Submission to the PJC Inquiry into Options for Greater Involvement by Private Sector Life Insurers in Worker Rehabilitation.

May 2018

Maurice Blackburn Lawyers submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into options for greater involvement by private sector life insurers in worker rehabilitation.

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 31 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Superannuation and Insurance and Financial Advice Disputes practice has represented and assisted thousands of claimants for over 20 years. We have the largest practice of its kind in Australia and currently have approximately 125 staff nationally working in the team.

At any one time we provide legal assistance to approximately 3500 to 4000 clients. Much of this work is assisting them with the complex and challenging processes involved in making an insurance claim under their superannuation scheme membership or retail insurance policy.

On a daily basis we witness the difficulties experienced by our clients when unexpected illness or injury forces them out of the workforce, and we also see the devastating impact of unfair decision making by life insurers.

Our Submission

Insurance is primarily a financial product. The primary purpose of insurance is financial protection, not to fulfil a rehabilitatory or medical role.

From this we can extrapolate that the role of the insurer is as a provider of financial protection, not as a provider of rehabilitation or medical services.

The primary function of private sector insurers is to derive a profit. In our experience, life insurers do not recommend initiatives that will jeopardise this. It is in their financial interest to avoid payment and, in our experience, they are willing to place pressure on claimants to achieve this outcome.

Maurice Blackburn concludes therefore that there must be other reasons that private sector insurance companies are seeking greater access to this process and that the life insurers' seemingly altruistic desire to assist with expediency in the claims process should be treated with caution.

We urge the Committee, in considering this proposal, to seek to understand the implicit motivations driving the proposed change, and the potential consequences on scheme clarity, the purity of medical opinion, and the peace of mind of ill and injured claimants.

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Maurice Blackburn Responses to Terms of Reference (ToR)

ToR (a) The interaction of Income Protection (IP) insurance and Total and Permanent Disability (TPD) insurance with State, Territory, and Commonwealth legislative and regulatory frameworks

- Maurice Blackburn submits that insurance is primarily a financial product.
- The report of the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the Life Insurance industry tells us that Life Insurance: "… *has a noble purpose in providing financial protection to policyholders in times of need and financial distress*"[1].
- From this definition, we can see that the primary purpose of insurance is financial protection, not to fulfil a rehabilitatory or medical role.
- From this we can extrapolate that the role of the insurer is as a provider of financial protection, not as a provider of rehabilitation or medical services.
- Maurice Blackburn submits that any direct involvement by private sector life insurers would need to proactively take into account attempts at RTW through other national and state/territory frameworks.
- Maurice Blackburn believes that it is important to recognise that many of the abovementioned regimes (Medicare, government employment schemes, the National Disability Insurance Scheme) have no external profit motive.
- Maurice Blackburn also draws the Committee's attention to the following:
    - If committing to greater involvement by private sector life insurers in worker rehabilitation, the Committee would need to be conscious of privacy requirements in sharing client information across regimes.
    - Safeguards already exist to prevent against 'double dipping'. Lawyers are required to include necessary reimbursements to insurers during settlement discussions, following a payout.
    - Service providers such as the NDIS are moving to put choice and control back into the hands of its recipients, in terms of how resources are managed to best fulfil their stated goals. Any involvement by private sector life insurers must continue in this direction. Attempts to recentralise the power base with provider organisations would be a retrograde step.
    - RTW processes are currently working well. For example, a recent review of the RTW system in Queensland has found that the scheme is profitable for insurers, has low disputation rates, low premium rates and a RTW rate of over 92%[2]

[1] Parliamentary Joint Committee on Corporations and Financial Services inquiry into the Life Insurance industry (March 2018), p.ix
[2] *Second review of the workers' compensation scheme, Issues Paper*. Queensland Office of Industrial Relations, April 2018. P.16

- Maurice Blackburn is concerned that the current proposal may inadvertently set up two systems:
    - The current workers' compensation regime, which involves state and federal frameworks establishing and enabling the conditions which underpinning RTW processes, and
    - A parallel regime in which private sector insurers determine the worthiness of claims and the processes and conditions for RTW.

ToR (b) The interaction of IP and TPD insurance products with social security benefits in the context of the *Life Insurance Act 1995*, *Health Insurance Act 1973* and *Private Health Insurance (Prudential Supervision) Act 2015*

No response to this Term of Reference

ToR (c) How benefits available under continuous disability policies, such as TPD, could be utilised to provide assistance and incentives to people returning to work, such as covering the cost of professional nursing care and other rehabilitation related expenses.

- Maurice Blackburn argues that the status quo should be maintained in relation to regulatory restrictions precluding life insurers from directly funding medical and rehabilitation services.
- Maurice Blackburn agrees that early intervention is vital in patient recovery and enabling an early return to work. We further agree that an early return to work is beneficial to the holistic wellbeing of the injured person.
- It would be tempting for the Committee to conclude that ANY mechanism which promotes expediency in the provision of supports aiding rehabilitation and an early return to work would be a positive thing. We argue, however, that there are countervailing dangers associated with this conclusion.
- There are several reasons why the existing restrictions on private sector life insurers providing worker rehabilitation services exist. These include:
    i. Private sector life insurers are for-profit entities. They need to balance their duty of care to their customers with their need to provide an appropriate return on investment to their shareholders. Insurers save money on claims when claimants recover from their injury and return to work. The current restrictions ensure that decisions relating to a claimant's wellbeing are made in that claimant's best interest, not for financial reasons.
    ii. All Income Protection policies, and an increasing number of TPD policies have a requirement that claimants follow the regular advice of a medical practitioner. Allowing insurance companies to have input into rehabilitation processes risks having them cut across the considered, objective opinion of the treating medical practitioner. This has the potential to confound and disrupt an existing treatment plan. This is not in the claimant's best interest.

iii. There is a substantial risk that, if regulatory restrictions are eased, insurers will use surveillance of retraining or rehabilitation processes for the collateral purpose of testing a claimant's credibility during the claims process.

Such conduct by insurers is already known to occur, which is why it is specifically prohibited in relation to medical examinations conducted by insurer's nominated experts in the course of court proceedings[3]. However those legal protections do not apply to examinations conducted outside court proceedings - such as during the assessment of a claim - at which time most sick and injured claimants are not legally represented and are acutely vulnerable to the misuse of examinations by insurers.

iv. The life insurance industry is not suggesting that it will engage health care professionals *solely* for the purpose of medical treatment, or that they will be used in lieu of expert witnesses used to test and dispute claims.

Maurice Blackburn fears that this additional layer of medical scrutiny is likely to lead to a proliferation of witnesses which is contrary to the presumption that an insurer is limited to one expert for each of the specialties relevant to a claim[4].

- Maurice Blackburn is concerned at opinions such as those made by the Financial Services Council (FSC) where they say:
  *"Specifically, life insurers wish to offer targeted rehabilitation payment for medical treatment or therapy that **they** determine to be relevant, appropriate and necessary to assist the life insured return to work."* [5]

  The basis of our concern is the willingness of the life insurance industry to promote **their** perception of appropriate treatment over that of treating medical practitioners. The primary motivation of the insurer is profitability, through minimising the number and quantity of payments.

- Evidence would suggest that insurers are already finding ways to sidestep regulation. We are aware of insurers creating RTW agencies in an attempt to keeping payouts 'in-house'. The potential for insurers to benefit financially at every point of the claims process is of concern when considering the true basis of their decisions. Such actions represent a worsening of transparency and consumer choice in the industry.

[3] See UNIFORM CIVIL PROCEDURE RULES 2005 (NSW), Rule 23.2; *Rowlands v State of NSW* [2009] NSWCA 136 per Hodgson J at [49]: *'…The ordering of particular medical examinations must be for the purpose of obtaining evidence about a plaintiff's medical condition, and cannot be justified by the purpose of obtaining evidence that might go to the plaintiff's veracity generally.'*; *Vincent v SAS Trustee Corporation* [2016] NSWDC 73 per Neilson DCJ at [17]: *'The rules with which I am here concerned cannot be used for a collateral purpose such as testing a party's credibility.'*

[4] See *Tvedsborg v Vega* (2009) NSWCA 57; *Hinset Pty Ltd v Lane Cove Council* (2011) NSWLEC 120.

[5] Financial Services Council submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Life Insurance Industry. Submission 26. P.14. Our emphasis.

- Maurice Blackburn is concerned about a potential conflict of interest which would accompany any change to existing regulatory arrangements. We support the opinion of Dr Stephen Carbone from beyondblue, who warns[6] of a potential conflict of interest that would arise if the life insurer is 'paying the bills' associated with a claim, and also contributing to the decisions around an early return to work for the policy holder. We, like Dr Carbone are concerned that undue pressure could be placed on the claimant to return to work early, even if he/she is not ready to do so.

- Maurice Blackburn is concerned that allowing direct input for private sector life insurers into RTW processes may have poor, unforeseen outcomes for clients. A failed attempt at returning to work may mean that he/she can no longer satisfy eligibility criteria as spelled out in his/her insurance policy.

- Additionally, we consider it unlikely that employers would agree to participate in RTW processes directly involving private sector life insurers. The life insurance industry has not demonstrated how employers might be incentivised to agree to such arrangements. Maurice Blackburn notes that because employers generally do not pay insurance premiums in respect of their employees' life insurance cover, the life insurers do not have the sort of leverage that exists in the workers' compensation context.

- We have particular concerns around small employers' capacity and willingness to fulfil their obligations relating to RTW cases.

- Maurice Blackburn notes that private sector insurers would also stand to benefit from gaining access to more client information which would be open for use by the insurer in disputing the claim.

- Maurice Blackburn submits that, despite the compelling reasons against doing so, should the Committee recommend that current regulations be relaxed to allow private sector life insurers greater involvement in rehabilitation, safeguards need to be imposed to address the following matters:

    i. The plans provided by the treating medical practitioner should be given preference over those of the insurer's medical practitioner.

    ii. If the treating doctor does not support the proposals of the insurer's medical practitioner, those proposals should not go ahead.

    iii. In circumstances where the treating medical practitioner 'overrules' the insurer's medical practitioner under the above provisions, this should not be allowed to be used as a basis for the denial of the claim.

- Maurice Blackburn further submits that, should the Committee recommend that current regulations be relaxed to allow private sector life insurers greater involvement in worker rehabilitation, there must be a 'no disadvantage test' implemented.

[6] Refer section 10.187 of the PJC Report on its inquiry into the Life Insurance Industry: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/LifeInsurance/~/media/Committees/corporations_ctte/LifeInsurance/report.pdf

- The nature of this test should be such that:
    - if a claimant does not participate in an insurer's return to work plan, this will not be used to decline a claim;
    - If a claimant does participate and the attempt fails, this will not be used later in an attempt to decline or reduce a claim on the basis that they fail to meet requisite underwriting/eligibility criteria. Such criteria may include an 'at work' definition that deprives them of the same level of insurance cover that they held prior to their rehabilitation/RTW attempt.

- Maurice Blackburn draws the Committee's attention to the dangers of conflating the role of rehabilitation provider and expert witness. As mentioned earlier, medical processes are prone to misuse by insurers in order to obtain access to claimants to test their credibility, under the guise of rehabilitation. If the proposed changes go ahead, there should be a further condition imposed that the health care provider involved in the rehabilitation cannot be briefed as an expert witness, or used against the claimant in any dispute.

- Maurice Blackburn draws the Committee's attention to existing case law in relation to insurers requiring clients to enter into specified medical treatments. Its provisions could be summarised as follows:
    - An Insurer may turn their mind to the possibility that a claimant's condition may improve with surgery and/or treatment. Occasionally individuals may refuse the suggested surgery or treatment. That can lead Insurers to refuse to assess or deny claims.
    - An Insurer may decide that a claimant is unreasonably refusing medical treatment for the purpose of obtaining or continuing to receive benefits.[7] In *Dragojlovic v The Director-General of Social Security*[8] the plaintiff refused to submit to surgery which might reduce his incapacity to work.

      The court held that the required consideration was not whether the refusal for treatment was unreasonable but whether the reasons for the refusal were genuine or reasonable.
    - The law concerning the refusal of medical treatment is a question of reasonableness; this must be judged in light of the information available to the plaintiff.[9]
    - Additionally, reasonable rehabilitative treatment is a question of fact that would have to take account of many factors, including the risk of failure and the possible extent of the benefit of the treatment, particularly when compared to the present position.[10]

[7] *Flegeltaub v Telstra Super* [2000] VSC 107
[8] (1984) 52 ALR 157
[9] *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345
[10] *Comcare v Filla* 67 ALD 24

- The test is:

  > *What, if any, reasonable rehabilitative treatment exists for the particular impairment whose permanence is under consideration; and, secondly, assuming that some reasonable rehabilitative treatment does exist for the particular impairment whose permanence is under consideration, has the employee undertaken all of it?* [11]

- Additionally, consideration must be given to the potential that treatment may fail:

  > *It may be that treatment which offers just a chance of restoring a person to their pre-injury condition is not properly to be described as "rehabilitative treatment". Where the prospect of "restoration" involves a not insignificant possibility of failure, it is a question whether such treatment is truly "rehabilitative treatment*".[12]

- Maurice Blackburn submits that, should the Committee recommend that current regulations be relaxed to allow private sector life insurers greater involvement in rehabilitation, the current 'reasonableness' test should be retained and enforced to protect the genuine concerns of the claimant.

ToR (d) The current definitions, standards, and requirements claimants must meet to access services and payments, including waiting periods or prerequisites

- Maurice Blackburn has been consistent in our ongoing calls to tighten definitions across insurance products. For example TPD policies require:
  - Consistency in the use of terms such as "unlikely" or "unable" to work,
  - Consistency around what constitutes 'limited cover' and when it applies, and
  - Consistent language around policy exclusions.

- Should the Committee decide to recommend that private insurers should have greater involvement in worker rehabilitation processes, we believe that these definitional matters take on added importance.

- Under TPD policies, any return to work regime is dependent on whether the policy refers to a claimant's capacity to:
  - return to their current role, or
  - return to any other role.

  If the claimant is unable to resume their current role, any return to work will be a function of retraining or reskilling. Maurice Blackburn would be alarmed at any attempt to have insurers influence or prescribe the percentage of a payout that can be allocated or earmarked for retraining. These are decisions that should rest with the claimant and the treating medical practitioners.

[11] *Comcare v Filla* 67 ALD 24
[12] *Comcare v Filla* 67 ALD 24

- Maurice Blackburn also urges the Committee to ensure there are clear, consistent rules governing payout mechanisms. We've seen how insurers will seek to implement payout processes designed to prolong the process and add complications for claimants.

  For example, Sunsuper has implemented a process whereby TPD payments are not made through lump sum payout, rather through annual instalments – each of which requires fresh medical assessments to be performed. This example shows how private insurers, once given the opportunity, will implement systems and processes which are more aligned to achieving outcomes beneficial to the company, rather than to the claimant.

ToR (e) The consistency and transparency of IP and TPD insurance definitions, policies, and disclosure documents in the context of other rehabilitation schemes

- As noted in our response to TOR (d), there is a lack of consistency in definitions, policies and disclosure documents.

- The Committee's report from its inquiry into Life Insurance made the following recommendation:

  Recommendation 10.3
  10.60 The committee recommends that in relation to definitions in life insurance policies, the life insurance industry must:
  - *regularly update all definitions in policies to align with current medical knowledge and research;*
  - *standardise definitions across all types of polices;*
  - *use clear and simple language in definitions; and*
  - *clearly explain which associated conditions that may arise from the initial condition, including mental ill health, are covered by the insurance policy.*

  We believe that the same standards should also apply in TPD policies.

ToR (f) Information available to consumers about IP and TPD insurance in the context of other rehabilitation schemes

No response to this Term of Reference

Maurice Blackburn Lawyers submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into options for greater involvement by private sector life insurers in worker rehabilitation.

Summary of Recommendations:

1. Maurice Blackburn argues that the status quo should be maintained in relation to regulatory restrictions precluding life insurers from funding rehabilitation services.

2. Maurice Blackburn submits that, should the Committee recommend that current regulations be relaxed to allow private sector life insurers greater involvement in worker rehabilitation:

    - Safeguards should be imposed to address the following matters:

        i. The plans provided by the treating medical practitioner should be given preference over those of the insurer's medical practitioner.
        ii. If the treating doctor does not support the proposals of the insurer's medical practitioner, those proposals should not go ahead.
        iii. In circumstances where the treating medical practitioner 'overrules' the insurer's medical practitioner under the above provisions, this should not be allowed to be used as a basis for the denial of the claim.

    - There must be a 'no disadvantage test' implemented. The nature of this test should be such that:
        - if a claimant does not participate in an insurer's return to work plan, this will not be used to decline the claim;
        - If a claimant does participate and the attempt fails, this will not be used later in an attempt to decline or reduce a claim on the basis that they fail to meet requisite underwriting/eligibility criteria such as an 'at work' definition that deprives them of the same level of insurance cover that they held prior to their rehabilitation/RTW attempt.

    - The current 'reasonableness' test should be retained and enforced to protect the genuine concerns of the claimant.

    - The Committee must be conscious of privacy requirements in sharing client information across regimes.

    - There needs to be clear, unambiguous, agreed definitions which achieve:

        - Consistency in the use of terms such as "unlikely" or "unable" to work,
        - Consistency around what constitutes 'limited cover' and when it applies,
        - Consistent language around policy exclusions.

    - There needs to be clear, agreed rules around payout mechanisms.