASES

Federal Court supports application of the *Colella* 'capacity' approach to an 'unlikely ever to be able' TPD definition

Felix v NULIS Nominees (Australia) Ltd (FCA 2020)

Key Takeaways

In the decision of *Felix v NULIS Nominees (Australia) Ltd*, the FCA has dismissed a statutory SCT appeal by a super member against the SCT's decision to affirm a TPD decline involving an '*unlikely ever to be able*' TPD definition.

The affirmation was based on the FCA's acceptance that the relevant vocational evidence which the insurer and trustee relied upon and which identified relevant alternative ETE jobs, was sound in all respects. Significantly however, in reaching its decision, the FCA endorsed the Victorian appellate decision of *Hannover Life Re of Australasia Ltd v Colella* (VSCA 2014) stating that:

> *'The relevant cover is insurance against total and permanent disablement, not against the unavailability of work for the insured. See Colella at [34].'*

Brief Facts

The member was a former call centre operator. Her employment was terminated on medical grounds and she has never worked again.

She lodged a TPD claim which the insurer and trustee declined on the grounds she was not relevantly disabled during the waiting period. Additionally, the insurer and trustee concluded, on the basis of a vocational report obtained during the workers' compensation claim, that the member could return to work within her ETE, being work as a call or contact centre operator, clerical and administrative worker and in customer service.

The SCT affirmed the denial of the claim. Relevantly, the SCT held that '*at the assessment date [being the conclusion of the waiting period] the member retained a part-time capacity for work for which she was reasonably qualified by ETE*' – being the three identified employment options in the vocational report.

Judgment

On appeal, the FCA ruled that the SCT had properly conducted its review function when it affirmed the decision by the insurer and trustee to decline the TPD claim.

The First Limb Of The TPD Definition

The preliminary issue was a construction point relating to the wording of the first limb of the TPD definition which required the member to '*suffer an injury or illness which stops the person insured working in any business, occupation or regular duties continuously for 6 months*' [emphasis added].

The member had argued that she satisfied the first limb because her injury '*stopped her working*' in her usual occupation as a call centre operator[1]. The FCA was unpersuaded by the restrictive construction adopted by the member that the first limb was limited to her usual occupation. In that respect it drew on the interpretation of the VCA in *Colella*, that the word '*any*' and the similar expression '*unable to do any work*' meant any occupation or remunerative work of the kind for which the person was otherwise suited[2].

The Second Limb Of The TPD Definition

The second limb of the TPD definition required the insurer to form an opinion, after consideration of the evidence satisfactory to it, that the member was:

> *'unlikely ever to be able to work in any business, occupation or regular duties…for which [she] is reasonably qualified by ETE'.*

The FCA dismissed a *Hannover Life Re of Australasia Ltd v Jones* (NSWCA 2017) style argument that she was unsuited to the three identified work options in the vocational report noting that the roles '*were wholly congruent with the applicant's own vocational history*'.

The member also contended that the SCT erred in that it failed to consider the actual likelihood of a person with the injuries and sickness of the member, being able to obtain the nominated ETE work.

The FCA found no error of law on the part of the SCT on this point noting that the SCT made its findings with regard to the '*applicant's capacity*' for relevant ETE work after having '*identified relevant restrictions on her ability to work*'. The FCA elaborated that the findings of the SCT were plainly open to it, noting that the vocational report contained a labour market analysis that explicitly considered '*work opportunities within the geographic range of the applicant's capabilities for driving and using public transport*' and it had demonstrated a reasonably accessible labour market for the identified roles.

Having made these findings that the nominated jobs were available and accessible to the member (being the test required in a non '*unable*' TPD definition), the FCA importantly directed its concluding remarks to *Colella* as follows:

> *'The fact that the applicant has in fact subsequently found it difficult to obtain work is not the point. The relevant cover is insurance against TPD, not against the unavailability of work for the insured. See Colella at [34].'*

Implications

The distinction between the '*unlikely ever*' TPD definition on the one hand and an '*unable*' or '*unlikely ever to be able*' TPD definition on the other hand has for some time now, been topical.

Many have felt that the fact that an '*unable*' definition was wholly capacity based and not concerned with the availability and accessibility of work, was conclusively determined in the VCA decision of *Colella*. For example, submissions were put to that effect and seemingly accepted by the PJC in its report into the life insurance industry of March 2018.

However, parochial distinctions appeared to emerge in a string of later NSWSC decisions[3] which seem to cast doubt on the application of *Colella* outside of Victoria[4].

As is often the case with SCT TPD appeals, the FCA in this matter did not feel the need to engage in an extensive review of competing (mainly NSW) TPD decisions dealing with the differences between the '*unlikely*' and '*unable*' TPD definition, so perhaps the decision lacks somewhat in terms of judicial horsepower. That stated, as evidenced by the quote from the judgment we have referenced twice, there can be no doubt that the judgment endorses the view in *Colella* that an '*unable*' TPD definition is concerned with the capacity for an ETE job, not the availability and accessibility of same. On this basis, this judgment is certainly one to note.

[1] She contended that the first limb required her to suffer an injury or illness which stops her from doing the actual job she was doing immediately before the injury, and not any job whatsoever. She argued that '*any*' means '*a*' and emphasised the use of the present tense in the expression *'stops… working'*.

[2] The FCA found that the wording in *Colella* was very close to the wording in the present case on the basis the word '*stops*' should be given a meaning synonymous with '*prevents*' and that '*prevented from working in any business etc*' is the same as being '*unable to work in any business etc*'.

[3] See for example *Carroll v United Super Pty Ltd* (NSWSC 2018), *Jones v United Super Pty Ltd* (NSWSC 2016), *Lazarevic v United Super Pty Ltd* (NSWSC 2014) or discussion in *Hellessey v MetLife Insurance Ltd* (NSWSC 2017)

[4] Although note the logic of *Colella* was endorsed in Queensland in the decisions of *Reynolds v Sunsuper Pty Ltd & Anor* (QDC 2016) and *Wilkin v TAL Life Limited & Anor* (QDC 2017)

LIFE AND SUPERANNUATION CASES

Federal Court considers scope of AFCA's powers

QSuper Board v Australian Financial Complaints Authority Limited (FCAFC 2020)

Key Takeaways

In a recent key judgment, the FCA has clarified the ability of AFCA to make conclusions of law. The judgment is likely to have important implications for trustees and life insurers.

Brief Facts

Dr Lam was a member of the QSuperannuation Fund (**Fund**) and had TPD and Death cover. Members of the Fund were all charged generic premiums for cover irrespective of their individual circumstances. This changed in 2016, when the QSuper (**Trustee**) entered into a policy with QInsure Limited under which a member could personalise their cover and alter the amounts of premiums paid (**Policy**). Prior to the effective date of the Policy of 1 July 2016, the Trustee wrote to Dr Lam and advised him of the option of tailored cover and the introduction of occupational ratings for premiums. The Trustee did not, however, inform Dr Lam of whether he would be eligible for an occupational rating or provide him with information on how to change the rating.

Accordingly, after Dr Lam's existing cover for TPD and Death were rolled over to the Policy, he paid premiums at the standard rate. Sometime prior to December 2018 Dr Lam discovered that he qualified for a professional-rated premium, being 60% of the standard premium he had been paying. In order for Dr Lam to change to a professional-rated premium, he was required to make an application and the Trustee would have to approve his application. Neither of these things happened.

In January 2019, Dr Lam requested the Trustee repay him the difference between the standard premiums and the professional premiums. The Trustee refused and Dr Lam lodged a complaint with AFCA. Following a preliminary determination in favour of the Trustee, Dr Lam submitted some additional material and AFCA then reframed his complaint in terms of the obligations under s1017B of the *Corporations Act 2001* (Cth) (**the Act**). That section imposes notice requirements on issuers of financial products where there has been a material change to a matter or significant event which is required to be specified in a Product Disclosure Statement.

Despite the fact that Dr Lam did not apply for a change in rating, AFCA decided the complaint in favour of Dr Lam and found the Trustee should have informed him of his default standard rating, his eligibility for, and the benefits of, a professional rating, along with how to access further information. On this basis, AFCA decided that the Trustee's decision not to refund the difference in premiums was not fair and reasonable and that the Trustee should refund the difference. The Trustee appealed to the Federal Court.

Judgment

The two main issues were as follows: (1) whether AFCA had in fact made a decision that the Trustee had contravened s1017B of the Act, and if so, whether the determination involved a mistake (or an '*error of law*'); (2) if AFCA had made such a determination, whether AFCA had exercised judicial power in contravention of Chapter III of the Constitution.

The Court found that AFCA had not made a decision that the Trustee had contravened s1017B and the notice requirements under that section.

On the second issue, the Court found that even if AFCA had made a decision as to whether the Trustee breached s1017B of the Act, this would not breach Chapter III of the Constitution.

The Court had regard to previous High Court authorities (notably *Breckler*), and found that AFCA, although an administrative body, was entitled to make conclusions of law in making an administrative decision which it was empowered to make under the Act. In the Court's view, this would not be an exercise of judicial power.

Implications

The Court has given a wide interpretation to AFCA's powers and functions. While the Court's comments on whether AFCA can make findings on a conclusion of law may not be strictly binding (as the dispute was determined on other grounds), it is likely that the Court would be inclined to find AFCA could exercise this function if it was disputed in the future. Practically speaking, the Court would approve AFCA making determinations as to whether a breach of legislation has occurred.

Trustees and insurers should ensure that their submissions to AFCA deal with these issues if they arise in a complaint.

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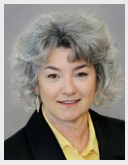

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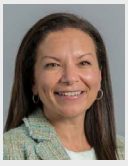

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