

**Universal terms for insurance within  
MySuper – Taking action on  
recommendation 4.13 of the Banking,  
Superannuation and Financial Services Royal  
Commission**

Submission to Financial Services Reform Taskforce,  
The Treasury

**26 April 2019**

## CONTENTS

|   |     |
|---|-----|
| Who we are .....                        | 3   |
| Introduction .....                      | 4   |
| Responses to Discussion Questions ..... | 6   |
| Conclusion.....                         | 344 |

## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)

## Introduction

1. The ALA welcomes the opportunity to have input into the consultation regarding Universal terms for insurance within MySuper.
2. The ALA agrees with ASIC that there is an excessively 'high level of variation in the Total and Permanent Disablement (TPD) definitions used in the insurance products offered through superannuation funds' and that these 'variations can make it difficult for consumers to compare the insurance offerings between funds or to understand insurance offered in superannuation generally'<sup>2</sup>.
3. The improved disclosure through a Key Facts Sheet built into the Insurance in Superannuation Code of Practice (Super Code)<sup>3</sup> is a step in the right direction however that code is not mandatory, and is unenforceable. Furthermore, self-regulation has been demonstrably unsuccessful in the life insurance sector and will fail to deliver members the legal protections needed to ensure value and quality of automatic insurance through MySuper products.
4. The consumer legal protections needed can and should be provided through the already robust statutory framework (and through a properly resourced and vigilant regulator).
5. Specifically, the ALA calls for the following statutory and regulatory reform:
  - a. Life insurance contracts to be protected by the Standard Cover provisions in Part V of the *Insurance Contracts Act 1984* (ICA), as is the case for various types of general insurance policies, thus becoming 'prescribed contracts' which would oblige life insurers to provide a Key Facts Sheet (KFS)<sup>4</sup> clearly informing super fund members if their insurance cover differed from the standard cover<sup>5</sup>.

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<sup>2</sup> ASIC, Report 591, 7 September 2018, p.6

<sup>3</sup> [http://www.aist.asn.au/media/1099546/insurance\\_in\\_superannuation\\_voluntary\\_code.pdf](http://www.aist.asn.au/media/1099546/insurance_in_superannuation_voluntary_code.pdf) (see also the draft FSC Life Insurance Code of Practice 2.0)

<sup>4</sup> Pursuant to s.35 of the ICA and Division 4 of Part IV of the ICA

<sup>5</sup> Standard Cover is prescribed in Part II of the *Insurance Contracts Regulations 1985*

- b. The 'standard cover' for TPD insurance in MySuper should be no more onerous than the definition for early release of super due to 'permanent incapacity'<sup>6</sup>:

*'a member of a superannuation fund or an approved deposit fund is taken to be suffering permanent incapacity if a trustee of the fund is reasonably satisfied that the member's ill-health (whether physical or mental) makes it unlikely that the member will engage in gainful employment for which the member is reasonably qualified by education, training or experience.'*

- c. Where the fund trustee enters into a policy that provides members with more onerous TPD cover (such as multiple claim exclusions, pre-existing condition exclusions, loss of use of limb/eyesight or Activities of Daily Living tests), clear and prominent disclosure must be given in the KFS together with information as to the value of such cover relative to the premium paid.
6. It is submitted that such a system will, if adopted by Treasury, provide members with the disclosure needed to demonstrate the **values proposition** offered by the product – both in terms of **price** and **product**.
7. In terms of **price**, the KFS should clearly demonstrate how the premium cost compares to equivalent cover available in an independently benchmarked retail product for insureds of the same demographic as the member.
8. In terms of **product**, the ALA submits that Treasury should consider the adoption of a tiered system by which trustees can rate their own products.
9. The ALA also points out some insurer practices which we believe should be deemed unacceptable, and we highlight the impacts these processes have on claimants.

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<sup>6</sup> Reg.1.03C of the *Superannuation Industry (Supervision) Regulations 1994*:  
[http://classic.austlii.edu.au/au/legis/cth/consol\\_reg/sir1994582/s1.03c.html](http://classic.austlii.edu.au/au/legis/cth/consol_reg/sir1994582/s1.03c.html)

## Responses to Discussion Questions

### 1. What are the costs and benefits of standardisation of terms and definitions for default MySuper group life policies?

10. The ALA is of the firm view that automatic death and TPD insurance cover in MySuper is an overwhelmingly successful means of mitigating Australian households' serious underinsurance gap. It has been and remains an invaluable and affordable resource for workers who have become disabled and their dependents who often have no other means of managing medical retirement besides resorting to Centrelink.<sup>7</sup>
11. To that end, the ALA supports the public policy objective of s.68AA<sup>8</sup> of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) which makes default TPD cover mandatory in MySuper products.
12. However, the propensity of the insurance industry to water down terms and definitions often leaves some policies worthless to the consumer.
13. The ALA observes that these issues arose in reaction to the post Global Financial Crisis (GFC) 'claims spike' which caused unbudgeted pay outs<sup>9</sup>. That in turn caused a number of rushed group life insurance policy renegotiations which diminished the quality and value of members' default arrangements as the insurers attempted to claw back losses. These renegotiated premium hikes were most flagrant where retail fund trustees engaged their related party to provide group life insurance.
14. The below APRA table reports, in grey, the Group Lump Sum profits for the life insurance industry<sup>10</sup> which demonstrates how the reconfiguration (or claw back) of premiums delivered insurers higher profits in 2015-2017 than before the 2013 claims spike:

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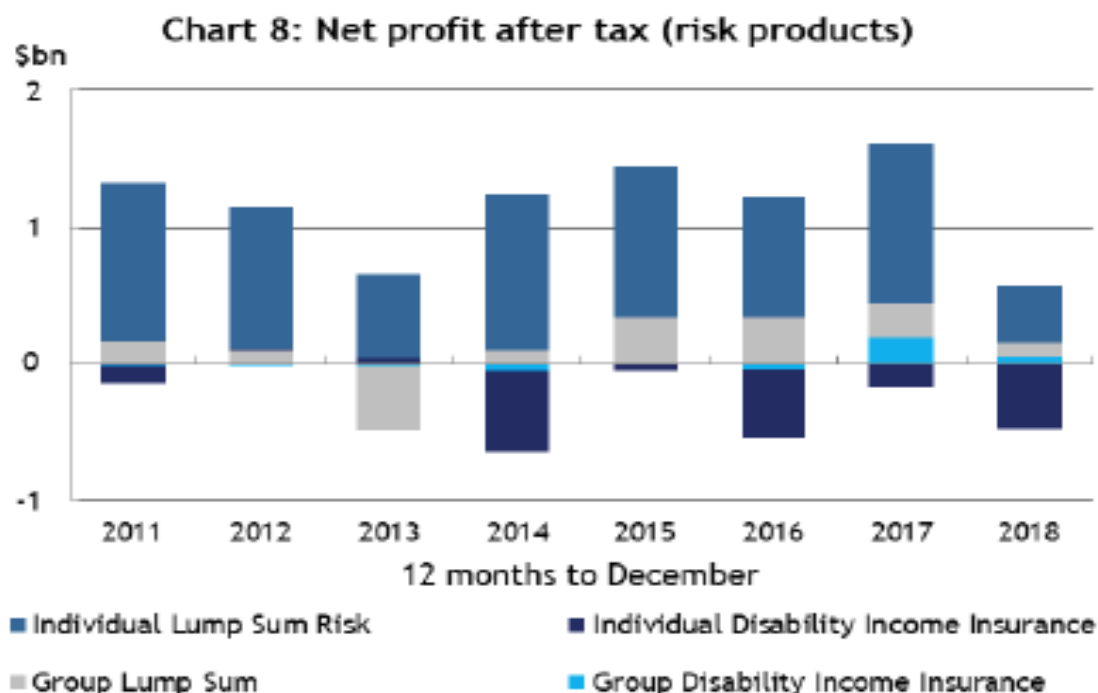
<sup>7</sup> The ALA's submission to the Productivity Commission's 'Superannuation: Assessing Efficiency and Competitiveness' detailed our concerns as to unintended consequences of auto-consolidation of super accounts and opt-out cover for members aged 25 and under is here: [https://www.pc.gov.au/data/assets/pdf\\_file/0003/221493/sub065-superannuation-assessment.pdf](https://www.pc.gov.au/data/assets/pdf_file/0003/221493/sub065-superannuation-assessment.pdf)

<sup>8</sup> [http://www5.austlii.edu.au/au/legis/cth/consol\\_act/sia1993473/s68aa.html](http://www5.austlii.edu.au/au/legis/cth/consol_act/sia1993473/s68aa.html)

<sup>9</sup> Life insurance industry overview General insurance industry overview: [https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKewiFo\\_eg\\_ezhAhVieH0KHajJDnEQFjABegQIBRAC&url=https%3A%2F%2Fwww.apra.gov.au%2Fsites%2Fdefault%2Ffiles%2F14-Insight-Issue-2.pdf&usg=AOvVaw1ehi-VufbTViJ097Zw\\_luW](https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKewiFo_eg_ezhAhVieH0KHajJDnEQFjABegQIBRAC&url=https%3A%2F%2Fwww.apra.gov.au%2Fsites%2Fdefault%2Ffiles%2F14-Insight-Issue-2.pdf&usg=AOvVaw1ehi-VufbTViJ097Zw_luW), p.14

<sup>10</sup> <https://www.apra.gov.au/publications/quarterly-life-insurance-performance-statistics>

Table 1 – APRA life insurance profits chart



15. This knee jerk reaction by life insurers generated media attention and community concern regarding account balance erosion. This issue became a focal point for the Productivity Commission and the Royal Commission which specifically examined questions of sustainability and value of group insurance arrangements within super.
16. In some instances the TPD policy terms and conditions cascaded down to the point of being almost impossible to satisfy. For example, many members' death or TPD cover exclude a claim arising from a condition that existed prior to the commencement of cover (Limited Cover), or only assess the member under a highly onerous Activities of Daily Living (ADL) definition. That commonly occurs where the insurer deems that the member was not working sufficient hours or was working on a restricted basis, determined by reference to an 'at work' or 'active employment' test in the relevant policy.
17. A member does not usually find out about the application of the inferior coverage until their claim is declined, despite paying the same premium as optimally insured members. That is because funds and insurers generally do not know which group members will be deemed to have inferior conditions until after a claim is lodged. That is inadequate:

- a. Firstly, those members with Limited Cover or ADL cover should be paying a much lower premium to reflect the vast inferiority of their coverage. By charging the standard premium funds and insurers are improperly eroding their account balances and that cannot be consistent with s52(7)(c) of the SIS Act which states that a trustee must 'only offer or acquire insurance of a particular kind, or at a particular level, if the cost of the insurance does not inappropriately erode the retirement income of beneficiaries'.
  - b. Secondly, members with such inferior cover ought to have certainty regarding the insurance cover they hold to enable them to determine whether such cover is adequate and if not to seek additional or alternative cover.
18. Blanket underwriting, whereby the same coverage is provided to all members regardless of their personal circumstances, is not the problem per se. It is not feasible to individually underwrite millions of policy holders. However, 'at work' or 'active employment' definitions vary widely from one policy to another, and are often technical or counter-intuitive to the terms' natural English meaning.
19. Work attendance information is readily knowable for trustees, for example by obtaining such data from the participating employer or by deducing it from their earnings based on the default employer contributions received. With such data members could have certainty as to their cover type and not be 'blind-sided' with a denial based on Limited Cover or ADL when they are permanently disabled from suitable work and in need of their insurance payment.
20. It is also concerning that group life insurers often have no idea which individuals they are covering despite receiving premiums, let alone their age and other important individual details (noting insurers often receive only a list of member numbers and dates of birth). Greater visibility and communication between trustees, insurers and employers is needed. Trustees need to do a better job of monitoring these matters and ensuring members are matched to appropriate levels of quality cover suited to their demographic profile. This is no doubt a complex challenge which will require significant investment in technology. The linking of superannuation accounts to tax file numbers can assist and that advantage should be capitalised.



21. In summary:

- a. It is submitted that there are clear benefits of standardising terms and definitions in MySuper insurance products to protect consumers from poor value TPD cover loaded with technical underwriting terms and conditions that may render the product practically useless at time of claim.
- b. However the challenges faced, as illustrated above, can be addressed without resorting to the strict imposition of a universal and mandatory TPD definition. It is submitted that the homogenisation of group TPD insurance would:
  - i. hobble a trustees' ability to tailor much needed insurance cover to the specific demographic needs of its members;
  - ii. likely drive down cover amounts so as to undermine the utility of insurance in super;
  - iii. disincentivise competition, innovation and product development by funds and insurers.
- c. Rather, a trustee can and should be permitted to use its judgement to carefully balance levels of cover, policy terms and price, so as to meet its fiduciary and other legal obligations for its particular membership, as long as it is operating in compliance with a legal framework that protects consumers and is subject to stringent regulatory oversight. To that end, the ALA's submissions focus on the specific reforms needed to deliver the legal framework necessary, which can be done by embedding group life insurance cover in the existing 'prescribed contracts' statutory system.

**2. What terms and definitions would benefit from standardisation? Are there particular terms/definitions where the case for standardisation is stronger or should be prioritised?**

22. Presently, Division 4 of Part IV of the ICA, which obliges an insurer to provide a Key Facts Sheet (KFS) does not apply to life insurance contracts.

23. **The ALA calls for life insurance contracts to be deemed 'prescribed contracts' such as to become covered by Part IV of the ICA.**

24. The ALA's experience is that particularly in the group insurance sector, consumers are often unable to understand the differences in coverage available. The consequences of not having adequate coverage can mean families are placed in extreme financial hardship in the event of unexpected injury or illness. They then become reliant on government welfare and the public health system if they do not have adequate insurance coverage. This leads to significantly reduced quality of life, with hardship becoming ongoing and self-perpetuating.
25. Specific examples of the deviation of group TPD definitions from the SIS Act 'permanent incapacity' early release test are as follows:

**Capacity: Unlikely vs incapable**

26. In 2014, after the 2013 claims spike, AustralianSuper led the industry in departing from the 'permanent incapacity' early release test by contracting with Tal Life Limited to remove the word 'unlikely' and by having regard to a claimant's possible future retraining. Specifically, its TPD definition now requires claimants to demonstrate that they are '*incapable* of ever engaging in any occupation for which [they are] *or may become* reasonably suited by education, training or experience'.
27. The 'incapable of ever engaging' test is more onerous than 'unlikely':
  - a. Members can have claims rejected, even if it is *unlikely* that they will ever engage in employment for which they have been shaped and prepared by their pre-morbid education, training or experience.
  - b. The 'unlikely' test requires an insurer to consider not just the theory that a claimant is physically fit to do particular work, but also the actual likelihood of that person obtaining such work "in the real world"<sup>11</sup>.

That is not to say that the 'unlikely' TPD test is easy to satisfy: The NSW Court of Appeal has considered the 'unlikely' TPD test and found that 'A real chance that a person will return to relevant work, even if it is less than 50%, will preclude an Insured Person being unlikely ever to return to relevant work.'<sup>12</sup>

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<sup>11</sup> *Folan v United Super Pty Ltd* [2014] NSWSC 343 at para [68]

<sup>12</sup> *TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* [2016] NSWCA 68 at [89]

28. It is pleasing to see that some funds, such as CBUS, have resisted any pressure from life insurers to depart from the 'permanent incapacity' test, by retaining the 'unlikely' definition. The fact that such definitions are being retained by a fund with a majority of members in non-sedentary work suggests the viability for doing so across all most if not all MySuper funds.

### **Ongoing care**

29. The current MTAA/Metlife policy contains the following definition for regular and ongoing care. It means the person:

*(a) Is under the regular and ongoing care of a medical practitioner who has given a clear prognosis that the Injury or Illness will continue throughout the life of the Covered Person (including after the expiry of the cover and the commencement of retirement) without any prospect of an improvement which would lead to a return to work (whether or not for reward) in any capacity; and*

*(b) Is complying with reasonable medical advice and treatment; and*

*(c) Has, in our opinion reached the maximum level of medical improvement possible for that Covered Person based on their Injury or Illness.*

30. This represents one of the most severe departures from the relevant SIS Act test and the ALA submits it is a gross deviation from reasonable community expectations of a TPD definition. The chances of a claim being admitted are deleteriously low due to the difficulty a claimant will have procuring such unequivocal medical opinion, which effectively requires that a doctor assure against future improvement. Few doctors would provide such a pessimistic message to any non-terminal patient.

31. The definition also expressly enables the insurer to decline claims where a claimant may be able to do some unpaid work. Compare that to the definition of 'gainful employment' in the SIS Regulations: 'employed or self-employed *for gain or reward* in any business, trade, profession, vocation, calling, occupation or employment'.

### **32. Multiple claim exclusion clauses**

- a. Some trustees prohibit the payment of a TPD benefit if the member is eligible to claim or has received a TPD benefit from another source, despite them having paid

premiums. That is even the case where a member holds cover with the same insurer elsewhere.

- b. See for example the AMP Flexible Super policy exclusion, as follows:

*12. AMP Flexible Super Employee Essential Protection*

*12.5 Employee eligibility*

*An employee Member of an Employer Plan is eligible for Employee Essential Protection if:*

*...*

*(h) the employee does not have existing insurance cover within AMP Flexible Super;*

*(i) the employee has not previously been paid a total and permanent disablement benefit from AMP Flexible Super, or another superannuation or insurance plan.*

- c. The effect of this clause is that AMP can, at the time of claim, retrospectively deem a member ineligible for insurance, despite accepting premiums under two policies for years whilst knowing (or at least having the ability to know) that the member is ineligible for the second benefit.
- d. This suggests that the AMP trustee and insurer specifically engineered its policy to facilitate ‘fees for no service’ by allowing the insurer to collect premiums for a benefit that would never be payable in respect of large numbers of members.<sup>13</sup>
- e. A further example is the following exclusion clause contained in a legacy NGS Super/CommInsure policy:

*Excluded Member Means a Member to whom any of the following applies:*

*(a) A terminal illness, total and permanent disablement, trauma or similar benefit has been paid or is payable or can be claimed in respect of the Member under any insurance policy, whether that policy be owned by the Member or another person (including the Fund or another superannuation scheme);*

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<sup>13</sup> This issue was raised by the ABC in 2018: <http://www.abc.net.au/7.30/banking-royal-commission-to-look-at-superannuation/10063336>

*(b) the Member has received, or is eligible to receive, a benefit, or has had a claim for a benefit admitted, from:*

*i. the Fund; or*

*ii. another superannuation scheme;*

*on the basis the fund or scheme has found the Member to suffer from 'permanent incapacity' or a 'terminal medical condition' under the Superannuation Industry (Supervision) legislation or any legislation which replaces it; or*

*(c) the Member has or was eligible to have cover under any group life policy issued to the Fund and the Member:*

*i. opted out of being covered; or*

*ii. cancelled the cover; or*

*iii. ceased being a member of the Fund.*

- f. Australian Taxation Office (ATO) statistics state that as at 30 June 2018 approximately 39% of workers held more than one super account<sup>14</sup>. As such, this CommInsure policy effectively excludes TPD claims by almost half of its members despite taking non-refundable premiums from them.
- g. We have seen clauses similar to these in other policies currently on sale in the group life market affecting millions of superannuation fund members who are unlikely to have an informed appreciation for the low quality insurance they are paying for.

### **33. Work Status - Active Employment/At Work**

- a. Current iterations of 'active employment' or 'at work', do not demonstrate to consumers, in any practical manner, how claim eligibility may be limited by the need to meet such tests.

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<sup>14</sup> <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/Super-accounts-data/Super-accounts-data-overview/>

- b. The ALA believes that minimum standards should be developed to provide for full cover as long as members meet minimum work attendance.
- c. The ALA submits that the Key Facts Statement (KFS) should do more than provide 'high level' information about the fund – it should actually tell consumers whether they currently meet such a test, thereby giving them certainty as to whether they have a limited or otherwise inferior form of cover. We discuss this matter more in response to Question 3.
- d. The REST case study in the Royal Commission hearings highlighted the effects of this problem for a disabled and vulnerable consumer. In that case the trustee of REST, the FSC member insurer (AIA) and the participating employer (McDonalds) failed to have proper systems in place to determine vulnerable consumers' employment status and other circumstances directly material to each fund member's eligibility for cover.
- e. That case is emblematic of a widespread industry problem. The ALA submits that the KFS should confirm what work status the trustee and insurer is using for underwriting purposes. That is, whether the member meets the underwriting test for 'active employment' or 'at work' by meeting the minimum hours worked per week based on available data, so members can know what cover they actually have instead of having to be retrospectively underwritten at the time of claim.
- f. Furthermore, it is submitted that full cover should be granted where either of the following has occurred:
  - i. a certain qualifying period of unrestricted employment has passed; or
  - ii. a member's compulsory super guarantee contributions made to the fund by the employer is above a threshold set by the fund/insurer.
- g. Neither of the above should be burdensome administratively, as trustees should have the necessary data on their members' employment status, income, contribution periods and amounts.
- h. The ALA submits that the above approach is workable and reasonable if after a qualifying period of employment a pre-existing condition has not caused a member to cease work, or within that qualifying period they are working sufficient hours to

attract a certain level of super guarantee contributions, then any such pre-existing condition's effect on risk is much diminished and the insurer ought to recognise that.

34. In summary, the ALA believes that the 'standard cover' definition of superannuation TPD cover should be based on the current 'permanent incapacity' definition contained in Regulation 1.03C of the SIS Regulations: The Parliament has for decades had in place a fair definition of permanent incapacity which strikes a balance between the needs of those who cannot work due to ill health and the public interest to ensure funds are preserved for the purposes of superannuation and only released in exceptional circumstances.

35. Thus, the terms and definitions that would benefit from standardisation include those related to:

- Capacity
- Ongoing Care
- Multiple Claim Exclusions
- Pre-existing condition exclusions
- Work status
- Activities of daily living
- Retraining clauses

36. Importantly, the ALA advocates that specific matters should be communicated to superannuation fund insureds in their KFS to mitigate against the risk of members not realising and doing something about their sub-standard insurance terms. This is discussed more in response to the next question.

**3. Should trustees be permitted to offer TPD insurances that differs from the definition of 'permanent incapacity' in the SIS Act? Is the current legislated definition of 'permanent incapacity' an appropriate standard definition of TPD?**

37. The ALA submits that trustees should be permitted to offer TPD insurances that differs from the definition of ‘permanent incapacity’ in the SIS Act through the ‘prescribed contracts’ statutory system.
38. However, **the ALA submits that trustees should also be obligated to clearly disclose how their stated coverage compares to the ‘standard cover’ test but also to others in the market.**
39. Above all, the ALA submits that Treasury should adopt the position that the KFS should be an expression of the **values proposition** offered by the product – both in terms of **product** and **price**.
40. In terms of **product**, the ALA submits that Treasury should consider the adoption of a tiered system by which trustees can rate their own products. Table 2 sets out a potential template for this tiered system.

*Table 2 – Example of KFS Product Tiers*

| Quality rating | TPD definition   | What you are covered for |
|----------------|--|--------------------------|
| [REDACTED]     | Consistent with the ‘permanent incapacity’ early release provisions at Regulation 1.03C of the SIS Regulations   | X                        |
| [REDACTED]     | Contains: <ul style="list-style-type: none"> <li>- ‘unable’ test (as opposed to ‘unlikely’)</li> <li>- a test that has regard to possible future education, training or experience</li> <li>- pre-existing exclusion clause</li> </ul> | ✓                        |
| [REDACTED]     | Other definitions (e.g. Activities of Daily Living, Everyday Working Activities, loss of use of limbs/sight, multiple benefit exclusions)  | ✓                        |



41. The ALA argues that having a clearly laid out, consumer tested tiering system for product description within the KFS would enable a member to clearly see where their TPD cover sits within that comparison.
42. In terms of **price**, the KFS should clearly demonstrate how the premium cost compares to equivalent cover available in an independently benchmarked retail product for insureds of the same demographic as the member.
43. Further, **the ALA calls for the KFS to express the value proposition of the cover by reference to claims paid versus premiums received as compared to the industry standard.**
44. The ALA submits that existing data collection processes for claims paid ratio could be utilised as the expression of this part of the KFS.
45. Table 3 below is derived from APRA's Insurance Claims and Disputes statistics report<sup>15</sup>.

*Table 3 - Claims paid ratio by cover type and distribution channel*

|          | Individual Advised | Individual Non-Advised | Group Super | Group Ordinary |
|----------|--------------------|------------------------|-------------|----------------|
| Death    | 41%                | 28%                    | 81%         | 70%            |
| TPD      | 42%                | 26%                    | 73%         | 30%            |
| Trauma   | 61%                | 39%                    | n/a         | 68%            |
| DII      | 66%                | 72%                    | 87%         | 56%            |
| CCI      | n/a                | 24%                    | n/a         | *              |
| Funeral  | n/a                | 23%                    | n/a         | n/a            |
| Accident | 26%                | 49%                    | n/a         | n/a            |

46. The ALA submits that, in the tiering system, the individual product offering could be compared to industry data such as that contained in Table 2, to demonstrate whether the product sits above or below industry averages in its payouts across products.
47. Additionally or alternatively, collected industry data about specific insurers, such as that which can be found on ASIC's MoneySmart website<sup>16</sup> could provide the basis for product comparison.
48. The ALA accepts that an improved disclosure regime is not a panacea for the issues related to definitions within insurance products, given the high levels of consumer disengagement. However the ALA submits that any level of greater consumer engagement that could be

<sup>15</sup> [https://www.apra.gov.au/sites/default/files/life\\_insurance\\_claims\\_and\\_disputes\\_statistics\\_june\\_2018.pdf](https://www.apra.gov.au/sites/default/files/life_insurance_claims_and_disputes_statistics_june_2018.pdf), Table 3, p.7

<sup>16</sup> <https://www.moneysmart.gov.au/tools-and-resources/calculators-and-apps/life-insurance-claims-comparison-tool>

achieved by efforts to spell out the values proposition of a policy would be valuable, and would help to weed out inappropriate elements which currently pervade the industry.

49. Improved disclosure and member communications are therefore an important part of the holistic solution needed to address the industry problems under discussion.
50. It also remains crucial that any negotiation process engaged in by a trustee on behalf of its members can guarantee sufficient transparency and accountability.
51. In making recommendations related to group life policies, the Royal Commission made particular note of the role of vertical integration in poor decision making by trustees. Recommendation 4.14<sup>17</sup> reads as follows:

*APRA should amend Prudential Standard SPS 250 to require RSE licensees that engage a related party to provide group life insurance, or who enter into a contract, arrangement or understanding with a life insurer by which the insurer is given a priority or privilege in connection with the provision of life insurance, to obtain and provide to APRA within a fixed time, independent certification that the arrangements and policies entered into are in the best interests of members and otherwise satisfy legal and regulatory requirements.*

52. The ALA submits that, whilst the acceptance of recommendation 4.14 would assist in making trustee negotiations more open and transparent, it is narrow in its application due to it being limited to vertically integrated insurance arrangements.
53. The ALA calls for greater clarity and consistency on ALL MySuper fund trustee insurance tenders/negotiations, to ensure that legal compliance and the best interests of members are served.
54. The ALA submits that this is an area in which more specific consultation by Treasury may be beneficial.

### **Inappropriate Practices**

55. Whilst the ALA advocates for flexibility by trustees in TPD product delivery, it is submitted that some benefit designs are so aberrant in design and onus from the early release provisions that they should be banned. The multiple claim exclusion clauses and regular medical treatment

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<sup>17</sup> <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>, p.34

conditions detailed above are cases in point. Another important case in point is the TPD instalment system employed by SunSuper in its TPD Assist product.

56. Our concerns with this product are shared by other consumer advocates. For example, Maurice Blackburn in its submission to the Royal Commission<sup>18</sup> wrote:

*A move toward incremental payments rather than lump sum TPD payments, requiring claimants to undergo ongoing medical and other checks over a period of years. For example, Sunsuper for their TPD Assist policy (effective 1/7/16) pays the lump sum over five years, requiring the claimant to reapply each year. This often deprives seriously ill and injured people the opportunity to effectively retire debt and pay for much needed medical treatment. (p.8)*

57. Maurice Blackburn went on to conclude that, regardless of its legality, the main reason for this policy to be in place is to delay and confound the claims process, to increase opportunities to avoid making the payout.

58. The human impact of this insurer's choice of payout methodology is best described via case studies. The ALA submits two below for consideration:

#### **Case study 1**

Following an injury, our client, a career baker, after many months finally persuaded Sunsuper to accept his claim for TPD.

Under any other MySuper automatic insurance scheme, our client would have received a lump sum payout from the insurer, and set about paying down debt, or investing the funds to provide for his and his family's future.

Due to the fact that his insurance was through Sunsuper's TPD Assist product, our client was only paid an initial instalment of \$40,000.

Following receipt of the instalment, he received a telephone call from Sunsuper offering him rehabilitation training/vocational assistance, and asking him what work he wanted to get into in the future so they could help him.

Our client responded that he had been a baker for the past 20 years and has never done anything else – and so he wasn't sure what they wanted him to say. He told the fund he was planning on maybe doing some Uber driving as he is a single dad and cannot get by on the instalment received from the fund.

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<sup>18</sup> <https://www.mauriceblackburn.com.au/media/4018/maurice-blackburn-submission-to-the-financial-services-royal-commission.pdf>

He was told by Sunsuper that if he works as an Uber driver, or in any type of work during this next 12 months he will be voiding the claim.

He reported feeling pressured by the fund to make a quick decision in relation to his future.

Our client is now stuck. He cannot return to his career, and he cannot work to supplement the meagre payout instalments.

### **Case study 2**

Our client was a fruit picker and cleaner, who was injured at work in July 2016, suffering multiple spine and rib fractures.

When her savings ran dry in 2017 she made a claim through Sunsuper for a TPD lump sum, unaware the company had recently changed its policy to make payments in instalments.

The impact of this on the client is best expressed in her own words:

*"Every 12 months I have to undergo more tests to prove that I do indeed have this existing condition. I think it's absolutely disgusting and inhumane and a total injustice that a person who has a permanent injury is treated this way. They are totally aware that I'm not going to get better, that my future prognosis is poor and I will eventually need surgical intervention."*

Our client is now under financial stress with a dependent son, but isn't eligible for government assistance because she has a de facto partner.

She describes herself as a 'broken person'.

59. As the policy is written, instalments continue for six years, so a person only gets one sixth of what they would normally get in a lump sum. They are held in this system of having to obtain continuous medical assessments and prove over and over that they are disabled. This is humiliating and degrading. These are people who have already proved that they are totally and **permanently** disabled.
60. From our perspective as consumer advocates, it is difficult not to draw the conclusion that, in adopting this payout method, AIA thinks that it will be more profitable to pay people out over time because money devalues over time, and that some people will just give up and abandon their claims.
61. For those claimants suffering conditions such as terminal cancer and chronic heart disease it is likely many will die and not receive the balance of their instalments.

62. The ALA believes that, for consumer-unfriendly policy settings such as these, it is not enough to merely make them transparent on a KFS – they should be banned.
63. To understand where this type of policy provision falls short of legal requirements, it is helpful to revisit the reason that insurance within superannuation exists.
64. The Productivity Commission, in their final report of their inquiry into superannuation<sup>19</sup> notes that:

*The broad objective of superannuation is to provide an income source in retirement. In some circumstances, there is some alignment between this objective and the objectives of insurance – life, total and permanent disability (TPD) and income protection (IP) – in superannuation.*

- *For TPD cover, insurance contributes to retirement income, as it insures against the risk that a member’s accumulation phase is cut short.*
  - *For life cover, the links are less clear, except to the extent that insurance payouts can fund the retirement of a dependent partner.*
  - *For IP cover, there may be a link where a Superannuation Guarantee contribution component is deducted from the payment, or if the payment assists the worker to re-enter the workforce (for example, through facilitating rehabilitation programs).*
65. If the core purpose of insurance through superannuation is primarily to ensure that one’s income source in their post-work era is maintained in the event of injury or death, how can this be reconciled with a claims payout methodology that drip feeds the payout over time?
66. The ALA submits that SunSuper’s TPD Assist claims payment methodology effectively converts a TPD claim (a lump sum payment designed to ensure appropriate post-work income) to an Income Protection claim (instalment payment for temporary incapacity).
67. On this basis, we would argue that this policy is:
- not consistent with Sole Purpose Test; and

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<sup>19</sup> <https://www.pc.gov.au/inquiries/completed/superannuation/assessment/report/superannuation-assessment.pdf>, p.364

- not compliant with *Superannuation Industry (Supervision) Regulations 1994* - regulation 4.07D<sup>20</sup>

68. Section 62(1)(a) of the SIS Act<sup>21</sup> spells out the **core purposes** within the Sole Purpose Test:

*(1) Each trustee of a regulated superannuation fund must ensure that the fund is maintained solely:*

*(a) for one or more of the following purposes (**the core purposes**):*

*(i) the provision of benefits for each member of the fund on or after the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged (whether the member's retirement occurred before, or occurred after, the member joined the fund);*

*(ii) the provision of benefits for each member of the fund on or after the member's attainment of an age not less than the age specified in the regulations;*

*(iii) the provision of benefits for each member of the fund on or after whichever is the earlier of:*

*(A) the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged; or*

*(B) the member's attainment of an age not less than the age prescribed for the purposes of subparagraph (ii);*

*(iv) the provision of benefits in respect of each member of the fund on or after the member's death, if:*

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<sup>20</sup> [http://classic.austlii.edu.au/au/legis/cth/consol\\_reg/sir1994582/s4.07d.html](http://classic.austlii.edu.au/au/legis/cth/consol_reg/sir1994582/s4.07d.html)

<sup>21</sup> [http://www5.austlii.edu.au/au/legis/cth/consol\\_act/sia1993473/s62.html](http://www5.austlii.edu.au/au/legis/cth/consol_act/sia1993473/s62.html)

*(A) the death occurred before the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged; and*

*(B) the benefits are provided to the member's legal personal representative, to any or all of the member's dependants, or to both;*

*(v) the provision of benefits in respect of each member of the fund on or after the member's death, if:*

*(A) the death occurred before the member attained the age prescribed for the purposes of subparagraph (ii); and*

*(B) the benefits are provided to the member's legal personal representative, to any or all of the member's dependants, or to both; or*

69. Section 62 (1)(b) of the SIS Act spells out the **ancillary purposes** within the Sole Purpose Test

*(b) for one or more of the core purposes **and** for one or more of the following purposes (the **ancillary purposes**):*

*(i) the provision of benefits for each member of the fund on or after the termination of the member's employment with an employer who had, or any of whose associates had, at any time, contributed to the fund in relation to the member;*

*(ii) the provision of benefits for each member of the fund on or after the member's cessation of work, if the work was for gain or reward in any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged and the cessation is on account of ill-health (whether physical or mental);*

*(iii) the provision of benefits in respect of each member of the fund on or after the member's death, if:*

*(A) the death occurred after the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged (whether the member's retirement occurred before, or occurred after, the member joined the fund); and*

*(B) the benefits are provided to the member's legal personal representative, to any or all of the member's dependants, or to both;*

*(iv) the provision of benefits in respect of each member of the fund on or after the member's death, if:*

*(A) the death occurred after the member attained the age prescribed for the purposes of subparagraph (a)(ii); and*

*(B) the benefits are provided to the member's legal personal representative, to any or all of the member's dependants, or to both;*

*(v) the provision of such other benefits as the Regulator approves in writing.*

70. The ALA submits that none of the core purposes (as set out in Section 62 (1)(a)) assumes anything other than a lump sum payout. This section of the Act does not contemplate instalment payouts.
71. The TPD Assist claim payment methodology, then, because it is not a lump sum, could only be an ancillary purpose, at best.
72. Additionally, the TPD Assist claim payout methodology is not compliant with SIS Regulation 4.07D<sup>22</sup>. This regulation requires that:

*A trustee of a regulated superannuation fund must not provide an insured benefit in relation to a member of the fund unless the insured event is **consistent with a condition of release** specified in item 102, 102A, 103 or 109 of Schedule 1.*

73. The relevant condition of release, in the case of TPD is Regulation 1.03C<sup>23</sup>, which reads:

*For subsection 10(1) of the Act, a member of a superannuation fund or an approved deposit fund is taken to be suffering permanent incapacity if a trustee of the fund is reasonably satisfied that the member's ill-health (whether physical or mental) makes it unlikely that the member will engage in gainful employment for which the member is reasonably qualified by education, training or experience.*

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<sup>22</sup> [http://classic.austlii.edu.au/au/legis/cth/consol\\_reg/sir1994582/s4.07d.html](http://classic.austlii.edu.au/au/legis/cth/consol_reg/sir1994582/s4.07d.html)

<sup>23</sup> [http://classic.austlii.edu.au/au/legis/cth/consol\\_reg/sir1994582/s1.03c.html](http://classic.austlii.edu.au/au/legis/cth/consol_reg/sir1994582/s1.03c.html)



74. The ALA would also argue that the TPD Assist claim payout methodology is not compliant with s.68AA(2),(3) and (4)<sup>24</sup> of the SIS Act, as it is a benefit *redesign* which falls outside the envisaged notion of ‘reasonable condition’ on an entitlement to the permanent incapacity benefit<sup>25</sup>.
75. APRA has given the industry some guidance<sup>26</sup> in relation to this matter. In answer to a Frequently Asked Question, namely:

*FAQ 68: Is it possible for an RSE to continue to have a permanent incapacity (TPD) definition which is a combination of the definition in the SIS Regulations plus another test, in order to be eligible to be paid a TPD benefit?*

76. APRA offered the following guidance:

*The definition of TPD under the insurance contract **may** differ to the definition of permanent incapacity under the SIS Act, depending on the contract negotiated between the trustee and the insurer. Such a difference will not contravene the SIS Act if the difference is not inconsistent with the condition of release under SIS Reg 1.03C. As outlined in the explanatory statement to Select Legislative Instrument 2013 No. 26, compliance with SIS Reg 4.07D is not intended to require the strict adoption of the SIS Regulations definition of permanent incapacity so long as it is consistent with the condition of release.*

77. The use of the term ‘may’ in the first line provides insurers with significant scope. However, as discussed above, the conditions of release of funds in a superannuation account on the basis of permanent incapacity assume a one-off payout of the balance of the fund, including payments from any TPD payout. Incremental payment structures are inconsistent with the conditions of release.
78. It is noted that SunSuper justifies its TPD Assist product on the basis that its telephone survey of TPD recipients in 2015 found that 36% of successful claimants were able to return to work after recovering from a disability<sup>27</sup>. However it is noted that:

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<sup>24</sup> [http://www5.austlii.edu.au/au/legis/cth/consol\\_act/sia1993473/s68aa.html](http://www5.austlii.edu.au/au/legis/cth/consol_act/sia1993473/s68aa.html)

<sup>25</sup> See *Maxwell v Highway Hauliers Pty Ltd* (2014) 252 CLR 590; [2014] HCA 33

<sup>26</sup> <http://www.gtm.apra.gov.au/Super/Pages/Prudential-Standards-Frequently-Asked-Questions.aspx#faq68>

<sup>27</sup> <https://www.investmentmagazine.com.au/2015/08/sunsuper-reveals-tpd-is-not-permanent-for-one-third-of-claimants/>

- a. the survey appears to have been conducted in house rather than by an independent body and therefore was not at arm's length which may have compromised the data;
- b. we do not know what specific questions were asked of the consumers or whether they were leading questions which may have compromised the data;
- c. only 3% of those surveyed had returned to full time work;
- d. the data did not state whether the 'work' which consumer had returned to was of such a nature that it would not be relevant to the particular TPD test. For example:
  - i. volunteer work<sup>28</sup> or work that was not capable of producing 'a living'<sup>29</sup>,
  - ii. casual or intermittent work<sup>30</sup>,
  - iii. a special light duties job<sup>31</sup> with accommodations for pain relief<sup>32</sup>,
  - iv. work secured by virtue of new education, training or experience<sup>33</sup>;
- e. the data did not suggest any health or financial benefit for members if they were to receive TPD instalments rather than a lump sum.

79. The ALA therefore remains concerned as to the veracity and value of that so called research.

80. In summary, the ALA believes that claims payment methodologies for TPD claims, which provide for anything other than a lump-sum payout are:

- not consistent with the Sole Purpose Test;
- not consistent with regulation 407(D);

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<sup>28</sup> *Hastings v Secretary of the Department of Social Security* (1997) 14 ALD 181 at [32]

<sup>29</sup> *Giles v National Mutual Life Association of Australasia Ltd* (1986) 4 ANZ Insurance Cases 60 – 751 at p74,530

<sup>30</sup> *Hannover Life Re of Australasia Ltd v Dargan* [2013] NSWCA 57 at [46]

<sup>31</sup> *Cavill Power Products Pty Ltd v Royle* [1992] 42 IR 229; *Dolton v State Authority Superannuation Board* [1995] NSWIRC at [159]

<sup>32</sup> *Sayseng Kellogg Superannuation Pty Ltd* [2007] NSWSC 583 at [69]

<sup>33</sup> *Fernance v Wreckair Pty Ltd (No 2)* (1992) 43 IR 300 at [329]; *Halloran v Harwood Nominees Pty Ltd* [2007] NSWSC 913 at [36]

- not in members' best interests as per s.52 SIS Act covenants<sup>34</sup>; and
- based on unsound research.

81. On the issue of multiple benefit exclusion clauses, the ALA submits that whilst such clauses have a sound public policy rationale under income protection policies, they should be banned from TPD policies. We suggest this because:

- TPD, death and other contingency-based insurance products are not indemnity policies; and
- of the lump sum underinsurance issue Australians have as they carry world record levels of household debt<sup>35</sup>.

#### **4. Should the definition of TPD allow for rehabilitation or return to work initiatives? Why/Why not?**

82. The ALA notes the findings of the Parliamentary Joint Committee on Corporations and Financial Services (the PJC) inquiry into options for greater involvement by private sector life insurers in worker rehabilitation.<sup>36</sup> This inquiry firmly rejected a proposal by the Financial Services Council (FSC) that life insurers should have an expanded role in the rehabilitation of insured persons. Specifically, the PJC stated:

*The committee has particular concerns about the FSC's answer regarding the provision of discretionary rehabilitation medical treatment. In the committee's view, a system that operates at the discretion of life insurers would appear to provide even less equity of access than a risk-rated system. A risk-rated insurance system at least has identifiable processes that can be held to account by dispute resolution systems, regulators and the courts. The FSC's discretionary proposal, however, has no equity of access and no accountability.*

And

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<sup>34</sup> [http://www5.austlii.edu.au/au/legis/cth/consol\\_act/sia1993473/s52a.html](http://www5.austlii.edu.au/au/legis/cth/consol_act/sia1993473/s52a.html)

<sup>35</sup> <https://www.abc.net.au/news/2018-01-18/household-debt-extremely-elevated-and-tipped-to-grow/9340880>

<sup>36</sup> [https://www.apf.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/Rehabilitation/Report](https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Rehabilitation/Report)

*The committee also has concerns about AIA's suggestion that the current prohibition on life insurance in the health sector is a legislative anomaly. Rather, the evidence from the Department of Health indicates that the difference between risk-rated and community-rated insurance stems from the fact that Medicare was designed as a system of universal access for Australians.*

83. The ALA has concerns regarding instances where insurers have sought to use independent medical examiners to contact claimants' treating doctor(s), ostensibly to discuss treatment issues. The ALA considers such conduct clearly inappropriate for an independent medical examiner appointed by an insurer (and generally briefed with a copy of the Expert Witness Code of Conduct in anticipation of legal proceedings) to seek to involve himself or herself in discussions between the claimant client and their treating physicians concerning their treatment.<sup>37</sup> That would amount to a breach of various statutory provisions<sup>38</sup>.
84. The ALA submits that the FSC Life Insurance Code of Practice should set standards that elaborate on, exceed or clarify this controversial area of law by clearly stating that FSC members are not permitted to and will not provide funding for or otherwise facilitate rehabilitation medical treatment whether as a claim requirement or otherwise.
85. The ALA also has significant concerns about the increasing use of life insurance policies such as the SunSuper Pty Ltd/AIA Australia Limited TPD Assist policy which purports to allow AIA to decline a TPD claim where it decides the claimant has not fully participated in 'an Occupational Rehabilitation Program' to AIA's satisfaction. An ordinary member of the public could not be expected to know the difference between 'an Occupational Rehabilitation Program', which is not prohibited by statute, and 'discretionary rehabilitation medical treatment' which is prohibited. It is submitted that the FSC Code should set standards that elaborate on, exceed or clarify this important distinction.
86. It is the ALA's firm belief that if any rehabilitation programs are to be permitted, despite the above objections, the standards for lawful rehabilitation programs (i.e. programs that do not involve medical treatment) should be no less favourable to consumers than the discretionary

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<sup>37</sup> The ALA will provide the details of a specific ongoing litigation matter on these facts subject to the consent of AIA Australia Limited

<sup>38</sup> *Life Insurance Act 1995, Private Health Insurance Act 2007, Private Health Insurance (Health Insurance Business) Rules 2013, Health Insurance Act 1973 and Superannuation Industry (Supervision) Regulations 1994* (Cth)

rehabilitation medical treatment would be if the FSC's law reform proposal had been recommended by the PJC. Therefore, consistent with the representations of Mr Allan Hansall of the FSC to the PJC<sup>39</sup> the FSC Code should state that such rehabilitation programs should be subject to the following minimum standards:

- a. It will only be proposed 'when the [rehabilitation] is cost effective for both the customer and the insurer';
- b. Any rehabilitation proposal 'would always be arranged through the customer's treating physician, and would be dependent on the customer's agreement and participation';
- c. 'No consumer will be forced to receive [rehabilitation] they don't want'; and
- d. Any patient who does not wish to receive [rehabilitation] 'will not have their income protection and TPD insurance payments stopped'.

**5. Is there a need for universal insurance exclusions in MySuper products? Why/Why not? If yes, should exclusions be standardised across all types of insurance provided within MySuper products? What standardised exclusions would deliver the greatest benefit to consumers?**

87. Please refer to our response to Question 2.

**6. What lead time would be required for the industry to implement standardised terms, definitions and exclusions if this reform was implemented?**

88. The ALA submits that, ideally, the standardised terms, definitions and exclusions should be implemented in time to correspond with the release of revised, (hopefully enforceable) industry codes of practice, scheduled for 2021.

**7. To what extent would standardising terms, definitions and exclusions across MySuper products impact the price of premiums?**

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<sup>39</sup> [https://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/49094fee-6d97-4fb3-b5b2-18e6f649e791/toc\\_pdf/Parliamentary%20Joint%20Committee%20on%20Corporations%20and%20Financial%20Services\\_2018\\_06\\_19\\_6247\\_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/49094fee-6d97-4fb3-b5b2-18e6f649e791/0000%22](https://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/49094fee-6d97-4fb3-b5b2-18e6f649e791/toc_pdf/Parliamentary%20Joint%20Committee%20on%20Corporations%20and%20Financial%20Services_2018_06_19_6247_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/49094fee-6d97-4fb3-b5b2-18e6f649e791/0000%22) at page 25

89. Please refer to our responses to Question 3 above.
90. We have suggested that the KFS should disclose clearly to members the value proposition of their policy, including:
- Data in relation to premiums paid vs industry benchmarks or averages; and
  - Information in relation to the ranking or tier of the TPD definitions in their policy.
91. The ALA submits that the adoption of this suggestion would allow the market to retain flexibility in their choice of definitions and pricing across the complex array of different Australian workplaces and occupations - whilst ensuring consumers enjoy greater transparency and accountability.

**8. Would the impact on premiums outweigh the benefits of standardising the definition of TPD, or other definitions, terms and exclusions?**

No response to this question.

**9. How could the impact on the price of premiums be mitigated, without incentivising the creation of 'junk insurance policies'?**

92. As mentioned earlier, the quality of TPD definitions in group policies have reduced some superannuation funds' offerings to 'junk insurance'. That is, collecting premiums from policy holders while providing little to no genuine prospect of insurance coverage in the event of serious injury or illness<sup>40</sup>.
93. The ALA believes that the determinants or enablers of junk insurance would include:
- Trustees failing to take seriously the primacy of their obligation to the best interests of members over other considerations;
  - An ineffective industry code of practice;

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<sup>40</sup> See for example: <http://www.abc.net.au/news/2018-06-03/sunsuper-insurance-members-sue-qld/9825324>; <https://www.afr.com/personal-finance/superannuation-and-smsfs/rest-industry-super-withheld-paraplegic-womans-disability-insurance-20160520-goziy>; <https://www.smh.com.au/business/banking-and-finance/cba-fought-employee-with-ms-20160401-gnvwo9.html>; <http://www.abc.net.au/news/2017-07-11/amp-accused-of-dragging-out-disability-insurance-claims/8698278>; <https://www.afr.com/business/insurance/prepare-for-life-insurance-horror-show-20180909-h15414>

- A disengaged/uneducated/submissive consumer base;
  - The process is tarnished through actual or perceived conflicts of interest – for example through vertically integrated product choice<sup>41</sup>.
94. The ALA submits that as much can be learned from looking at good practice, as can be learned from looking at misconduct.
95. CBUS is an example of good practice in this area:
- The trustees have negotiated prime TPD terms which prioritise the needs of their members. This includes ensuring that the definition of TPD is essentially in line with the ‘permanent incapacity’ early release benchmark, and there is no attempt to dilute the definition or to circumvent consumer friendly jurisprudence.
  - The terms of the coverage are matched to the needs of the industry groups with which they work.
  - The trustees negotiated with a non-affiliated corporate entity life insurer in a transparent manner, without the conflicts of interest inherent in a vertically integrated insurance deal.
96. The ALA believes that philosophically, there should be no immediate correlation between low premiums and an absence of junk insurance. If the trustees are taking their duty to the members seriously, and the industry is doing everything it can to not cause another Royal Commission, purveyors of junk insurance should be driven out of the industry.

**10. If terms, definitions and exclusions for MySuper products were standardised, how long would repricing of premiums take to flow through to members?**

97. The ALA believes that this is a matter for industry.

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<sup>41</sup> Although it is hoped that additional regulatory standards arising from the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* and Commissioner Hayne’s recommendation 4.14 will address this problem.

**11. To what extent would standardised terms, definitions and exclusions for MySuper products improve consumer understanding of insurance in superannuation? What particular changes would deliver the greatest benefits to consumer outcomes?**

98. Please refer to our response to Question 3.
99. The ALA believes that transparency in clearly laying out the values proposition of each product in the KFS would go some way to improving consumer understanding of insurance in superannuation.
100. There is no reason why products which represent a poor value proposition for consumers should continue to exist.
101. Clearer information and consumer awareness leads to better competition. To this end, it is important that statistical and comparative data clearly names the super funds and their insurers, instead of hiding behind industry-wide data, so consumers can make an informed choice.

**12. Are there other ways to improve consumer understanding of insurance in superannuation without standardising terms/definitions/exclusions?**

No response to this question.

**13. Should maximum, minimum or set levels of cover be prescribed for MySuper products? Why/Why not? Should these apply to all types of insurance provided within MySuper products?**

102. Section 51 (7) of the SIS Act sets out the covenants which Trustees must adhere to in negotiating insurance coverage as part of superannuation packages. It reads as follows:

*7) The covenants referred to in subsection (1) include the following covenants by each trustee of the entity:*

*(a) to formulate, review regularly and give effect to an insurance strategy for the benefit of beneficiaries of the entity that includes provisions addressing each of the following matters:*

*(i) the kinds of insurance that are to be offered to, or acquired for the benefit of, beneficiaries;*

*(ii) the level, or levels, of insurance cover to be offered to, or acquired for the benefit of, beneficiaries;*



*(iii) the basis for the decision to offer or acquire insurance of those kinds, with cover at that level or levels, having regard to the demographic composition of the beneficiaries of the entity;*

*(iv) the method by which the insurer is, or the insurers are, to be determined;*

*(b) to consider the cost to all beneficiaries of offering or acquiring insurance of a particular kind, or at a particular level;*

*(c) to only offer or acquire insurance of a particular kind, or at a particular level, if the cost of the insurance does not inappropriately erode the retirement income of beneficiaries;*

*(d) to do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success.*

103. The ALA submits that the covenants outlined in s.51 (7) are adequate, and therefore it would be unnecessary to legislate for the setting of benefits. Trustees are already bound to act in the best interests of members. This requirement applies to trustees when they are negotiating the price and coverage of the insurance contracts that will form part of their superannuation fund offerings.
104. In relation to capping premiums, the ALA believes that a proposal to impose a cap on premiums as a percentage of salary would be appropriate in principle. However, any cap needs to allow sufficient flexibility for different demographic cohorts within each fund's membership. Such arrangements should also have flexibility to accommodate different workplace practices, such as government organisations that contribute more than the Superannuation Guarantee (SG) rate of 9.5%.
105. In relation to the setting of coverage, the ALA observes that one significant advantage many industry funds have is that they are specialised to a particular class of employees (e.g. construction workers (CBUS), healthcare workers (HESTA) transport and delivery workers (TWUSuper)). Hence that the pool of beneficiaries share characteristics around which targeted cover may be designed. It is important that any change can retain this capacity for tailoring to the needs of an industry. This would be lost where funds' membership bases become large and generalised. That problem would likely be exacerbated, for example, by the introduction of the

Productivity Commission's 'best in show'<sup>42</sup> proposal which would drastically broaden and vary the membership base of the top performing funds.

106. On the basis of the above, the ALA believes that a statutory requirement under s68AA of the SIS Act would be an appropriate means of enacting a clear obligation on Trustees to ensure that their members are defaulted to statistically appropriate rates for insurance required to be offered through the fund. This should be followed by the development of clear minimum standards through a regulatory guide.

**14. What factors should be taken into account if a minimum, maximum or set level of cover were to be prescribed?**

No response to this question.

**15. Are there any unintended consequences of mandating a minimum, maximum or set level of cover for MySuper products?**

No response to this question.

**Conclusion**

107. The ALA welcomes the opportunity to provide a submission in relation to the consultation regarding Universal terms for insurance within MySuper. The ALA would also welcome the opportunity to engage further with you in relation to these matters should the need arise.



Josh Mennen

**Australian Lawyers Alliance**

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<sup>42</sup> Draft Report 'Superannuation: Assessing Efficiency and Competitiveness' 29 May 2018 (<https://www.pc.gov.au/inquiries/current/superannuation/assessment/draft>)