Federal Court of Australia

Madden v Australian Financial Complaints Authority Limited [2025] FCA 196

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| Appeal from: |  |
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| File number(s): |  |
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| Judgment of: | **COLLIER J** |
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| Date of judgment: | 13 March 2025 |
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| Catchwords: | **ADMINISTRATIVE LAW** – appeal from determination of the Australian Financial Complaints Authority (**AFCA**) made under s 1055 *Corporations Act 2001* (Cth) – where superannuation member did not receive opt-in letter to elect to maintain death benefit insurance cover required under s 68AAA *Superannuation Industry (Supervision) Act 1993* (Cth) – where opt-in letter sent to address incorrectly updated by trustee – where death benefit insurance cover cancelled as completed opt-in letter not received by trustee – whether “best interests” duty of trustee under s 52(2)(c) and s 52(7)(d) *Superannuation Industry (Supervision) Act 1993* (Cth) relevant to consideration of fair and reasonable – whether assessment of loss appropriate – whether AFCA erred in finding decision of trustee fair and reasonable – AFCA not required to determine legal rights and obligations of parties – application dismissed |
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| Legislation: | *Corporations Act 2001* (Cth) ss 1053(1), 1055(1), 1055(3), 1057  *Superannuation Industry (Supervision) Act 1993* (Cth) ss 52(2)(c), 52(7)(d), 68AAA(1)-(2)  *Treasury Laws Amendment (Protecting Your Superannuation) Act 2019* (Cth) |
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| Cases cited: | *Commonwealth v Cornell* (2007) 229 CLR 519  *Tratter v Aware Super* [2024] FCAFC 36  *QSuper Board v Australian Financial Complaints Authority Ltd* (2020) 276 FCR 97  *Resolution Life Australasia Ltd v Mitchell* [2024] FCA 310  *Brady v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund (No 4)* [2024] FCA 1374  *Nottingham v Australian Financial Complaints Authority* [2023] FCA 58  *Sharma v H.E.S.T. Australia Ltd* (2022) 159 ACSR 635; [2022] FCA 536  *Retail Employees Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359  *Steer v AMP Life Limited & AMP Superannuation Ltd* [2021] SADC 109 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
|  |  |
| Number of paragraphs: | 53 |
|  |  |
| Date of hearing: | 25 July 2024 |
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| Counsel for the Applicant: | Mr S Lipp |
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| Solicitor for the Applicant: | Keypoint Law |
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| Counsel for the First Respondent: | Ms E Holmes |
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| Solicitor for the First Respondent: | Becketts Lawyers |
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ORDERS

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|  | | NSD 647 of 2023 |
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| BETWEEN: | JENNIFER MADDEN IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE BENJAMIN MADDEN  Applicant | |
| AND: | AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY LIMITED (ACN 620 494 340)  First Respondent  ONEPATH CUSTODIANS PTY LIMITED (ABN 12 008 508 496) AS TRUSTEE OF THE FUND AND POLICY OWNER  Second Respondent | |

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| order made by: | COLLIER J |
| DATE OF ORDER: | 13 MARCH 2025 |

THE COURT ORDERS THAT:

1. The application be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLLIER J

1. Before the Court is a notice of appeal of a superannuation determination of the first respondent, the Australian Financial Complaints Authority Ltd (ACN 620 494 340) (**AFCA**), dated 2 June 2023 (**superannuation determination**). By way of its superannuation determination, AFCA affirmed the decision of the second respondent, OnePath Custodians Pty Limited (ABN 12 008 508 496) (**the trustee**), that the applicant, Mrs Jennifer Madden, was not entitled to the $300,000.00 accrued under the life insurance death benefit policy held by her late husband, Mr Benjamin Madden (**the** **deceased**), which was cancelled by the trustee effective 30 June 2019.
2. AFCA filed a submitting notice on 25 July 2023 which it later sought leave to withdraw by way of its interlocutory application filed 23 April 2024. I granted leave for AFCA to withdraw its submitting notice in my orders dated 16 May 2024.
3. The trustee filed a submitting notice on 28 February 2024 which it has maintained.

# BACKGROUND

1. The deceased opened an account with the trustee’s superannuation fund (then ING Masterfund) on 28 October 2002 which included a life insurance death benefit policy. On 30 November 2016, there was a transfer of the account to ANZ Smart Super Choice, but the trustee remained trustee for the new fund.
2. On 12 March 2019, the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) was amended by the *Treasury Laws Amendment (Protecting Your Superannuation) Act 2019* (Cth) (**PYS Act**) which, in part, inserted s 68AAA(1) which provides that the trustee of a regulated superannuation fund must ensure that it only provides insurance to a member with an “inactive” account where the member has elected to obtain or maintain the insurance cover. The trustee is required by s 68AAA(2) to ensure that each member is invited to elect in writing to take out or maintain insurance cover. Here, it is not in dispute that the trustee is a trustee of a regulated superannuation fund and that the deceased’s account was inactive.
3. Following the enactment of s 68AAA of the SIS Act, the trustee issued a letter to the deceased on 16 April 2019 inviting him to elect to maintain his death benefit insurance cover as his account had been inactive for more than 16 months. On 13 August 2019, the trustee issued a notice to the deceased notifying him that it had cancelled his insurance cover effective from 30 June 2019 as it had not received the completed opt-in letter.
4. The deceased died on 30 October 2020.
5. On 25 January 2021, Mrs Madden (as administrator of the estate of the deceased) contacted the trustee via email seeking that the cancellation of the deceased’s death benefit be reviewed. On 1 February 2021, the trustee contacted Mrs Madden via return email notifying her that the death benefit was cancelled in accordance with the requirements of s 68AAA of the SIS Act. On 13 September 2022, Mrs Madden lodged an online complaint with AFCA. The superannuation determination of AFCA which affirmed the review and decision of the trustee is the subject of the present application.

# RELEVANT LEGISLATION

1. Section 68AAA of the SIS Act (as inserted by the PYS Act) relevantly provides:

**Benefits provided by taking out insurance—inactive accounts**

(1) Each trustee of a regulated superannuation fund must ensure that a benefit is not provided by the fund to, or in respect of, a member of the fund under a choice product or MySuper product held by the member by taking out or maintaining insurance if:

(a) the member’s account is inactive in relation to that product for a continuous period of 16 months; and

(b) the member has not elected under subsection (2) that the benefit will be provided to, or in respect of, the member under the product by taking out or maintaining insurance, even if the member’s account is inactive in relation to that product for a continuous period of 16 months.

Note: This section does not apply in relation to regulated superannuation funds with no more than 6 members (see section 68AAD).

(2) Each trustee of the regulated superannuation fund must ensure that each member of the fund who holds a choice product or MySuper product offered by the fund may elect, in writing, that a benefit specified in the election is to be provided to, or in respect of, the member under the product by taking out or maintaining insurance, even if the member’s account is inactive in relation to that product for a continuous period of 16 months.

(2A) A member’s election:

(a) that:

(i) is given under subsection (2); or

(ii) because of a previous application of this subsection, is taken to have been given under subsection (2);

to the trustee of a regulated superannuation fund (the ***original fund***); and

(b) that is in force immediately before the transfer of the benefits of the member from the original fund to another regulated superannuation fund (the ***successor fund***);

continues in force (and may be dealt with) as if it had been given under subsection (2) to the trustee of the successor fund, if:

(c) the successor fund confers on the member equivalent rights to the rights the member had under the original fund in respect of the benefits; and

(d) before the transfer, the trustee of the successor fund had agreed with the trustee of the original fund that the successor fund will confer such equivalent rights on the member.

(3) For the purposes of this section, a member of a regulated superannuation fund has an account that is ***inactive*** in relation to a choice product or MySuper product for a period if the trustee, or trustees of the fund, have not received an amount in respect of the member that relates to that product during that period.

(4) The prohibition in subsection (1) ceases to apply to benefits provided to, or in respect of, a member of the fund under a choice product or MySuper product held by the member if the trustee, or trustees of the fund, receive an amount in respect of the member that relates to that product after the account has been inactive in relation to the product for 16 months.

(5) However, the prohibition in subsection (1) applies again if the member's account is again inactive in relation to the product for a period of 16 months.

…

1. Section 1053(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) provides that a person may make a complaint to AFCA relating to superannuation under the AFCA scheme, established under pt 7.10A of the Corporations Act. Where the complaint is that a trustee of a regulated superannuation fund (such as the trustee here) has made a decision relating to a particular member or former member of the fund that is or was unfair or unreasonable (Corporations Act s 1053(1)(a)), AFCA has, subject to s 1055, all of the powers, obligations and discretions conferred on the trustee who made the decision to which a complaint relates (Corporations Act s 1055(1)).
2. Section 1055 of the Corporations Act relevantly provides:

**1055 Making a determination**

(1) In making a determination of a superannuation complaint, AFCA has, subject to this section, all the powers, obligations and discretions that are conferred on the trustee, insurer, RSA provider or other person who:

(a) made a decision to which the complaint relates; or

(b) engaged in conduct (including any act, omission or representation) to which the complaint relates.

*Affirming decisions or conduct*

…

(3) AFCA must affirm a decision relating to the payment of a death benefit if AFCA is satisfied that the decision, in its operation in relation to:

(a) the complainant; and

(b) any other person joined under subsection 1056A(3) as a party to the complaint;

was fair and reasonable in all the circumstances.

1. This Court has jurisdiction in relation to a determination made under s 1055 pursuant to s 1057 of the Corporations Act which provides:

**1057 Appeals to the Federal Court from determination of superannuation complaint**

(1) A party to a superannuation complaint may appeal to the Federal Court, on a question of law, from AFCA’s determination of the complaint.

(2) An appeal by a person under subsection (1) is to be instituted:

(a) not later than the 28th day after the day on which a copy of the determination of AFCA is given to the person, or within such further period as the Federal Court (whether before or after the end of that day) allows; and

(b) in accordance with rules of court made under the *Federal Court of Australia Act 1976*.

(3) The Federal Court is to hear and determine the appeal and may make such order as it thinks appropriate.

(4) Without limiting subsection (3), the orders that may be made by the Federal Court on an appeal include:

(a) an order affirming or setting aside the determination of AFCA; and

(b) an order remitting the matter to be determined again by AFCA in accordance with the directions of the Court.

(5) The Federal Court must not make an order awarding costs against a complainant if the complainant does not defend an appeal instituted by another party to the complaint.

# superannuation determination

1. In its superannuation determination, AFCA made the following key findings in affirming, as fair and reasonable, the decision of the trustee that the applicant was not entitled to the deceased’s death benefit:
2. the trustee did not receive an opt-in letter from the deceased and was therefore required to cancel his cover effective 1 July 2019 under s 68AAA(1) of the SIS Act;
3. the trustee did not provide disclosure to the deceased as it sent information about the insurance changes to an address that it had incorrectly updated; and
4. AFCA was not satisfied that the deceased would have received the opt-in letter if it had been sent to the address the trustee held immediately before it incorrectly updated the deceased member’s address.
5. In finding that the trustee incorrectly updated the address of the deceased, AFCA accepted the following evidence:

In its correspondence to AFCA on 19 October 2022 the trustee said:

According to the Annual Statement ending 30 June 2010, the address on file was [address].

According to the Annual Statement ending 30 June 2011, the address on file was [different address].

According to the Annual Statement ending 30 June 2012, the address on file was [same address as on file for 2011 annual statement].

[…]

9 October 2012, the Trustee updated the address on file to [ATO address] in accordance with the ATO Lost Member Register (LMR) provision of updated addresses program. The ATO LMR provision of updated addresses program enables superannuation providers to access extracts which contain updated addresses for lost members to allow them to reconnect with their members. The program relies on addresses supplied to the ATO as shown on the most recent income tax return for members of the superannuation fund.

In its correspondence to AFCA on 28 April 2023 the trustee said:

The Trustee does not hold a record as to why the address was changed after the FY10 Annual Statement (for the FY2011 and FY12 Statements).

The Trustee notes that the account was recorded as Lost on 2 March 2010 and reported as Lost as part of the 30 June 2010 lodgment file. The Trustee does not hold a record of the date the account was marked as Found.

1. While AFCA accepted that the trustee had incorrectly updated the address of the deceased, AFCA determined that this error did not cause direct financial loss to Mrs Madden as she was unable to establish that:

* the address held on file with the trustee before the address was incorrectly updated on 9 October 2012 was the deceased’s address as at 16 April 2019 when the trustee sent the opt-in letter; and
* if the trustee had used the Australian Taxation Office’s Lost Member Register provision of updated address program to update the deceased’s address at a later time it would have been provided with the correct address.

1. AFCA dismissed submissions of Mrs Madden’s solicitor that the trustee had not met its “best interests” duty, in particular ss 52(2)(c) and 52(7)(d) of the SIS Act which read:

**Covenants to be included in governing rules—registrable superannuation entities**

…

*General covenants*

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

…

(c) to perform the trustee’s duties and exercise the trustee's powers in the best financial interests of the beneficiaries;

…

*Insurance covenants*

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

…

(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.

1. In dismissing the submissions of Mrs Madden’s solicitor in relation to the statutory duties of the trustee under the SIS Act, AFCA found:

…it is not AFCA’s role to determine whether the trustee complied with its statutory obligations. Rather AFCA must determine whether the decision under review is fair and reasonable in its operation in relation to the complainant all the circumstances.

1. AFCA also distinguished the decision in *Steer v AMP Life Limited & AMP Superannuation Ltd* [2021] SADC 109 (***Steer***), which was relied on by Mrs Madden’s solicitors, as that case concerned particular requirements for email correspondence and the notice here was sent to the deceased by post.
2. AFCA affirmed the decision of the trustee and concluded that:

The trustee issued the insurance opt-in letter to an address it incorrectly updated. As a result, the deceased member was unable to make an election to retain his insurance covers. This led to a loss of his Death and TPD insurance.

However, I am not satisfied the trustee’s error has caused the complainant any direct financial loss. The evidence does not substantiate the deceased member would have received the opt-in letter if it had been sent to the address the trustee held immediately before it incorrectly updated the deceased member’s address.

Therefore, the trustee’s decision not to pay the amount sought by the complainant is fair and reasonable in its operation in relation to the complainant in all the circumstances.

# notice of appeal

1. The questions of law in respect of which the applicant seeks determination by this Court in her notice of appeal are as follows:

1. The First Respondent erred as a matter of law in considering whether and finding that the Second Respondent’s error did not cause the Applicant any direct financial loss.

2. The First Respondent erred as a matter of law in finding that the evidence did not substantiate the deceased member would have received the opt-in letter if it had been sent to the address the Second Respondent held immediately before it incorrectly updated the deceased member’s address.

3. The First Respondent erred as a matter of law in finding that the Second Respondent’s decision not to pay the amount sought by the Applicant was fair and reasonable in its operation in relation to the Applicant in all of the circumstances.

4. The First Respondent erred as a matter of law in affirming the decision of the Second Respondent.

5. The First Respondent erred as a matter of law in its interpretation and application of section 68AAA of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) in respect to the Second Respondent’s acts and/or omissions.

6. The First Respondent erred as a matter of law in holding that whether the Second Respondent’s conduct was fair and reasonable did not involve consideration of any breach of the duties specified in ss. 52(2)(c) and 52(7)(d) of the SIS Act.

7. The First Respondent erred as a matter of law in its interpretation and application of Item 3 of Part 2 of the *Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019* (Cth) in respect to the Second Respondent’s acts and/or omissions.

1. The grounds of appeal of the superannuation determination on which the applicant relies are as follows:

1. Without limiting the matters specified above, the First Respondent erred in law:

a. in finding that the Second Respondent was entitled to cancel the late fund member, Mr Benjamin Madden’s, policy of insurance because Mr Madden did not elect to maintain his insurance cover by the due date in circumstances where no election was made because Mr Madden did not receive any notice of the proposed cancellation of the policy of insurance and in circumstances where the failure to give such notice was in breach of s. 68AAA of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**Act**) and Item 3 of Part 2 of the *Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019* (Cth);

b. in finding that it was unlikely that if the Second Respondent had not changed its record of Mr Madden’s address that it would have impacted the outcome of the complaint in circumstances where (a) at all material times the Second Respondent held and used Mr Madden’s correct email address but (b) did not use that email address for the purposes of communicating any changes to the policy of insurance;

c in treating Mr Madden as having an onus to update his address when the no such onus existed and the Second Respondent had a clear onus to give notification in writing to Mr Madded that the policy of insurance might be cancelled;

d. in failing to find that the Second Respondent’s obligation under s. 68AAA of the Act was to ensure that Mr Madden was given the ability to elect for the policy of insurance to continue but rather incorrectly finding that the Second Respondent’s obligation was to issue the required disclosure;

e. failed to consider and determine whether the Second Respondent breached its duty of care to Mr Madden pursuant ss. 52(2)(c) and 52(7)(d) of the SIS Act by failing to notify Mr Madden that the policy of insurance might be cancelled;

f. in considering the consequences of the error made by the Second Respondent and whether the error caused a direct financial loss to the Applicant when such causal requirements are not proper considerations but rather the proper consideration was that Mr Madden lost the opportunity to elect to maintain the policy of insurance;

g. in failing to consider and determine the value of the loss of opportunity to elect to maintain the policy of insurance;

h. in finding that the Second Respondent acted fairly and reasonably and repeats paragraphs (a) to (g) above.

# applicant’s submissions

1. In her written submissions, the applicant identified three issues emerging from these proceedings:

a. First, was Onepath obliged to end the Policy by reason of s 68AAA of the PYSP Act notwithstanding that the second respondent had not ‘ensured’ Mr Madden’s right to elect for the Policy to be continued (per s 68AAA(2)) and had not given him notice in writing as required by Item 3 of Schedule 2 of the SIS Act (**Item 3**)?

b. Second, was Onepath in breach of its obligation to act in the best interests of Mr Madden as provided for by s 52(2)(c) of the SIS Act in failing to comply with s 68AAA and Item 3?

c. Third, what was the proper approach to the assessment of the remedy, if any, to be accorded the applicant as a result of the breaches of s 68AAA and Item 3 found to have occurred and the breach of s 52(2)(c) of the SIS that the applicant says should have been found to have occurred?

## Proper construction of s 68AAA

1. The applicant submitted that, in the absence of compliance with s 68AAA(2), the trustee was not compelled or authorised to (and ought not have) cancelled the death benefit and that AFCA erred in so finding. In particular, the applicant submitted that s 68AAA(1) cannot sensibly be read as requiring the termination of an insurance policy in circumstances where the member has not been able to make an election because the trustee has not ensured that the member might make an election.

## Consideration of best interests duty

1. The applicant submitted that AFCA should have considered s 52 of the SIS Act, and that in not complying with its statutory obligations under the SIS Act, the trustee failed to act in the best interests of the deceased. In particular, the applicant submitted that:
2. AFCA must ensure that its decisions are not contrary to law under s 1055(7)(a) of the SIS Act;
3. a trustee’s compliance with the law or otherwise must go to the reasonableness and fairness of its decision making; and
4. it is AFCA’s responsibility to determine the lawfulness of a trustee’s compliance with statutory obligations in determining matters before it.

## Assessment of applicant’s loss

1. The applicant submitted that AFCA erred in its consideration of the loss suffered by the applicant. The applicant made specific reference to *Steer* and *Commonwealth v Cornell* (2007) 229 CLR 519 at [16]-[18].
2. The applicant submitted that AFCA found there to be a breach of statutory duty by the trustee. The applicant noted that AFCA did not itself classify the trustee having incorrectly updated the address of the deceased as a “breach of statutory duty” but that it instead classified such conduct as an “error”. The applicant submitted that the relevant loss to be considered by AFCA was the deceased’s loss of opportunity to elect to continue the death benefit and that the appropriate assessment to be undertaken by AFCA was:
3. whether there is a sufficient link between the conduct of the trustee and the deceased’s loss of the opportunity to elect to continue the death benefit; and
4. that the quantification of the loss will be ascertained by reference to the degree of possibility inherent in the deceased exercising his election in favour of continuing the death benefit had he been given the opportunity to so elect.
5. In her written submissions, the applicant outlined the principles governing damages for loss of opportunity and concluded that there is no evidence to suggest the deceased would have done anything but continue the death benefit.

# afca’s submissions

1. AFCA submitted the purpose of its written submissions was to assist the Court by providing a contradictor. AFCA noted that while the applicant listed multiple grounds of appeal in her notice of appeal, the applicant only focused on three issues in her written submissions. I note that these three issues remained the focus of Counsel for both parties at the hearing.

## Proper construction of s 68AAA

1. AFCA rejected the applicant’s submission that a failure to comply with s 68AAA(2), on its own, required non-compliance with s 68AAA(1).
2. In an effort to demonstrate why compliance with ss 68AAA(1) and (2) should not be conflated, AFCA submitted that, on the applicant’s reasoning, a superannuation member could make a similar complaint where:
3. a trustee had not ensured the member had an opportunity to elect to maintain or cancel their insurance cover under s 68AAA(2); but
4. the trustee continued to charge the member for that cover when;
5. by operation of s 68AAA(1), the member had not elected for the cover to be maintained.
6. AFCA conceded that the trustee did not comply with s 68AAA(2). However, AFCA submitted that the real issue was the consequence of the error that the trustee *did* commit (that is, incorrectly updating the address of the deceased).

## Consideration of best interests duty

1. In respect of the best interests duty under s 52 of the SIS Act, AFCA submitted that it was not its role to determine whether the trustee complied with its statutory obligations. AFCA relied on *Retail Employees Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359 at [31]; *Tratter v Aware Super* [2024] FCAFC 36 at [64]; and *QSuper Board v Australian Financial Complaints Authority Ltd* (2020) 276 FCR 97 (***QSuper***) at [184].

## Assessment of applicant’s loss

1. AFCA submitted that the approach to assessment proposed by the applicant would first require AFCA to determine breaches of statutory provisions, namely ss 68AAA and 52 of the SIS Act, when AFCA’s role was simply to consider whether the trustee’s decision was fair and reasonable. Accordingly, AFCA submitted that the applicant had not identified an error of law in AFCA’s assessment of whether the trustee’s decision was fair and reasonable.
2. AFCA also submitted that the decision in *Steer* relied on by the applicant in her written submissions was not authoritative, was distinguishable on its facts, and was not applicable to the circumstances of the present case, as *Steer* concerned a private claim brought by an insured where the Court’s role was to determine a cause of action and the appropriate remedy.

# consideration

1. In her notice of appeal, the applicant relied on eight grounds of appeal, asserting errors of law on the part of AFCA referable to:

* the decision of the trustee to cancel the deceased’s death benefit pursuant to s 68AAA of the SIS Act (grounds 1(a),(d));
* the consequences of the trustee’s error in updating the address of the deceased and determination of the applicant’s loss (grounds 1(b), (c), (f), (g));
* the obligations of the trustee under s 52(2)(c) and 52(7)(d) of the SIS Act (ground 1(e)); and
* in finding that the decision of the trustee was fair and reasonable (ground 1(h)).

1. In her submissions, the applicant’s arguments focussed on the proper construction of s 68AAA of the SIS Act, the consideration by AFCA of s 52 of the SIS Act, and the question of loss to the applicant.
2. In the recent decision of *Nottingham v Australian Financial Complaints Authority* [2023] FCA 58 (***Nottingham***), this Court considered similar arguments and principles in relation to an opt-in letter required under s 68AAA of the SIS Act. In that case the deceased had joined the relevant superannuation fund on 31 October 2001, but ceased to pay any amount in respect of his fund on 13 July 2012. Justice Burley observed that, as a result of the cessation of payments, the deceased’s superannuation account was deemed to be inactive under s 68AAA, and the deceased was given notice on 23 April 2019 that he needed to notify the trustee by 30 June 2019 if he wanted his insurance cover to continue. By 30 June 2019, the deceased’s account in the relevant superannuation fund remained inactive. The trustee in that case formed the view that, having not received an election from the deceased, his insurance cover must be cancelled in accordance with the requirements of s 68AAA(1) of the SIS Act. The deceased died in August 2019 and the trustee declined to pay out the death benefit that would otherwise have been payable. The executor challenged the decision of the trustee, contending that the deceased had signed and sent a form electing to maintain his insurance cover, a copy of which was found in the deceased’s personal papers. The trustee submitted that it did not receive the opt-in letter, and gave evidence to that effect. AFCA in that case accepted that evidence of the trustee.
3. Justice Burley in *Nottingham* helpfully outlined the key authorities referable to AFCA’s role in hearing superannuation complaints, as follows:

27 The Authority’s jurisdiction and powers concern the fairness and reasonableness of a decision, not its lawfulness, although by s 1055(7) of the Corporations Act it is prohibited from making a determination that is contrary to law.

28 In *QSuper Board v Australian Financial Complaints Authority Ltd* [2020] FCAFC 55; 276 FCR 97 (Moshinsky, Bromwich and Derrington JJ), the Full Court said:

64 The powers conferred by CA s 1055 permit AFCA to set aside or vary a decision made by a trustee in relation to a fund member even where the decision was authorised by the trust deed and any regulating statute. The determining factor is not the lawfulness of the decision, but its fairness or reasonableness “in its operation in relation to the complainant”. Such a power is more aptly applied in relation to discretionary powers which, by their nature, confer wide decisional freedom on the repository such that a broad range of decisions might legitimately be made from a single set of facts. In any event, under the scheme where a complainant is aggrieved by a trustee’s decision, AFCA can consider the relevant circumstances and exercise the power or discretion of the trustee afresh so as to correct any perceived unfairness or unreasonableness arising from the original decision’s operation.

65 Despite the width of AFCA’s remedial powers, subsection (7) requires that it exercise the powers of the trustee or other authorised person within legal confines. It is not entitled to make a decision which is contrary to the terms of the trust or beyond the limits of any relevant statutory regulation. For instance, AFCA could not, standing in the shoes of a trustee, exercise a power in a manner which breached the trustee duty to observe the terms of the trust.

29 The statutory scheme on appeal focusses attention on whether or not the Authority erred on a question or questions of law; Corporations Act s 1057. A finding of fact may, of course, be affected by an error of law. Generally this will arise if the Authority has failed to take into account a relevant matter, or had regard to an irrelevant matter, or if the decision is unreasonable in the legal sense of the word.

30 In *Sharp Corporation of Australia Pty Ltd v Collector of Customs* [1995] FCA 707; 59 FCR 6 at 12-13 per Davies and Beazley JJ, with whom Hill J agreed, the Full Court said:

Even so, in any particular decision, although the decision may be a factual one, all the usual grounds of review will apply for they are regarded as being illustrative of questions of law. Thus a decision-maker may have failed to provide procedural fairness or may have failed to take into account a relevant fact, or may have had regard to an irrelevant matter or the decision may have been so unreasonable that no reasonable decision-maker could have come to it. Examples where Courts have inquired under these principles into the facts found by administrative decision-makers are *Commissioner of Taxation (Cth) v McCabe* (1990) 26 FCR 431; *Bushell v Repatriation Commission* (1992) 175 CLR 408.

If the decision-maker adopts a wrong approach to the task, the decision may be set aside and the matter remitted for reconsideration. …

1. Justice Burley noted at [31] that, in respect of whether AFCA erred in determining that the trustee had not received the relevant opt-in letter, AFCA took into account submissions and evidence of the trustee. In making its determination under s 1055 of the Corporations Act, AFCA was required to make a decision as to whether, on the material before it, the decision of the trustee was fair and reasonable, and in so doing it was not obliged to comply with the rules of evidence applicable to judicial decision making. His Honour noted at [32] that AFCA had received information from the trustee concerning its processes in reviewing and manually scanning certain material, and continued:

33. In my view it was within the ambit of the Authority’s decision-making role to receive that evidence, and weigh it against the evidence provided by the appellant. The appellant is perhaps understandably aggrieved that, faced with an affidavit from an independent third party to the effect that he had seen the deceased complete the election form and post it, nonetheless the evidence of the trustee was accepted as conclusive that the form had not been received. However, that decision involved the Authority engaging in a weighing-up process that falls within the ambit of its powers. It was entitled to form the view that there may be a disconnect between the act of posting and receipt of the letter. On the other hand, there was evidence of the system in place at the trustee’s offices which was designed to ensure that mail received from an insured was properly allocated to a file. The Authority weighed one against the other and determined that the election form had not been received by the trustee. It may be noted that, even had the Authority made an error in the course of its fact finding to this effect, that of itself would not have amounted to an error of law; *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135 at [44] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

34. Nor can the conclusion that the trustee was obliged to decline cover after making a finding of non-receipt be criticised. As a matter of law, the trustee was required under s 68AAA(1) to cancel the policy upon that event.

35. Furthermore, for completeness, I add that in my view it cannot be concluded that the court should, in the exercise of its supervisory role, conclude that the outcome reached by the Authority was legally unreasonable…

36. In my view the conclusion reached by the Authority was within the range of decisional freedom available to it, and therefore did not amount to an error of law.

1. His Honour dismissed the application.
2. While the facts in *Nottingham* are not on all fours with those before me, the principles identified by the Court in that case remain applicable, and constitute a recent analysis of the authorities and principles referable to s 68AAA of the SIS Act and s 1055 of the Corporations Act, which I gratefully adopt.
3. Turning to the case before me, under s 1055(3) of the Corporations Act, AFCA must affirm a decision of a trustee, in relation to the payment of a death benefit, if satisfied that the decision of the trustee is fair and reasonable in all the circumstances. While AFCA may make decisions or form opinions as to the application of various statutory provisions and the rights of the parties arising *inter se*, such decisions or opinions are merely steps in the determination of whether the operation of the trustee’s decision is fair and reasonable: Corporations Act s 1053; *QSuper* at [157]; *Nottingham* at [27]-[30].
4. For the decision of AFCA to be set aside on appeal to this Court pursuant to s 1057 of the Corporations Act, it follows that the Court must be satisfied that AFCA erred as a matter of law in determining that the decision of the trustee was ***fair and reasonable***.
5. In *Resolution Life Australasia Ltd v Mitchell* [2024] FCA 310 at [53] Wigney J had regard to the earlier decision of McElwaine J in *Sharma v H.E.S.T. Australia Ltd* (2022) 159 ACSR 635; [2022] FCA 536 at [35], where McElwaine J found:

It follows that if in determining a superannuation complaint, AFCA materially misdirects itself as to the legal rights or obligations of the parties in order to found the statutorily required state of satisfaction (that a decision in its operation in relation to the complainant was fair and reasonable in all of the circumstances), the determination is reviewable for legal error: *Craig v South Australia* (1995) 184 CLR 169 at 179.

1. I too respectfully adopt the observation of McElwaine J in *Sharma* at [35] as relevant to my consideration of whether AFCA in the present case made an appellable error.
2. In the case before me, AFCA was satisfied that the trustee sent information about insurance changes to an address of the deceased that the trustee had incorrectly updated. However, AFCA was not satisfied in this case that the trustee’s error had caused the applicant any direct financial loss in circumstances where the evidence did not substantiate that the deceased would have received the relevant opt-in letter had it been sent to the address that the trustee held immediately before it was incorrectly updated. In deciding whether the decision of a trustee was fair and reasonable, it was appropriate for AFCA to have regard to the consequences of the trustee’s decision in its operation in relation to the applicant, including any error of the trustee in issuing the opt-in letter to the deceased which may have informed its decision, and whether any other address of the deceased in the trustee’s records would have resulted in the deceased receiving the opt-in letter.
3. AFCA submits that it is not its role to determine whether the trustee has legally complied with its statutory obligations, including in respect of the trustee’s conduct in relation to s 68AAA and its duties under s 52 of the SIS Act – rather AFCA is required to determine whether the decision of the trustee was fair and reasonable in all the circumstances. I accept this submission. Provided that AFCA has not materially misdirected itself as to the nature of those obligations and duties, it is appropriate for AFCA’s decision to simply be informed by those statutory obligations and duties in determining the fairness and reasonableness of the trustee’s decision.
4. In the present case, AFCA plainly had regard to the legal rights or obligations of the applicant and the trustee, finding, for example, that the trustee had erred in directing correspondence to an incorrect address of the deceased. However, AFCA was satisfied that in the circumstances of the case that, notwithstanding that error, the subsequent decision to cancel the deceased’s death benefit under his insurance cover was fair and reasonable. This was against a background of evidence before AFCA concerning the status of inactivity of the deceased’s insurance cover over several years, information available to the trustee regarding the deceased’s address, and a lack of evidence that any correspondence to the address of the deceased available to the trustee prior to the incorrect updating of that address would have reached him in any event.
5. The applicant has submitted that the decision of the District Court of South Australia in *Steer* is relevant. I note that the applicant relied on this decision before AFCA. However, as AFCA correctly observed, the role of AFCA in making such determinations can be distinguished from private claims brought in the Courts for determination of a cause of action and appropriate remedy. I do not consider that the decision in *Steer* assists the applicant’s case before me.
6. Similarly, in determining whether the decision of the trustee was fair and reasonable, the question whether the trustee breached its legal obligations under the SIS Act (including those obligations under s 52 of the SIS Act) was not a matter for AFCA provided that AFCA did not misdirect itself as to those legal rights or obligations. It was open to the applicant, for example, to pursue a pathway of litigation in the Courts for determination of the question whether the trustee had breached s 52 of the SIS Act: a relevant example of such a case being *Brady v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund (No 4)* [2024] FCA 1374. The applicant instead sought review by AFCA. As I have already noted, the role of AFCA in reviewing decisions of the trustee is limited to an assessment only of whether the trustee’s decision was fair and reasonable in all the circumstances.
7. I make a similar observation in relation to the submissions of the applicant concerning the prospect of an award of damages to the applicant for loss of opportunity on the part of the deceased to elect to maintain his death benefit insurance cover. I further note in any event that s 1055(3)(a) of the Corporations Act provides that AFCA’s assessment of whether the trustee’s decision was fair and reasonable, in relation to the payment of a death benefit, is limited to the operation of the trustee’s decision in relation to the *complainant* (before me, the applicant). The submissions of the applicant concerning a loss of opportunity for the *deceased* to elect to continue the death benefit insurance cover was therefore not relevant to AFCA’s assessment of whether the trustee’s decision was fair and reasonable under s 1055(3). It was rather any loss suffered by the applicant, to which AFCA had regard.
8. I am not satisfied that AFCA erred in determining that the decision of the trustee in this case was fair and reasonable. The grounds of appeal of the applicant are not substantiated.
9. The application is dismissed.

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| I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier. |

Associate:

Dated: 13 March 2025