

## A reminder that details matter; and the inherent benefits of SMSFs

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**One of the key benefits, of self-managed superannuation funds (SMSFs) that are well managed and have access to ongoing specialist advice, is the level of understanding members enjoy.**

SMSF member knowledge is often starkly highlighted, when compared to members of industry or retail funds where even issues as simple as an outdated email address can cause fundamental difficulties. The decision in *Steer v AMP Life Limited & AMP Superannuation Ltd* [2021] SADC 109 highlights this very point.

The factual matrix was relatively complex, however was ultimately created by the changes that commenced on 1 July 2019 to the *Superannuation Industry (Supervision) Act 1993 (SIS Act)* via section 68AAA which mandated that:

- (a) the trustee of a superannuation fund that offers a product under which a benefit may be provided to a member by taking out or maintaining insurance,
- (b) must ensure that the benefit is not provided in respect of a member's account in a superannuation fund that has been inactive for a continuous period of at least 16 months,
- (c) where the member has not elected that the benefit provided under the insurance policy was to be maintained (after notice has been provided to the member).

Relevantly here, AMP Super had arranged a life insurance policy via AMP Life of around \$260,000 for a member.

AMP Super sent emails to the insured member at an address that the deceased had not accessed for over 5 years, purporting to inform the member of the need to elect to have the life insurance policy maintained. When no response was received, AMP Super emailed the same address to inform the member the policy had been cancelled.

Shortly before the death of the member, AMP Super sent a physical letter further advising that it had not received an election and would make further contact before cancelling the life insurance benefits (despite the fact that, as the emails had stated, the policy had in fact already been cancelled). The letter was never read by the member, as she died before receiving it.

On the death of the member, their legal personal representative (**LPR**) made a claim on the policy which was denied on the basis that it had been cancelled. The LPR then brought proceedings for what would have been the insurance proceeds; but for AMP Super cancelling the policy.

In summary, the court confirmed:

- 1 AMP Life and AMP Super did not engage in unconscionable conduct (within the meaning of section 991 of the *Corporations Act* or section 12CB of the *Australian Securities and Investments Commission Act (ASIC Act)*) as there was no conduct that was 'so far outside the societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that (was) offensive to conscience' (see *Pitt v Commissioner for Consumer Affairs* [2021] SASCA 24).

- 2 AMP Super (by its sending of the letter stating, incorrectly, that the policy had not been cancelled), did not engage in misleading or deceptive conduct contrary to sections 1041E and 1041H of the Corporations Act or sections 12DA and 12DB of the ASIC Act as it was not seen nor relied upon by the member. That is, while the sending of the letter was misleading, it did not cause any loss.
- 3 AMP Super did not owe a duty of the utmost good faith to the member, as it was not itself a life insurer.
- 4 While AMP Life owed a duty of the utmost good faith, this was not breached as it was AMP Super, not AMP Life, that cancelled the life insurance benefits.
- 5 AMP Super had however breached its duties to act in the best interests of the member contrary to section 52(2)(c) of the SIS Act in that it did not in fact give notice to the member of the proposed cancellation of the life insurance benefits (as required by section 68AAA of the SIS Act).
- 6 Furthermore, as the member had not given express or inferred consent (pursuant to section 9(1) of the Electronic Transactions Act) for the receipt of communications from AMP Super by email (see *Beni v Minister for Immigration and Border Protection* [2018] FCAFC 228) the (purported) emails by AMP Super were invalid. This section provides that where a person is required to give information in writing, that requirement is satisfied when the person gives the information by means of an electronic communication, if the person to whom the information is required to be given, consents to the information being given by way of electronic communication.
- 7 If the member had in fact been given notice of their right to make an election, the court was comfortable that they would have elected to maintain the life insurance benefits by the payment of the premiums.
- 8 Thus, the LPR was entitled to a payment of damages from AMP Super equal to the amount of the (cancelled) insurance policy, plus (subject to further confirmation from the court) costs and interest.