

# FEDERAL COURT OF AUSTRALIA

## MetLife Insurance Limited v Australian Financial Complaints Authority Limited [2022] FCAFC 173

- Appeal from: *MetLife Insurance Limited v Australian Financial Complaints Authority* [2022] FCA 23
- File number(s): NSD 126 of 2022
- Judgment of: **MIDDLETON, JACKSON AND HALLEY JJ**
- Date of judgment: 27 October 2022
- Catchwords: **SUPERANNUATION** – appeal from decision of primary judge, where primary judge decided that respondent (AFCA) has authority to determine complaint relating to superannuation that falls outside ambit of sub-ss 1053(1)(a)-(j) of the *Corporations Act 2001* (Cth) – principles of statutory construction – textual analysis of s 1053(1) – statutory context – extrinsic materials considered – where AFCA did not have authority to determine complaint relating to superannuation falling outside sub-ss 1053(1)(a)-(j) – notice of contention that complaint by second respondent not a complaint relating to superannuation – where contractual provisions in AFCA Rules cannot consensually be expanded beyond statutorily defined limits – where no ad hoc agreement between parties that determination of the Superannuation Complaint should proceed independently of AFCA Scheme – notice of contention dismissed – appeal allowed
- Legislation: *Acts Interpretation Act 1901* (Cth) s 13  
*Corporations Act 2001* (Cth) ss 761A, 912A, 1050, 1051, 1053, 1054, 1054A, 1054B, 1054C, 1055, 1057  
Revised Explanatory Memorandum, Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth)  
Second Reading Speech, Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth)  
Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth)
- Cases cited: *Adamson and Others v New South Wales Rugby League*

*Limited and Others* (1991) 31 FCR 242  
*Australian Alliance Assurance Co. Ltd v Attorney-General of Queensland and John Goodwyn* [1916] St R Qd 135  
*Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55  
*Commonwealth v Baume* (1905) 2 CLR 405; [1905] HCA 11  
*Kostas and Another v HIA Insurance Services Pty Ltd and Another* (2010) 241 CLR 390; [2010] HCA 32  
*MetLife Insurance Limited v Australian Financial Complaints Authority* (2022) 157 ACSR 542; [2022] FCA 23  
*MetLife Insurance Limited v Australian Financial Complaints Authority (No 3)* [2022] FCA 849  
*Paula Susan Chappell as Executor of the Estate of Robert Hastings Hitchcock v Goldspan Investments Pty Ltd* [2021] WASCA 205  
*Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28  
*R v Khazaal* (2012) 246 CLR 601; [2012] HCA 26  
*SZTAL v Minister for Immigration & Border Protection and Another; SZTGM v Minister for Immigration and Border Protection and Another* (2017) 262 CLR 362; [2017] HCA 34  
*The Council of the City of Brisbane v His Majesty's Attorney-General for the State of Queensland* (1908) 5 CLR 695; [1908] HCA 8  
*Thiess v Collector of Customs and Others* (2014) 250 CLR 664; [2014] HCA 12

Treasury, *Final Report: Review of the financial system external dispute resolution and complaints framework*, report prepared by Ramsay, I et al (Treasury, Canberra, 2017)

Division: General Division  
Registry: New South Wales  
National Practice Area: Commercial and Corporations  
Sub-area: Commercial Contracts, Banking, Finance and Insurance  
Number of paragraphs: 192  
Date of hearing: 23 August 2022

Counsel for the Appellant: Mr J Gleeson SC with Ms K Lindeman

Solicitor for the Appellant: Herbert Smith Freehills

Counsel for the First Respondent: Mr MW Wise KC with Mr AF Solomon-Bridge

Solicitor for the First Respondent: Arslan Lawyers

Counsel for the Second Respondent: The Second Respondent submitted to any order of the Court

## ORDERS

NSD 126 of 2022

**BETWEEN:**           **METLIFE INSURANCE LIMITED ACN 004 274 882**  
Appellant

**AND:**               **AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY**  
**ACN 620 494 340**  
First Respondent

**BRIAN RONALD EDGECOMBE**  
Second Respondent

**ORDER MADE BY:**   **MIDDLETON, JACKSON AND HALLEY JJ**

**DATE OF ORDER:**   **27 OCTOBER 2022**

### THE COURT ORDERS THAT:

1.     Within fourteen (14) days the parties file an agreed form of orders, or in default of agreement, any submissions as to the form of the appropriate orders reflecting the reasons of the Court.
2.     Subject to any further directions, the final orders of the Court will be made on the papers.

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

## REASONS FOR JUDGMENT

### THE COURT:

#### INTRODUCTION

1 This appeal is concerned with the proper construction of s 1053(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**). The question to be determined is whether the Australian Financial Complaints Authority Limited (**AFCA**) has authority to determine a “complaint relating to superannuation” that falls outside the ambit of sub-ss 1053(1)(a)-(j). The primary judge answered that question in the affirmative: *MetLife Insurance Limited v Australian Financial Complaints Authority* (2022) 157 ACSR 542; [2022] FCA 23 (**J**).

2 The appellant (**MetLife**) contends that finding was in error.

3 MetLife submits that the text of s 1053, its statutory context, the legislative history and other extrinsic material all support the conclusion that AFCA has no authority to determine a “complaint relating to superannuation” that does not fall within any of the categories of complaint set out in sub-ss 1053(1)(a)-(j). Accordingly, it submits that AFCA had no authority to determine a complaint made by the second respondent (**Mr Edgecombe**) against MetLife in 2018 (**2018 Complaint**), being a “complaint relating to superannuation” that did not fall within any of sub-ss 1053(1)(a)-(j).

4 AFCA submits that the primary judge was correct to determine that s 1053(1) did not preclude it from determining the 2018 Complaint. Further, AFCA contends in its amended notice of contention that the 2018 Complaint was not a “complaint relating to superannuation”. AFCA submits that the parties had entered into a contract pursuant to the AFCA Complaint Resolution Scheme Rules (**AFCA Rules**) by which MetLife had agreed to comply with binding determinations by AFCA with respect to the 2018 Complaint, and MetLife had specifically assented by way of an ad hoc agreement to AFCA determining the 2018 Complaint.

5 For the reasons that follow, we are satisfied that AFCA does not have the authority to determine a “complaint relating to superannuation” that falls outside the ambit of sub-ss 1053(1)(a)-(j), and that none of the contentions advanced in the amended notice of contention relevantly detract from that conclusion. It follows that the appeal should be allowed and the amended notice of contention should be dismissed.

## BACKGROUND

6 The following background facts are taken from the decision of the primary judge.

7 In 2016, a review of the regulatory requirements concerning external dispute resolution and the complaints framework for providers of financial services was conducted. This review culminated in the *Final Report: Review of the financial system external dispute resolution and complaints framework*, issued in April 2017 (**Ramsay Report**).

8 The summary of the findings of the Ramsay Report in the revised explanatory memorandum (**Revised EM**) to the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth) (**AFCA Establishment Bill**), at [1.11], included:

- the existence of multiple EDR [external dispute resolution] schemes with overlapping jurisdictions means that it is difficult to achieve comparable outcomes for consumers with similar complaints;
- multiple EDR schemes give rise to a duplication in costs for both industry and ASIC;

9 AFCA is an external dispute resolution body established under the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) (**AFCA Act**).

10 The AFCA Act commenced in 2018. It introduced Pt 7.10A of the Corporations Act, which provides for the establishment and operation of a single financial services resolution scheme to be administered by AFCA (**AFCA Scheme**). It also repealed the legislation which had established the Superannuation Complaints Tribunal (**SCT**), and repealed other parts of the Corporations Act that had permitted the Australian Securities and Investments Commission (**ASIC**) to authorise competing external dispute resolution schemes.

11 AFCA replaced several financial services dispute resolution bodies, relevantly the SCT, the Financial Ombudsman Service (**FOS**) and the Credit and Investments Ombudsman (**CIO**).

12 The SCT was governed by the *Superannuation (Resolution of Complaints) Act 1993* (Cth), and had jurisdiction over regulated superannuation funds and other superannuation investments. The FOS and CIO dispute resolution schemes were governed by terms of reference approved by the ASIC, and decisions took effect by agreement.

13 The AFCA Scheme commenced operating on 1 November 2018.

14 In November 2018, after the commencement of the AFCA Scheme, Mr Edgecombe made the 2018 Complaint, which was a complaint made to AFCA in respect of an adverse decision of MetLife concerning a total and permanent disability (**TPD**) claim under an insurance policy issued by MetLife to the trustee of Mr Edgecombe’s superannuation fund (**PBR Policy**).

15 AFCA initially accepted an objection from MetLife that the AFCA Rules required the 2018 Complaint to have been made within two years of Mr Edgecombe ceasing work and it was out of time.

16 On 12 February 2019, however, AFCA wrote to MetLife in the following terms:

It remains the case that the complaint does not meet the time limits for a Superannuation complaint. However, page 126 of the AFCA Operational Guidelines states that, where a fund member does not meet the AFCA time limits for a Superannuation complaint, AFCA ‘may be able to accept a complaint against the insurer under our general jurisdiction’.

AFCA has made the decision to exercise this discretion to accept Mr Edgecombe’s complaint against Metlife in relation to the [PBR Policy], because the complaint is otherwise within our Rules under our general jurisdiction as outlined at B.4.3.1.

17 On 12 April 2019, AFCA purported to determine the 2018 Complaint adversely to MetLife and stated that the adverse determination had been made under the AFCA Rules.

18 In May 2019, MetLife commenced proceedings in this Court seeking a declaration that AFCA’s determination was not binding on MetLife on the basis that AFCA lacked the authority to determine the 2018 Complaint, as it was a “complaint relating to superannuation” within the meaning of s 1053 of the Corporations Act, but it did not satisfy any of sub-ss 1053(1)(a)-(j). Mr Edgecombe filed a submitting notice.

19 AFCA filed a cross-claim seeking specific performance of AFCA’s determination of the 2018 Complaint.

20 The primary judge ordered that the hearing proceed as a separate question. The order was expressed in the following terms:

The question whether in the events which have occurred and on the proper construction of the relevant statutory provisions and the AFCA Rules, the first respondent had jurisdiction or authority to make a determination in respect of the complaints 600361 and 507677 dated 12 April 2019 be separately determined.

21 Complaint 600361 is the 2018 Complaint. Complaint 507677 is a reference to an earlier  
complaint that is not the subject of this appeal.

## STATUTORY PROVISIONS AND PRINCIPLES

### Statutory Construction

22 The principles of statutory construction are well settled and were not in issue on the appeal.

23 The principles of statutory construction require a consideration of the statutory text, purpose and context of the legislative provisions in issue: see *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [69] (McHugh, Gummow, Kirby and Haydon JJ); *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 (*Consolidated Media Holdings*) at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Thiess v Collector of Customs and Others* (2014) 250 CLR 664; [2014] HCA 12 (*Thiess*) at [22]-[23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ). It must begin and end, however, with the statutory text: *Thiess* at [22] (quoting *Consolidated Media Holdings* at [39]).

24 As the primary judge stated at J [58], the principles of statutory construction were recently summarised in *Paula Susan Chappell as Executor of the Estate of Robert Hastings Hitchcock v Goldspan Investments Pty Ltd* [2021] WASCA 205 at [31]-[35] (Buss P and Mitchell JA) in the following terms:

31 The focus of statutory construction is upon the text of the provisions having regard to their context and purpose.

32 The statutory text is the surest guide to Parliament's intention. A decision as to the meaning of the text requires consideration of the context, in its widest sense, including the general purpose and policy of the provision. ...

33 The context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed. See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; 141 ALR 618.

34 However, legislative history and extrinsic materials cannot displace the meaning of statutory text. Further, the examination of legislative history and extrinsic materials is not an end in itself. ...

35 The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions.



... The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose. ...

[Footnotes omitted.]

25 The primary judge also referred to the following observations by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration & Border Protection and Another; SZTGM v Minister for Immigration and Border Protection and Another* (2017) 262 CLR 362; [2017] HCA 34 at [14] of their Honours' reasons:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

[Footnotes omitted.]

26 The starting point is therefore a textual analysis, followed by a historical contextual analysis in order to ascertain whether that either confirms or produces any different conclusion to the primary textual analysis.

### **Corporations Act**

27 Subject to certain exemptions that are not relevant in the current context, s 911A of the Corporations Act provides that a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence (AFSL) covering the provision of the financial services.

28 Section 912A(1)(g) provides that if those financial services are provided to persons as retail clients, the holder of the AFSL must have a dispute resolution system that complies with s 912A(2) and must give ASIC the information specified in any legislative instrument made by ASIC pursuant to s 912A(2A).

29 Section 912A(2) requires that the dispute resolution procedure must consist of:

- (a) an internal dispute resolution procedure that:
  - (i) complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes

of this subparagraph; and

- (ii) covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and

(c) membership of the AFCA scheme.

30 The AFCA Scheme is defined in s 761A as the “external dispute resolution scheme for which an authorisation under Part 7.10A is in force”.

31 A retail client is defined in ss 761G and 761GA. Section 761G provides that a “financial product or a financial service is provided to a person as a *retail client* unless subsections (5), (6), (6A) or (7), or section 761GA, provides otherwise” (emphasis in original).

32 We turn next to consider the relevant provisions of Pt 7.10A.

33 Section 1050(1) provides that the Minister may authorise an external dispute mechanism by notifiable instrument if the Minister is satisfied that the mandatory requirement of s 1051 will be met.

34 Section 1050(3) makes clear that only one external dispute resolution scheme can be in force at any one point in time.

35 The mandatory requirements for an external dispute resolution scheme are specified in s 1051. They relevantly include the following:

- (a) membership of an external dispute resolution scheme is open to every entity that is required to be a member of the scheme under a Commonwealth law, an instrument made under such a law or the conditions of a licence or permission issued under such a law (s 1051(2)(a));
- (b) the operations of the scheme are to be funded by members of the scheme (s 1051(2)(b));
- (c) determinations under the scheme are binding on members of the scheme but not binding on complainants under the scheme (s 1051(4)(e));
- (d) for superannuation complaints there is no limit on the value of claims that may be made under the scheme or the value of remedies that may be determined under the scheme (s 1051(4)(f));

- (e) as the operator of the scheme, AFCA is to ensure that the scheme complies with the conditions of its authorisation under s 1050(5)(b), regulatory requirements under s 1052A, directions given under ss 1052B, 1052BA or 1052C and the requirements of s 1052E (s 1051(5)(a)); and
- (f) no material changes are to be made to the scheme without the approval of ASIC under s 1052D (s 1051(5)(b)).

36 Section 1053(1) provides:

- (1) A person may, subject to section 1056, make a complaint relating to superannuation under the AFCA scheme only if the complaint is a complaint:
  - (a) that the trustee of a regulated superannuation fund or of an approved deposit fund has made a decision (whether before or after the commencement of this section) relating to:
    - (i) a particular member or a particular former member of a regulated superannuation fund; or
    - (ii) a particular beneficiary or a particular former beneficiary of an approved deposit fund;

that is or was unfair or unreasonable; or
  - (b) that a decision, by a trustee maintaining a life policy that covers a member of a life policy fund, to admit the member to the fund was unfair or unreasonable; or
  - (c) that the conduct (including any act, omission or representation) of an insurer, or of a representative of an insurer, relating to the sale of an annuity policy was unfair or unreasonable; or
  - (d) that a decision of an insurer under an annuity policy is or was unfair or unreasonable; or
  - (e) that a decision of a superannuation provider to set out, in a statement to which subsection (2) applies, an amount or amounts in respect of a person was unfair or unreasonable; or
  - (f) that the conduct (including any act, omission or representation) of an RSA provider, or of a representative of an RSA provider, relating to the opening of an RSA was unfair or unreasonable; or
  - (g) that a decision of an RSA provider relating to a particular RSA holder or former RSA holder is or was unfair or unreasonable; or
  - (h) that the conduct (including any act, omission or representation) of an insurer, or of a representative of an insurer, relating to the sale of insurance benefits in relation to a contract of insurance where the premiums are paid from an RSA, was unfair or unreasonable; or

- (i) that a decision of an insurer relating to a contract of insurance where the premiums are paid from an RSA is or was unfair or unreasonable; or
- (j) that a decision by a death benefit decision-maker relating to the payment of a death benefit is or was unfair or unreasonable.

Note 1: Section 1056 provides further limitations on when a superannuation complaint may be made to AFCA in relation to a decision about the payment of a death benefit.

Note 2: Certain persons are taken to be members of regulated superannuation funds or approved deposit funds, or holders of RSAs (see section 1053A).

37 Section 1053(4) provides that a complaint is not a superannuation complaint to the extent that it is a complaint that:

- (a) a decision made by a trustee of a self managed superannuation fund; or
- (b) conduct engaged in by an insurer, or by a representative of an insurer, relating to the sale of an annuity policy maintained, or to be maintained, by a trustee of a self managed superannuation fund on behalf of its members; or
- (c) a decision made by an insurer, or by a representative of an insurer, under an annuity policy maintained by a trustee of a self managed superannuation fund on behalf of its members;

is unfair or unreasonable.

38 AFCA is given the following specific powers in relation to superannuation complaints in Subdiv B of Div 3 of Pt 7.10A:

- (a) AFCA may join various specified persons to a superannuation complaint, including an insurer (s 1054);
- (b) AFCA may require any person to provide information and documents relevant to a superannuation complaint, if it has reason to believe the person is capable of providing such information or documents (s 1054A);
- (c) AFCA may require any person to attend a conciliation conference if it considers the person is likely to be able to provide information relevant to a settlement of a complaint or believes that person's presence is likely to be conducive to settling the complaint (s 1054B);
- (d) AFCA may, in the course of determining a superannuation complaint, give directions prohibiting or restricting the disclosure of documents or information relating to a

complaint and who may be present at any meeting relating to a complaint (s 1054BA);  
and

- (e) AFCA may refer, on its own initiative or on the request of a party to the superannuation complaint, a question of law for determination by the Federal Court for decision (s 1054C)).

39 Section 1055 confers on AFCA, in making a determination of a superannuation complaint, all the powers, obligations and discretions that are conferred on the trustee, insurer, RSA provider or other person who made a decision, or engaged in conduct, to which the complaint relates.

40 Section 1057 provides that a party to a superannuation complaint may appeal on a question of law to the Federal Court from AFCA's determination of the complaint.

#### **DECISION OF THE PRIMARY JUDGE**

41 The primary judge noted at J [49] that there was no dispute between the parties that the 2018 Complaint was not a complaint of a kind listed in sub-ss 1053(1)(a)-(j). But there was a dispute about whether the 2018 Complaint was a complaint relating to superannuation for the purposes of s 1053(1). The primary judge observed at J [49] that AFCA maintained, in the alternative, that the 2018 Complaint was not a "complaint relating to superannuation" because it was a complaint against MetLife, as an insurer, in respect of the beneficial interest that Mr Edgcombe was alleged to have in a policy that the parties had referred to as the "FSS Policy". His Honour noted that AFCA therefore submitted that even if MetLife succeeded in its construction of s 1053, the 2018 Complaint could be dealt with as a "non-superannuation complaint" under the AFCA Rules.

42 The primary judge noted at J [50] that r B.2 of the AFCA Rules dealt with complaints "other than a Superannuation Complaint" and r B.2.1(e)(i) provided:

A complaint (other than a Superannuation Complaint) must arise from or relate to ... a legal or beneficial interest of the Complainant arising out of ... a financial investment (such as life insurance, a security or an interest in a managed investment scheme or a superannuation fund).

43 His Honour then observed at J [51] that the term "Superannuation Complaint" was defined in r E.1 in the following terms:

Superannuation Complaint has the meaning set out in section 1053 of the Corporations Act.

Accordingly:

- a) a complaint about an insurer's decision under an insurance policy held by the trustee of a Regulated Superannuation Fund or an Approved Deposit Fund will:
  - (i) if all of the time limits in rule B.4.1.1 have been met, be considered as a Superannuation Complaint, by joining the insurer to a complaint against the trustee's decision;
  - (ii) otherwise, be considered as a non-superannuation complaint against the insurer; and
- b) a complaint about financial product advice relating to superannuation is not a Superannuation Complaint unless it is provided by:
  - (i) the trustee of a Regulated Superannuation Fund or Approved Deposit Fund, an RSA provider or a life company as issuer of an Annuity Policy (superannuation provider); or
  - (ii) an employee or representative of a superannuation provider under the superannuation provider's licence, to a member of the Regulated Superannuation Fund, a beneficiary of the Approved Deposit Fund, a holder of the RSA or a person with an interest in the Annuity Policy.

Otherwise a complaint about financial product advice relating to superannuation will be considered as a non-superannuation complaint against the Financial Firm providing the advice.

44 The primary judge observed at J [53] that an unusual consequence of paragraph (a)(ii) of the definition of a Superannuation Complaint was that if any complaint was made against an insurer in a similar form to that advanced in the 2018 Complaint, it would be treated as a superannuation complaint if made within time but, if not, it could be advanced as a non-superannuation complaint.

45 In this context we note that r B.4.1.1 imposes a two year time limit for superannuation complaints that, by reason of r B.4.4.1, was not capable of being extended.

46 The primary judge then explained at J [55] that, by reason of MetLife's contention that it was inappropriate of AFCA as an independent decision maker to be seeking to advance further defences, including estoppel and acquiescence, and the submitting notice of Mr Edgecombe filed in the expectation that those defences would be advanced, that the matter would proceed by way of a determination of the following separate question:

The question whether in the events which have occurred and on the proper construction of the relevant statutory provisions and the AFCA Rules, the first respondent had jurisdiction or authority to make a determination in respect of the complaints 600,361 and 507677 each dated 12 April 2019 be separately determined.

47 Complaint 600361 is the 2018 Complaint.

48 The primary judge stated at J [57] that the separate question gave rise to the following issues for determination with respect to the 2018 Complaint:

- (1) On the proper construction of s 1053(1) of the Corporations Act, does it provide for a category of complaints that includes the 2018 Complaint that cannot be made under the AFCA Scheme?
- (2) If yes to (1), was there an *ad hoc* agreement by which AFCA was to determine the 2018 Complaint outside the AFCA Scheme?

49 The primary judge stated at J [65] that the construction of s 1053(1) of the Corporations Act advanced by AFCA was to be preferred to that contended for by MetLife. Rather than reading the phrase “only if” as defining an exclusive class of superannuation disputes that could be brought under the AFCA Scheme, the primary judge preferred AFCA’s construction which at J [62] he stated involved reading s 1053(1) as providing, in effect:

A person may, subject to section 1056, make a complaint *as a complaint* relating to superannuation under the AFCA Scheme only if the complaint is a complaint [of the kind listed].

(Words in italics added.)

50 The primary judge also found at J [65] that if, contrary to his finding that AFCA’s construction should be preferred, the construction advanced by MetLife was correct, then AFCA’s alternative contention that the 2018 Complaint was not a “complaint relating to superannuation”, as it was directed at a decision by MetLife, should not be accepted.

51 The primary judge reasoned that the specific statutory provisions for superannuation complaints were directed at ensuring that only certain types of complaints could be made on the basis that they were superannuation complaints rather than precluding complaints from being dealt with under the AFCA Scheme as non-superannuation complaints. His Honour stated:

- 80 Most importantly, as has been explained, the statutory provisions concerned with superannuation complaints have detailed provisions concerning the manner in which insurers (and others) may be brought in as third parties and the nature and extent of the determinations that may be made that may affect the rights of those third parties. Those provisions also require a different approach to those which may apply to non-superannuation complaints. One manifestation of that difference is the extent to which the determinations by AFCA in relation to superannuation complaints must conform to the law and the provisions of the insurance contract (as distinct from being guided by what

is fair and reasonable). Another manifestation is the absence of any monetary limit in relation to superannuation claims.

81 These are all contextual reasons why s 1053(1) may be concerned, as AFCA contends, to ensure that only certain types of complaints could be made on the basis that they could be dealt with as superannuation complaints and not concerned with curtailing the circumstances in which complaints may be made under the AFCA Scheme as non-superannuation complaints.

52 The primary judge placed particular reliance on statements in the extrinsic material about the objective of creating a “one-stop shop” to address all complaints that could previously be made under the previous external dispute resolutions schemes. His Honour stated:

84 There is considerable support for the submission to the effect that the purpose of the provisions introduced into the Corporations Act by the AFCA Establishment Act was to continue the scope and structure of the previous regime in terms of the type of complaints that might be brought but bring them within a one-stop shop in the form of the AFCA Scheme. The recommendation of the Ramsay Report was to that effect as were the statements made upon the second reading of the Bill to introduce the AFCA Establishment Act.

85 Importantly, the provisions enacted by the AFCA Establishment Act reflected the scope of the external dispute resolution schemes that applied previously. In particular (and without being exhaustive), the following aspects were common to both the previous regime and the AFCA Scheme:

- (1) there is no monetary or compensation limit for superannuation complaints but there is such a limit for other complaints (notably complaints against insurers);
- (2) a decision by a trustee of a regulated superannuation fund relating to a member of the fund could be the subject of a complaint on the basis that it was unfair or unreasonable;
- (3) they provide for the same time limits on bringing complaints;
- (4) there is power to require third parties such as insurers in the position of Metlife to be joined to a complaint in the case of superannuation complaints but not otherwise;
- (5) in determining the complaint, the decision-maker could exercise all the powers, obligations and discretions of a third party in the case of superannuation complaints but not otherwise;
- (6) questions of law arising in relation to the determination of a superannuation complaint may be referred to this Court but not otherwise; and
- (7) in both cases, the nature of the determination to be made in the case of superannuation complaints is expressed in similar terms and is subject to a limitation to the effect that the determination must not be contrary to law, the governing rules of the superannuation fund or the terms and conditions of an insurance policy.



86 Those aspects provide considerable support for AFCA's construction.

53 The primary judge concluded that the context supported a construction of s 1053(1) that preserved all the determinations available under the previous schemes rather than a construction that identified categories of complaints that could no longer be brought:

100 Having regard to the context, the construction contended for by AFCA is to be preferred. Under the previous regime, a complaint of the kind made by Mr Edgecombe as the 2018 Complaint could be made to the Ombudsman Service (and was not a complaint that had to be made to the Superannuation Complaints Tribunal) provided it was within the monetary limits. A complaint could also be made to the Tribunal concerning the conduct of a superannuation trustee in dealing with an insurer as to an insurance benefit to which the member claimed to be entitled. In such a case, a different procedure was followed with a different type of determination than if the complaint was determined by the Ombudsman Service. Therefore, there were different types of determinations that could be made depending upon whether a complaint was made to the Tribunal or to the Ombudsman Service. An examination of the previous regime and the provisions of the AFCA Establishment Act shows that the provisions in Div 3 of the Corporations Act that were introduced by the AFCA Establishment Act were directed to establishing a one-stop shop rather than changing the types of determinations that could previously be made by the Tribunal and the Ombudsman Service respectively. The terms of the Ramsay Report and the second reading speech support that conclusion. There is no more specific purpose that may be discerned.

101 Therefore, the context supports a construction which continues the availability of the kinds of determinations that could be made under the previous regime rather than a construction which identifies a category of complaints that could no longer be brought before external dispute resolution.

102 It follows that, having regard to context, the construction advanced by AFCA is to be preferred. The phrase 'a complaint relating to superannuation under the AFCA Scheme' means a complaint that relates to superannuation in the sense that it seeks to invoke the particular statutory authority conferred by Div 3.

54 The primary judge then considered and rejected AFCA's alternative case, including the three contentions the subject of the amended notice of contention.

55 *First*, the primary judge did not accept that the manner in which Mr Edgecombe framed his complaint was determinative of whether the complaint was a complaint relating to superannuation. His Honour concluded at J [104]-[105] that on the assumption that the MetLife construction of s 1053(1) was correct, the 2018 Complaint was a complaint relating to superannuation because the insurance policy had been negotiated between the insurer and Mr Edgecombe's superannuation trustee, the benefit payable under the policy if liability was

established would be paid to Mr Edgecombe as a member of the superannuation fund and his claim arose solely from his status as a member of a superannuation fund.

56 *Second*, the primary judge did not accept that the parties had agreed that the 2018 Complaint could be determined by AFCA under the AFCA Rules. His Honour reasoned at J [125]:

There was no evidence of a consensus to the effect that a decision would be made outside the AFCA Scheme by reference to the AFCA Rules even though they were not applicable between the parties. Nor is there evidence from which it may be inferred that the parties agreed by conduct that the 2018 Complaint would be determined on the basis of the AFCA Rules even if the AFCA Scheme did not apply to the 2018 Complaint (because it was a superannuation complaint of a kind that could not be considered under the AFCA Scheme). Therefore, AFCA acquired no further authority than that conferred by the AFCA Scheme to determine the 2018 Complaint.

57 *Third*, the primary judge did not accept that there was any ad hoc agreement by which AFCA was to determine the 2018 Complaint. After summarising the evidence of the communications between AFCA, Mr Edgecombe and MetLife in the period leading up to the determination of the 2018 Complaint, his Honour concluded at J [125] that the conduct of all three parties throughout that period demonstrated that they were proceeding on the basis that AFCA was conducting a determination pursuant to the AFCA Scheme and not some other process.

## GROUND 1

### Introduction

58 The first ground of appeal advanced by MetLife is that:

1. The primary judge:
  - a. erred in finding that, on the proper construction of s 1053(1) of the *Corporations Act 2001* (Cth), the Australian Financial Complaints Authority (AFCA) had authority to determine complaint 600361 (the **2018 Complaint**) under the AFCA Scheme, as defined in s 761A of the *Corporations Act 2001* (Cth) (see at [19], [65], [100], [101], [102], [147]); and
  - b. ought to have found that, on the proper construction of s 1053(1) of the *Corporations Act 2001* (Cth), AFCA did not have authority to determine the 2018 Complaint under the AFCA Scheme, such that the separate question should be answered in the negative insofar as it relates to the 2018 Complaint.

## **MetLife submissions**

### ***Overview***

59 MetLife submits that the primary judge ought to have concluded that s 1053 is an exclusionary provision, providing that if and to the extent that a complaint was a complaint “relating to superannuation” it does not fall within any of the categories of complaint identified in sub-ss 1053(1)(a)-(j), it may not be brought under the AFCA Scheme. It submits that this flows from the textual meaning of s 1053, the statutory context, legislative history and other extrinsic materials.

### ***Textual meaning***

60 MetLife submits that the ordinary meaning of the phrase in s 1053(3) that “[a] complaint made in accordance with subsection (1) of this section is a superannuation complaint” is that where a complaint is properly characterised as a complaint “relating to superannuation”, it can only be made under the AFCA Scheme if the complaint falls into one of the 10 categories identified in s 1053(1).

61 MetLife submits that this construction follows from the following considerations.

62 *First*, the class of complaints constituting complaints “relating to superannuation” is wider than the specific categories of complaint identified in sub-ss 1053(1)(a)-(j), having regard to the ordinary meaning of the phrase “relating to”, which here merely requires a nexus between the complaint and superannuation (see J [75]).

63 *Second*, and critically, the exclusionary words “only if” operate to impose a limitation on the circumstances in which a specified class of complaint, being “complaint[s] relating to superannuation”, may be made under the AFCA Scheme (namely, when such complaints fall into a sub-category identified in sub-ss 1053(1)(a)-(j)).

64 *Third*, “AFCA Scheme” is a defined term, meaning “the external dispute resolution scheme for which an authorisation under Pt 7.10A is in force”: s 761A of the Corporations Act. In light of the definition of “AFCA Scheme”, s 1053 could not be read as imposing a limitation on the circumstances in which a “complaint relating to superannuation” may be made within AFCA’s superannuation jurisdiction alone. MetLife submits that if a “complaint relating to superannuation” does not satisfy s 1053(1) because it is not a “superannuation complaint” for

the purposes of s 1053(3), the words “only if” in s 1053(1) operate to prevent such a complaint being made under the AFCA Scheme at all. It submits that in those circumstances, the complaint is excluded from both AFCA’s superannuation and non-superannuation jurisdictions, given that the definition of “AFCA Scheme” in s 761A encompasses the whole of AFCA’s jurisdiction for which it receives its authorisation.

### *Statutory context*

65 MetLife submits that when s 1053 is read in the context of other provisions in Pt 7.10A, Div 3, it becomes clear that the primary judge’s construction of s 1053 in effect subverts the carefully crafted protections imposed on AFCA’s superannuation jurisdiction, weighing heavily against his Honour’s construction. It submits that Div 3 of Pt 7.10A of the Corporations Act confers a range of special powers and obligations on AFCA, and protections on parties, when dealing with “superannuation complaints”, that are not applicable in AFCA’s general jurisdiction.

66 MetLife submits that the effect of the primary judge’s construction of s 1053 is that a complainant is able to circumvent the powers and protections specifically applicable in AFCA’s superannuation jurisdiction by ensuring that their complaint relating to superannuation is framed so as to fall outside the categories of complaint identified in sub-s 1053(1)(a)-(j).

### *Legislative history*

67 MetLife submits that the existence of certain commonalities between the AFCA Scheme and its predecessor scheme as identified at J [85] does not support an inference that the legislature intended to preserve identically the scope of the former external dispute resolution scheme in the newly established AFCA Scheme. It submits that once the instances of commonality are considered together with instances of departure, nothing can be inferred as to a legislative intention to preserve in identical terms the scope of the former regime by the identification of only certain points of commonality.

68 MetLife submits that other aspects of s 1053’s statutory context support its construction of the provision. For example, the heading of s 1053 is: “When complaints relating to superannuation can be made under the AFCA Scheme”. It submits that this heading is relevant to the construction exercise by reason of s 13(1) of the *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**): J [72]. In circumstances where the phrase “AFCA Scheme” is a defined

term, MetLife submits that the heading makes plain that s 1053 should be construed as setting out the parameters of when a complaint “relating to superannuation” can be made under the AFCA Scheme as a whole, that is, in either AFCA’s superannuation or general jurisdiction.

69 MetLife submits that excluding from the AFCA Scheme complaints made by members of a superannuation fund such as Mr Edgecombe against insurers in respect of decisions relating to certain insurance policies entered into by a superannuation fund trustee is consistent with AFCA’s role, which may be described as an external body providing dispute resolution services between financial services licensees and their retail clients. Sub-sections 912A(1)(g) and (2) of the Corporations Act requires financial service licensees who provide financial services to persons as “retail clients” to be members of the AFCA Scheme: J [21]-[22].

***Other extrinsic material***

70 MetLife submits that the primary judge fell into error by relying on the Ramsay Report, the second reading speech in respect of the AFCA Establishment Bill (**Second Reading Speech**) and the Revised EM to support an inference that the legislature intended to preserve the scope and structure of the former regime in the AFCA Scheme so as to support his Honour’s ultimate construction of s 1053.

71 MetLife submits that when the Second Reading Speech and the Ramsay Report are considered in full, together with the Revised EM, no legislative intention can be discerned to create a “one-stop shop” external dispute resolution scheme by the AFCA Act that otherwise preserved the types of determination that could previously be made by the SCT and FOS. It submits that the phrase “one-stop shop” is equally capable of being read as a short-hand reference to the replacement of multiple decision-making bodies with a single decision-making body.

72 MetLife submits that on a fair and complete reading, the Ramsay Report should be understood to recommend a new external dispute resolution scheme within which a binary world exists where a complaint relating to superannuation must be dealt with within a discrete superannuation jurisdiction or not at all, whereas non-superannuation complaints are dealt with in a separate general jurisdiction with different rules and procedures.

73 MetLife also seeks to rely on the changes made in the text of what ultimately became s 1053 between an exposure draft of the proposed legislation to establish AFCA (**Exposure Draft**) and the AFCA Establishment Bill. It submits that whereas the draft provision in the Exposure

Draft was essentially definitional, by introducing the concept of a “complaint relating to superannuation”, which has a wider ambit than the categories of complaint in the subsections to the provision, and adding words of exclusion (“only if”), the legislature makes clear that there is a class of complaint that cannot be dealt with as part of the AFCA Scheme *at all*, namely complaints “relating to superannuation” that do not fall within sub-ss 1053(1)(a)-(j).

## **AFCA submissions**

### ***Overview***

74 AFCA supports the primary judge’s finding at J [102] that the phrase “a complaint relating to superannuation” under the AFCA Scheme means a complaint that relates to superannuation in the sense that it seeks to invoke the particular statutory authority conferred by Div 3 of Pt 7.10A of the Corporations Act. It submits that this is a construction that is open on the text of s 1053, and one that is strongly favoured by the legislative context.

### ***Textual meaning***

75 AFCA submits that, given the strong contextual factors, it is open to read “relating to superannuation” in the chapeau to s 1053(1) as an identification of the genus of matters which s 1053 then introduces in sub-ss (1)(a)-(j). In this way, it submits that “complaint relating to superannuation” is to be construed to mean nothing wider than the matters listed thereunder. It submits that this is consistent with the fact that s 1053(3) defines a complaint made in accordance with subsection (1) as a “superannuation complaint” — there being intuitive “synonymousness” between “a superannuation complaint” and “a complaint relating to superannuation”.

76 AFCA submits that it is equally open to read the words “only if” as intended to reinforce the fact that it is only *those* complaints listed that are affected by the peculiar statutory powers, limitations and appeal rights that apply to superannuation complaints in Div 3 of Pt 7.10A of the Corporations Act, and which do not apply to complaints determined in AFCA’s general (non-superannuation) jurisdiction. It submits that on this approach, the reference in s 1053(1) to complaints “under the AFCA Scheme” (which includes AFCA’s general jurisdiction) simply reflects that a complaint under the AFCA Scheme will not attract those peculiar statutory powers, limitations and appeal rights unless it answers the description of a type of complaint listed in s 1053(1).

### *Statutory context*

77 AFCA submits that the construction propounded by MetLife creates new lacunae by which complaints that could previously be entertained under contractual external dispute resolution schemes could no longer be entertained. It submits that that is an anomalous, inconvenient and unreasonable consequence. It submits that it is a consequence that should be striven against should there be an alternative reading of the provision which is open.

78 AFCA submits that, contrary to MetLife’s submissions there is no “jurisdictional election”, a complaint either answers the description of the kinds of complaint specified in s 1053(1), in which case the “powers and protections” apply, or it does not, in which case the “powers and protections” do not apply.

79 AFCA submits that the fact that non-payment by an insurer under a group insurance policy might sometimes be brought as a complaint against the insurer, and sometimes as a complaint against the trustee, reflects, if anything, the peripheral nature of the subject matter to the concept of superannuation at all. It is not a reason to shut out the insured from making financial complaints against the insurer where he or she could previously have done so.

80 AFCA submits that it is not per se objectionable that similar subject matter might be treated differently in different jurisdictions. It points to choices that plaintiffs might have to bring claims in the Victorian Civil and Administrative Tribunal or the Victorian Magistrates Court, with different rules of evidence and different rights of appeal, but submits that the existence of these choices could not be said to “circumvent and therefore subvert” the rules of either forum.

81 AFCA submits that the relevant criterion under the AFCA Scheme is that the Minister must be satisfied that “the complaints mechanism under the scheme is appropriately accessible to persons dissatisfied with members of the scheme” (AFCA emphasis). It submits that the AFCA Rules do not require the complainant to have been a “retail client” of the member, and that this accommodates the legislative intention that “all financial complaints” be brought in the one forum. It submits that once a financial services licensee is a member of AFCA it is bound by the entirety of the AFCA Rules, independently of the occasion for it becoming a member.

82 AFCA submits that, contrary to the position advanced by MetLife, a person in the position of Mr Edgecombe may have a complaint against the decision of an insurer but not have a genuine grievance against the trustee and therefore the person would be precluded from being a

complaint under s 1053(1)(a). It submits that if a trustee pursued a claim for the benefit of a member pursuant to its duty under s 52(7)(d) of the *Superannuation Industry (Supervision) Act 1993* (Cth) it would be difficult to see how AFCA could do anything other than affirm the decision of the superannuation trustee.

### ***Legislative history***

83 AFCA submits that the elements of identity (or substantial similarity) between the previous external dispute resolution schemes and the AFCA Scheme which was their successor naturally militates against a construction which would significantly diminish the jurisdictional coverage of the new AFCA body as compared with the schemes it succeeded.

### ***Other extrinsic material***

84 AFCA submits that a central concern of the Ramsay Report, the Revised EM, and the Second Reading Speech was “the creation of a single external dispute resolution body that would be more accessible, and that could deal with all financial disputes (including superannuation disputes)” (AFCA emphasis).

85 It submits that the intention of Parliament to establish “a body which, at the very least, would not have less accumulated coverage than the bodies it succeeded is obvious”.

86 AFCA submits that the relevant concern of the Ramsay Report was with the “existence of multiple external dispute resolution bodies, not with the internal rules of a particular body” (AFCA emphasis).

87 AFCA submits that the Exposure Draft provides no assistance in discerning any relevant legislative intention. First, it submits that MetLife does not point to any particular cause of the drafting changes and the intention behind the changes remain a matter of speculation. Second, it submits that the Exposure Draft is necessarily further removed from the Revised EM and the Second Reading Speech which it submits both provide strong contextual support for the primary judge’s construction.



## Consideration

### *Textual meaning*

88 It is both necessary and convenient to commence with an analysis of the text of s 1053(1) before considering the statutory context, legislative history and other extrinsic materials.

89 As stated above, the chapeau to s 1053(1)(a) provides:

A person may, subject to section 1056, make a complaint relating to superannuation under the AFCA scheme only if the complaint is a complaint: [a complaint specified within (a) to (j)]

90 The grammatical and ordinary sense of the words in the chapeau to s 1053(1)(a) is that a complaint that relates to superannuation can only be made under the AFCA Scheme if it falls within the ten types of complaints specified in sub-ss 1053(1)(a)-(j).

91 We do not see any textual support for construing the phrase “only if” as meaning anything other than that a complaint relating to superannuation may only be advanced under the AFCA Scheme if it falls within one of the ten types of complaints specified in sub-ss 1053(1)(a)-(j). This conclusion is reinforced by the heading to Subdiv A of Div 3, namely “[w]hen complaints relating to superannuation can be made under the AFCA scheme”.

92 We do not accept that there is any textual support for AFCA’s contention that “a complaint relating to superannuation” in s 1053(1) is limited to an “identification of the genus of matters which s 1053 then introduces in sub-ss 1053(1)(a)-(j)” and a “complaint relating to superannuation” can be construed to mean “nothing wider than the matters listed thereunder”.

93 Such a construction would deprive the words “only if” of any meaning or effect. It would limit a complaint “relating to superannuation” to only those complaints specified in sub-ss 1053(1)(a)-(j). If that were the case, there would be no need for the words “only if”. It would effectively be reading the chapeau to s 1053(1) as if it read:

A person may, subject to section 1056, make a complaint relating to superannuation under the AFCA scheme *being a complaint* [specified within (a) to (j)]:

(Words in italics added.)

94 Alternatively, as the primary judge observed at J [62], it would involve construing s 1053(1) as providing:

A person may, subject to section 1056, make a complaint *as a complaint* relating to

superannuation under the AFCA scheme being a complaint [specified within (a) to (j)]:

(Words in italics added.)

95 We accept, as the primary judge reasoned at J [75], citing *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390; [2010] HCA 32 at [24] (French CJ), that terms such as “in relation to” constitute prepositional phrases of indefinite content and there can be a considerable range in the degree or type of connection that may be connoted by such a phrase. Further, as the primary judge observed, French CJ stated in *R v Khazaal* (2012) 246 CLR 601; [2012] HCA 26, at [31]:

Relational terms such as “connected with” appear in a variety of statutory settings. Other examples are: “in relation to”; “in respect of”; “in connection with”; and “in”. They may refer to a relationship between two subjects which may be the same or different and may encompass activities, events, persons or things. They may denote relationships which are causal or temporal or relationships of similarity or difference. The task of construing such terms does not involve the resolution of ambiguity. They are ambulatory words and may be designed to cover a variety of subjects and a variety of relationships between those subjects. The nature and breadth of the relationships they cover will depend upon their statutory context and purpose. Generally speaking it is not desirable, in construing relational terms, to go further than is necessary to determine their application in a particular case or class of cases. A more comprehensive approach may be confounded by subsequent cases.

[Footnote omitted.]

96 The statutory context and purpose may well inform the precise scope of the phrase “relating to” in a particular statutory provision. The phrase “relating to”, however, necessarily involves a relationship between two subjects. In the present context, the two subjects are “complaints” and “superannuation”. The use of the phrase “relating to” confines the type of complaint to a complaint that has a “nexus” with superannuation but does not identify the nature and breadth of that relationship. For present purposes, the scope of the sufficiency or character of that relationship does not need to be determined.

97 Here, the issue is whether “relating to” can by reference to the statutory context be construed as limiting “a complaint relating to superannuation” to only those types of complaints identified in sub-ss 1053(1)(a)-(j). Unlike the primary judge, we do not accept that the detailed provisions concerned with superannuation complaints, including that AFCA’s determinations of them must conform to the law rather than being guided by what is fair and reasonable, provide contextual reasons why “a complaint relating to superannuation” can be construed,

notwithstanding the “only if” qualification in s 1053(1), as limited to only those types of complaints identified in sub-ss 1053(1)(a)-(j).

98 Further, it would deprive s 1053(3) from having any meaning or effect. Section 1053(3) provides a specific definition of a “superannuation complaint” being a complaint “made in accordance with subsection (1) of this section”. If a complaint “relating to superannuation” is to be construed as being synonymous with the complaints identified in sub-ss 1053(1)(a)-(j) the definition in s 1053(3) would be redundant. As MetLife submits, the legislature could simply have provided in s 1053(1) that “a “superannuation complaint” is a complaint ...” and then set out each of the categories of complaint specified in sub-ss 1053(1)(a)-(j) rather than introducing in s 1053(1) the language of a “complaint relating to superannuation” and then a specific definition in s 1053(3) confining a “superannuation complaint” to only those categories of complaint identified in sub-ss 1053(1)(a)-(j).

99 It is a well-established principle of statutory construction that, if possible, all words in legislation must be given some meaning or effect: *Commonwealth v Baume* (1905) 2 CLR 405; [1905] HCA 11 at 414 (Griffith CJ). This is not a situation in which it could be suggested that it is impossible to give a full and accurate meaning to every word or that any infelicitous drafting makes it necessary to give the words a construction “that produces the greatest harmony and the least inconsistency”: cf *The Council of the City of Brisbane v His Majesty’s Attorney-General for the State of Queensland* (1908) 5 CLR 695; [1908] HCA 8 at 720 (O’Connor J); *Australian Alliance Assurance Co. Ltd v Attorney-General of Queensland and John Goodwyn* [1916] St R Qd 135 at 161 (Cooper CJ).

100 Nor do we accept AFCA’s further textual contention in support of the primary judge’s construction of s 1053(1) that the reference in s 1053(1) to the “AFCA scheme” should be read as simply reflecting the fact that a complaint under the AFCA Scheme will not attract AFCA’s superannuation jurisdiction unless the complaint falls within one of the categories specified in sub-ss 1053(1)(a)-(j).

101 The definition of the AFCA Scheme, however, is not limited to AFCA’s superannuation jurisdiction. If the definition of the “AFCA scheme” in s 761A were incorporated into s 1053(1) it would read as follows:

A person may, subject to section 1056, make a complaint relating to superannuation

under the [external dispute resolution scheme for which an authorisation under Part 7.10A is in force] only if the complaint is a complaint: [specified within (a) to (j)]

102 Textually, there is no room for a construction that a complaint “relating to superannuation” that falls outside sub-ss 1053(1)(a)-(j) may be made under AFCA’s general jurisdiction.

***Statutory context***

103 We turn now to consider the statutory context for s 1053(1).

104 The section is an integral component of the specific provisions introduced in Div 3 of Pt 7.10A to provide a mechanism for the determination of complaints relating to superannuation under the AFCA Scheme. It prescribes what is constituted by a “superannuation complaint” and at least on a textual analysis, limits complaints relating to superannuation to be dealt with under the AFCA Scheme to complaints falling within sub-ss 1053(1)(a)-(j).

105 We do not accept, contrary to AFCA’s submissions, that the textual construction of s 1053(1) advanced by MetLife would lead to any new lacunae by which complaints that could previously be dealt with under the external dispute resolution schemes could no longer be dealt with under the AFCA Scheme.

106 We accept that the 2018 Complaint, being a complaint against an insurer, not a superannuation trustee, could previously have been dealt with by FOS. We also accept that the 2018 Complaint was relevantly a complaint “relating to superannuation” (for the reasons set out in our consideration of Grounds 1 and 2 of AFCA’s Amended Notice of Contention) and therefore it would follow from the textual construction of s 1053(1) advanced by MetLife that it could no longer be made under the AFCA Scheme against the insurer as claims made against insurers relating to superannuation do not fall within sub-ss 1053(1)(a)-(j). This does not, however, give rise to any lacunae.

107 By reason of s 1053(1)(a), the 2018 Complaint could still have been made under the AFCA Scheme as a complaint against a superannuation trustee that had made a decision that is alleged to be unfair or unreasonable, in the case of the 2018 Complaint a decision not to pursue the insurer for indemnity, and the insurer could then be joined to the complaint pursuant to s 1054(1). On the assumption that there was a bona fide complaint by a member against a decision of an insurer it is not apparent how a decision by a superannuation trustee not to pursue the insurer could not be the subject of a complaint by the member against their trustee. If

ultimately, once the insurer is joined, AFCA determines that the decision of the insurer was incorrect then it would appear to follow that the member had a sound claim against a superannuation trustee that had not pursued the claim against the insurer. Hence the inability to bring a claim directly against an insurer under the AFCA Scheme does not appear to give rise to any practical lacuna.

108 Any absence of coverage in the current context only arises because the 2018 Complaint was not advanced under the AFCA Scheme until after the two year limitation period for superannuation complaints stipulated in the AFCA Rules. That is not a lacuna; it is just an outcome of a time limit imposed by the rules.

109 Further, the statutory context makes plain that some complaints relating to superannuation are expressly excluded from the AFCA Scheme. Section 1053(4) provides that complaints about decisions of a trustee of a self-managed superannuation fund (SMSF) and complaints about certain conduct or decisions of an insurer, under an annuity policy maintained by a trustee of an SMSF are not “superannuation complaint[s]”.

### *Extrinsic materials*

110 On balance, we have concluded that the extrinsic materials reinforce and do not relevantly detract from our view of the correct textual construction of s 1053(1). We had the assistance of comprehensive submissions on those materials, which was not given to the primary judge. The materials suggest that it was part of the design of the new statutory scheme to reserve complaints relating to superannuation to the superannuation jurisdiction of AFCA, and so exclude them from the jurisdiction it inherited from FOS. That was one outcome of the rationalisation of three complaint bodies into a “one-stop shop”.

### *Revised Explanatory Memorandum*

111 The perceived benefits of what was referred to as a “one-stop shop” were explained in the Revised EM in the following terms:

1.12 On 9 May 2017, the Government announced the creation of a new framework for dispute resolution with a ‘one stop shop’ EDR scheme which will be known as AFCA. AFCA will replace FOS, CIO and the SCT and will consider certain disputes about products and services provided by Financial Firms.

1.13 A key benefit of a one stop shop is that it enables consumers to approach a single scheme to resolve all financial complaints.

112 At the same time, the Revised EM placed particular emphasis on the extent to which AFCA would be provided with additional and bespoke statutory powers to assist it to resolve superannuation complaints and that its determinations of superannuation complaints would be subject to appeals to the Federal Court on questions of law.

113 The Revised EM summarised Div 3 of Pt 7.10A in the following terms:

1.33 Division 3 of Part 7.10A contains additional provisions relating to superannuation complaints. This includes providing AFCA with statutory powers which can be used to assist in resolving a superannuation complaint. The Division also includes provisions that deal with how a determination about a superannuation complaint is made, how questions of law about a superannuation complaint can be referred to the Federal Court and how appeals about superannuation complaints can be made to the Federal Court on a question of law.

1.34 AFCA's statutory powers which can be used to assist in resolving a superannuation complaint are as follows:

- the power to join certain third parties to a superannuation complaint;
- the power to obtain information and documents which are relevant to a superannuation complaint;
- the power to require people to attend conciliation conferences to assist in the resolution of a superannuation complaint;
- the power to issue directions to protect the confidentiality of information; and
- the power to refer a question of law arising in relation to a superannuation complaint to the Federal Court.

1.35 In relation to the making of a determination of a superannuation complaint, Division 3 also:

- sets out the powers, obligations and discretions of AFCA in making a determination;
- requires AFCA to give written reasons for a determination relating to a superannuation complaint; and
- explains that a determination comes into operation immediately upon the making of the determination unless otherwise specified by AFCA.

1.36 AFCA's determinations of superannuation complaints will be subject to appeal to the Federal Court on a question of law. Division 3 also includes rules about the status of a determination which is subject to appeal to the Federal Court. A right of appeal is maintained for superannuation complaints given the compulsory nature of superannuation and the obligation of trustees to act in the best interests of all beneficiaries of the fund. The outcome of a superannuation complaint may have wider implications on the future payment of benefits by a trustee to members. It is important that these types of decisions can be appealed where the law may have been incorrectly applied.

1.37 Division 3 also provides that AFCA staff members will be subject to secrecy requirements in relation to information that is compulsorily obtained from third parties as part of a superannuation complaint.

114 The Revised EM included a table at pages 14 and 15 contrasting the new law with the current law. The table first addressed the AFCA Scheme generally and then dealt with superannuation complaints sourced back to the SCT law. A sharp distinction was drawn between superannuation and non-superannuation complaints.

115 The perceived need to provide additional powers to AFCA to facilitate the determination of superannuation complaints was explained in the following paragraphs of the Revised EM:

1.99 As superannuation complaints are often complex in nature, particularly where third parties are involved, this Bill provides additional powers to AFCA to facilitate the resolution of superannuation complaints.

1.100 The additional powers that will apply in relation to superannuation complaints are as follows:

- a power to join certain persons to a superannuation complaint;
- a power to obtain information and documents about a superannuation complaint;
- a power to require people to attend a conciliation conference about a superannuation complaint;
- the power to issue directions to protect the confidentiality of information; and
- the ability to refer questions of law relating to a superannuation complaint to the Federal Court.

1.101 These additional powers are required for superannuation complaints because it may be necessary in some cases to require people who are not originally parties to a complaint to participate in the superannuation complaints process. The powers are consistent with the powers that the SCT currently has to resolve superannuation complaints.

1.102 This Bill also provides the ability for parties to a superannuation complaint to appeal determinations to the Federal Court on a question of law, as is currently the case for SCT determinations. A right of appeal is maintained for superannuation complaints given the compulsory nature of superannuation and the obligation of trustees to act in the best interests of all beneficiaries of the fund. The outcome of a superannuation complaint may have wider implications on the future payment of benefits by a trustee to members. It is important that these types of decisions can be appealed where the law may have been incorrectly applied.

1.103 This Bill also outlines secrecy obligations for AFCA staff members who receive confidential information obtained compulsorily under these provisions. Information that is not obtained compulsorily will be protected in accordance with the *Privacy Act 1988*.

116 The above extract from the Revised EM clearly evidences the legislative intention that a discrete procedure was necessary and would be implemented to deal with complaints relating to superannuation.

117 The Revised EM stated at [1.104] that a complaint relating to superannuation:

can be made under the AFCA scheme only if the complaint relates to one of the decisions or types of conduct outlined below and the complainant alleges that the decision or conduct was unfair or unreasonable.

118 The decisions or types of conduct that became the ten sub-paragraphs of s 1053(1) were then set out in the Revised EM at [1.105] to [1.113].

119 It is significant that the Revised EM at [1.104] refers to the AFCA Scheme as a whole, not the superannuation jurisdiction of the AFCA Scheme. The Revised EM does not contemplate that a complaint relating to superannuation may be made under the non-superannuation jurisdiction of the AFCA Scheme. It expresses the contrary.

120 The decision to exclude certain complaints about SMSFs from the AFCA Scheme was explained at [1.117 ] in these terms:

Certain complaints about self-managed superannuation funds (SMSFs) cannot be made under the AFCA scheme. A key characteristic of an SMSF is that the trustees of an SMSF are also members of the SMSF. For this reason it would not be appropriate for an SMSF member to make a superannuation complaint relating to an SMSF to AFCA, as the decision of the trustee is also the decision of the member. These include complaints relating to:

- a decision made by the trustee of an SMSF;
- conduct engaged in by an insurer, or a representative of an insurer, in relation to the sale of an annuity policy maintained or to be maintained by the trustee of an SMSF on behalf of its members; or
- a decision made by an insurer, or a representative of an insurer, under an annuity policy maintained by the trustee of an SMSF on behalf of its members.

121 The Revised EM stated at [1.118]:

However, members of an SMSF may still lodge non-superannuation complaints with AFCA. For example, an SMSF may, as a consumer of financial advice, be permitted to bring a non-superannuation complaint to AFCA regarding a financial adviser.



122 The Revised EM then provided three illustrative examples of how the powers given to AFCA to deal with superannuation complaints would be exercised. The first example at [1.125] (**Hermione example**) was directed at the power to join parties and is in the following terms:

Hermione makes a claim on a TPD insurance policy held by her superannuation fund. The claim is declined by the trustee on the basis that the superannuation fund's insurer has determined that Hermione's disability does not meet the definition of a TPD in the policy.

Hermione makes a complaint under the AFCA scheme about the trustee's decision to reject her claim. AFCA joins the insurer as a party to Hermione's complaint.

AFCA can review the decision of the trustee and the insurer.

AFCA reviews the information used by the trustee and insurer in making their decisions and determines that the insurer did not gather sufficient information about Hermione's illness to properly determine whether she has a TPD.

AFCA remits the decision back to the trustee and insurer with directions requiring them to obtain further medical information about Hermione's disability.

123 The 2018 Complaint falls squarely within the parameters of the Hermione example. The example reveals a legislative intention that complaints relating to superannuation, in this case a TPD insurance policy held by a trustee of a superannuation fund, may be advanced by making a complaint against a decision of a superannuation trustee pursuant to s 1053(1) and thus enlivening the specific statutory framework for dealing with superannuation complaints.

### *Second Reading Speech*

124 The Second Reading Speech records at page 7318 of the Senate Hansard that the central recommendation of the review undertaken by Professor Ian Ramsay, Ms Julie Abramson and Mr Alan Kirkland in connection with their preparation of the Ramsay Report was "to establish a new one-stop-shop dispute resolution body for all financial disputes, including superannuation disputes".

125 It was then stated in the Second Reading Speech at page 7319 that:

In line with this recommendation, the Government committed to establishing the Australian Financial Complaints Authority, or AFCA, which will be based on an industry ombudsman model, with additional statutory powers where required.

This approach combines the strengths of both a statutory tribunal and an industry ombudsman scheme.

AFCA will replace the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT),

and will reduce the unnecessary duplication and consumer confusion that has been characteristic of the current framework.

126 The need to provide additional powers to facilitate the resolution of superannuation disputes was explained as follows at pages 7319-20 of the Senate Hansard:

The legislation also includes a number of statutory provisions to ensure that AFCA has the necessary powers to effectively resolve superannuation disputes. Additional statutory provisions are required because of the complex nature of some superannuation disputes that involve third parties, such as death benefit disputes.

AFCA will have the power to join third parties to a dispute, require parties to attend conciliation and require the production of documents.

The statutory provisions available to AFCA will allow timely decisions to be made, to enable prompt payment of death benefit amounts by superannuation funds, to those who may be in need.

127 It was also stated in the Second Reading Speech at page 7321 of the Senate Hansard that:

The new [External Dispute Resolution] regime will result in significant benefits for consumers and small businesses, with less confusion, increased access to redress and greater accountability for financial firms.

### *Ramsay Report*

128 By reason of s 15AB(1) of the Acts Interpretation Act, the Ramsay Report is capable of assisting to ascertain the meaning of the AFCA Act, given that both the Revised EM and the Second Reading Speech expressly referred to it, and the Revised EM recorded at [5.2] that:

Treasury has certified that the Ramsay Review and subsequent consultation as a process and analysis equivalent to a Regulation Impact Statement.

129 The Ramsay Report placed particular emphasis on the particular structural and legal aspects of superannuation. Under a heading “Preserving the strengths of the existing arrangements”, it was stated:

5.61. The Panel has noted there are aspects of superannuation disputes that distinguish them from other financial disputes, including the structural and legal aspects of superannuation (for example, the fiduciary duties of trustees). The Panel has given careful consideration to these issues, including obtaining legal advice.

5.62. The Panel considers that an informal, accessible and effective industry-based EDR body, in conjunction with careful design and, where necessary, statutory provisions, will be able to effectively manage the unique features of superannuation disputes. This is discussed in detail in Chapter 7. With careful design and, where necessary, statutory provisions, particular structural and legal aspects of superannuation can be accommodated.

130 A particular concern expressed in the Ramsay Report was the risk of inconsistent outcomes across different external dispute resolution bodies, given the overlap in their various jurisdictions. The authors of the Ramsay Report explained that:

5.70. A key principle guiding this Review is that the outcomes from similar disputes should be comparable. This is critical for consumer confidence in the financial system overall.

5.71. At present, the EDR bodies have different:

- jurisdictions (for example, FOS and CIO have different definitions of ‘financial services’ and SCT and FOS/CIO have different monetary limits);
- processes for dealing with disputes (for example, some schemes have fast-track processes for certain disputes) and different decision making models (for example, decisions by ombudsmen or panels, depending on the nature of the dispute); and
- decision making criteria.

5.72. These factors mean that consumers can have different dispute resolution experiences and different outcomes for similar disputes.

5.73. This is clearly illustrated in the case of life insurance disputes. The mere fact of whether the insurance was obtained within or outside superannuation determines which EDR body (FOS or SCT) deals with the dispute and results in very different experiences for the consumer, given the lengthy delays currently experienced by SCT.

[Footnotes omitted.]

131 A particular concern that had arisen in relation to the overlap between the jurisdictions of the SCT and the FOS was identified at [5.90] of the Ramsay Report in the following terms:

A separate concern was raised in relation to disputes where there is an overlap between FOS’s and SCT’s jurisdictions. In such cases, it was submitted that it is FOS alone that determines what part of the dispute falls within its jurisdiction. Concerns were raised about ‘subjectiveness’ in what aspects of a matter can be taken by FOS, which can result in fragmentation of disputes to different bodies, in turn resulting in inconsistent outcomes and confusion for consumers who lodge complaints with the incorrect EDR body.

[Footnotes omitted.]

132 The authors of the Ramsay Report concluded, at page 109, that the current multi-body framework imposed unnecessary costs on consumers because it resulted in inconsistent outcomes and processes for similar disputes, difficulties when firms were members of different external dispute resolution schemes and consumer confidence as to where they should seek redress.

*Exposure Draft*

133 The Exposure Draft was released between the publication of the Ramsay Report and the introduction of the AFCA Establishment Bill into Parliament.

134 Following a period of public consultation, a number of changes were made to the text of s 1052 of the Exposure Draft, which subsequently became s 1053 in the AFCA Act.

135 The principal changes were as follows:

- (a) the heading to the section was changed from “Meaning of *superannuation complaint*” to “When complaints relating to superannuation can be made under the AFCA scheme”;
- (b) the prefatory words to sub-s 1 “A *superannuation complaint* is a complaint, made under an authorised external dispute resolution scheme, that: [paragraphs (a) to (j)]” were replaced by “A person may, subject to section 1056, make a complaint relating to superannuation under the AFCA scheme only if the complaint is a complaint: [paragraphs (a) to (j)]”;
- (c) a new sub-s (3) was added that provided that “A complaint made in accordance with subsection (1) of this section is a *superannuation complaint*”.

136 The changes were significant. Section 1052(1) of the Exposure Draft was directed at providing a definition of “superannuation complaint”, that is each of the matters identified in sub-ss 1052(1)(a)-(j). The revised s 1053(1), by the introduction of the expressions “relating to superannuation” and “only if”, goes beyond providing a definition of superannuation complaints that can be made under the AFCA Scheme by expressly providing that only superannuation complaints that fall within sub-ss 1053(1)(a)-(j) can be made under the scheme.

137 We do not accept AFCA’s submission that the Exposure Draft is of no assistance. The intention behind the drafting change can be inferred from the terms of the amendments and it cannot simply be dismissed as a matter of speculation. The amendments on their face reflect, or at least are consistent with, a legislative recognition that complaints relating to superannuation might extend beyond those identified in sub-ss 1052(1)(a)-(j) and a legislative intention that such complaints could not be made under the AFCA scheme. If the legislative intention had been only to define a superannuation complaint for the purpose of the provisions of Div 3, no amendments would need to have been made to s 1052(1) of the Exposure Draft.

*One-stop shop to resolve all financial complaints*

138 Much reliance was placed by AFCA on the references in the extrinsic materials to the creation of a “one-stop shop” for the determination of financial complaints to resolve “all financial complaints” (AFCA emphasis).

139 We do not accept that these references support any contention that it was intended by the legislature that *all* methods and alternatives for the resolution of complaints provided by the previous external dispute resolution bodies must be retained. Such a contention is inconsistent with the legislative concern to avoid inconsistency and promote efficiency by having complaints dealt with consistently and subject to the same rules and procedures. That concern was expressed in the Revised EM as achieving “comparable outcomes for consumers with similar complaints” (at [1.11]) and in the Ramsay Report a key principle identified was that “outcomes from similar disputes should be comparable” (at [5.70]). This was stated in the Ramsay Report to be not currently possible given the existence of different jurisdictions, processes and decision making criteria that meant consumers “can have different dispute resolution experiences and different outcomes for similar disputes” (at [5.71]-[5.72]). In the Second Reading Speech, it was stated that AFCA, as a single decision making body, would “reduce the unnecessary duplication and consumer confusion that has been the characteristic of the current framework”.

140 Addressing this legislative concern would necessarily include a rationalisation, variation or elimination of procedures and practices that otherwise might give rise to inconsistent outcomes. The references in the Ramsay Report to the need for ‘careful design’ indicate that AFCA’s jurisdiction to decide superannuation complaints would be the result of intentional decisions about the scope of that jurisdiction, not uncritical replication of the overlap and duplication between the existing schemes.

*Particular characteristics of superannuation complaints*

141 Allied to that concern was a recognition in the extrinsic materials that the particular characteristics of superannuation complaints required the provision of additional powers to AFCA to facilitate the resolution of complaints relating to superannuation. The statutory powers to join persons including insurers to a complaint, to obtain information and documents,

to require persons to attend conciliation conferences and the ability to refer questions of law to the Federal Court are not given to AFCA in dealing with non-superannuation complaints.

142 Any construction of s 1053(1) that had the consequence that a complaint relating to superannuation could be made in the non-superannuation jurisdiction of AFCA would be antithetical to the explanations in the extrinsic materials that the particular characteristics of superannuation complaints required different procedures to non-superannuation complaints.

143 At the same time, any construction of s 1053(1) that had the consequence that a complainant could bring a superannuation complaint to AFCA under its superannuation jurisdiction within two years of the impugned conduct and thereafter in AFCA's general jurisdiction is antithetical both to the comparable outcomes for comparable complaints objective and the recognition that the particular characteristics of superannuation complaints require different procedures to non-superannuation complaints.

144 The Hermione example in the Revised EM highlights the legislative intention that complaints relating to superannuation made by a person in the position of Mr Edgecombe against an insurer that might previously have been made to FOS are now to be made under the AFCA Scheme against the superannuation trustee under s 1053(1)(a).

145 For these reasons, references to "all financial complaints" in the extrinsic materials should be understood as revealing a legislative intention to replace multiple decision-making bodies with a single decision-making body through the introduction of the AFCA Act. That is, it was intended that AFCA would determine "all financial complaints", in contradistinction to AFCA determining only some financial complaints, with other complaints being determined by a different external dispute resolution scheme. That intention makes it unlikely that the single body is to deal with a given complaint in one way if its superannuation jurisdiction is invoked and in another way if the same complaint is made in a way that does not invoke that jurisdiction.

#### *Cutting down of pre-existing jurisdiction*

146 A fundamental premise of AFCA's contention that the ability of a person in the position of Mr Edgecombe to bring a complaint against a superannuation trustee pursuant to s 1053(1) and then join the insurer does not count against its construction of s 1053(1) is its contention that there was no indication in any of the extrinsic materials that Parliament intended to "cut down" any of the pre-existing jurisdiction. This contention in turn was based on contentions that *first*,

the introduction of the AFCA Scheme was not intended to disallow types of complaints that could previously be made under external dispute resolution schemes, such as FOS, and *second*, the AFCA Scheme was intended to provide a continuity of jurisdiction, not a new regime whose jurisdiction was written from scratch.

147 It is not possible, however, to reconcile these contentions with the statutory framework introduced by the AFCA Act for the resolution of financial complaints. Under the former regime a person in the position of Mr Edgecombe could bring a complaint “relating to superannuation” against the insurer directly to FOS at any time within six years of the date when the applicant first became aware or should reasonably have become aware that they had suffered loss or a complaint: rr 4.2(b)(iii) and 6.2 of the FOS terms of reference.

148 The construction propounded by AFCA, and accepted by the primary judge, leads to the conclusion that a claim relating to superannuation that fell within sub-ss 1053(1)(a)-(j) may be brought under the superannuation jurisdiction of AFCA within the first two years of becoming aware that they had suffered loss and then for the next four years under the non-superannuation jurisdiction of AFCA.

149 It follows that AFCA’s own construction leads to the inevitable conclusion that the implementation of the AFCA Scheme has led to a “cutting down” in the pre-existing jurisdiction. Under the former external dispute resolution schemes, a person in the position of Mr Edgecombe could have framed his complaint as a non-superannuation complaint to FOS at any time within six years of suffering loss. Under the AFCA Scheme, on AFCA’s construction, such a person could not bring a complaint relating to superannuation as a non-superannuation complaint within the first two years of suffering loss.

#### *Election between different jurisdictions*

150 Another inevitable consequence of the construction propounded by AFCA is that a person making a complaint in the nature of the 2018 Complaint can choose to make the complaint as a complaint under s 1053(1)(a) and thus attract the superannuation jurisdiction of AFCA or choose to make a direct complaint against the insurer under the general (non-superannuation) jurisdiction of AFCA with its different procedures, standards and rights of appeal leading to potentially different outcomes. Such a result would again be antithetical to the concerns expressed in the extrinsic materials about the need to avoid inconsistent outcomes and the key

guiding principle that the outcomes from similar disputes should be comparable, as expressed by the authors of the Ramsay Report in undertaking their review of the former external dispute resolution schemes.

151 Moreover, the AFCA construction would permit a person, either carelessly or intentionally, to allow the two year period for bringing a complaint against a superannuation trustee under s 1053(1)(a) to lapse, thereby transferring the complaint from the superannuation jurisdiction of AFCA to the general jurisdiction of AFCA with its different procedures, standards, rights of appeal and leading to a potentially different outcome for the same complaint.

### ***Conclusion***

152 For these reasons, ground 1 should be upheld.

### **GROUND 2**

153 Ground 2 of the notice of appeal was not pressed. MetLife submits that it does not require Ground 2 having regard to AFCA's submissions on the appeal, in particular its acceptance that the 2018 Contract was not a complaint falling within any of the categories specified in sub-ss 1053(1)(a)-(j).

## **AMENDED NOTICE OF CONTENTION**

### **Grounds 1 and 2**

#### ***Introduction***

154 AFCA contends in the first two grounds in its amended notice of contention that the primary judge should have found that the 2018 Complaint was not a complaint relating to superannuation. It alleges that:

1. The Court erred in fact and law in finding that, if the Appellant's construction of s 1053(1) of the *Corporations Act 2001* (Cth) was correct, the complaint submitted by the Second Respondent to the First Respondent (the **2018 Complaint**) was a complaint relating to superannuation (J: [104]-[105]).
2. The Court should have found that, if the Appellant's construction of s 1053(1) was correct, the 2018 Complaint was not a complaint relating to superannuation, but rather was a complaint by the Second Respondent about a decision made by the Appellant as insurer.



155 The primary judge provided the following reasons for rejecting AFCA’s contention that the 2018 Complaint could still be dealt with under the AFCA Scheme because it was not a complaint “relating to superannuation”:

104 AFCA says that Mr Edgecombe’s complaint was directed towards the conduct of Metlife and not the conduct of the trustee. I accept that his complaint was expressed in that manner. However, the way in which Mr Edgecombe chose to express his complaint cannot be determinative. If s 1053(1) is construed in the manner that Metlife contends then it does not apply by reference to the way in which a complaint is expressed but by reference to whether the complaint relates to superannuation. The insurance policy the subject of Mr Edgecombe’s complaint was a policy that had been negotiated and agreed between Metlife and the trustee. The benefit that might be received by Mr Edgecombe if there was liability under the policy was as a member of the superannuation fund. Even though he might be said to have a beneficial interest in the moneys to be paid to the trustee, his claim arose solely from his status as a member of the superannuation fund and could only be based upon that status.

105 For those reasons, on the assumption that Metlife’s construction is correct, the 2018 Complaint was a complaint relating to superannuation within the meaning of those words as used in s 1053(1).

### ***Submissions***

156 AFCA submits that the 2018 Complaint was not a “complaint relating to superannuation” within the meaning of s 1053(1) because it was a “complaint about a decision made by MetLife as insurer”. It further submits that the complaint was not concerned with any conduct or decision of the superannuation trustee, the trustee was not joined to the 2018 Complaint, the complaint was about his interest in an insurance policy, not superannuation and it was entirely incidental that the PBR Policy had been transacted by the trustee and not by his employer, his union or himself.

157 MetLife submits that none of the matters raised by AFCA impugn the primary judge’s conclusion that the 2018 Complaint was a complaint “relating to superannuation”.

158 *First*, MetLife submits that Mr Edgecombe’s complaint can properly be understood as, in essence, a complaint that his superannuation trustee did not pursue MetLife in accordance with its duties, in circumstances where Mr Edgecombe considered that he had a reasonably arguable claim for TPD under the PBR Policy.

159 *Second*, MetLife submits that the question of whether the trustee was a party to the complaint cannot determine whether the complaint was a complaint relating to superannuation and the

fact that the benefit was an insured benefit rather than an investment benefit does not alter its status as a superannuation benefit.

160 *Third*, MetLife submits that the status of Mr Edgecombe’s insurance interest as a superannuation benefit cannot be described as “incidental”. It submits that the fact that Mr Edgecombe gained benefits under the PBR Policy via his superannuation fund, rather than through any direct means, was significant from Mr Edgecombe’s perspective, as it resulted in Mr Edgecombe obtaining additional rights, such as the benefit of obligations of the trustee. In addition, it submits the cost and the scope of coverage may have been affected by the fact that the PBR Policy was negotiated and entered into by the superannuation trustee, rather than by Mr Edgecombe personally.

### ***Consideration***

161 We are satisfied that none of the matters raised by AFCA establish that the 2018 Complaint was not a “complaint relating to superannuation”, essentially for the reasons advanced by MetLife.

162 In particular, we accept that, given that the parties to the PBR Policy were the trustee and MetLife, the complaint made by Mr Edgecombe was in substance a complaint that his superannuation trustee had not pursued MetLife in circumstances where he had a reasonably arguable claim for TPD under the policy. Mr Edgecombe had no right to receive any entitlements under the PBR Policy itself. The trustee of Mr Edgecombe’s superannuation fund was the policyholder and the party with the right to the entitlements under the policy.

163 As the primary judge reasoned at J [104]:

Even though he might be said to have a beneficial interest in the moneys to be paid to the trustee, his claim arose solely from his status as a member of the superannuation fund and could only be based upon that status.

164 Grounds 1 and 2 of the amended notice of contention must be dismissed.

## **Grounds 3 and 4**

### ***Introduction***

165 AFCA contends that the primary judge erred by not finding that the parties had agreed that the 2018 Complaint could be determined by AFCA as a non-superannuation complaint. It alleges in its amended notice of contention that:

3. The Court did not make a finding whether the parties had agreed that a complaint such as the 2018 Complaint could be determined by the First Respondent, pursuant to Rules B.2.1(e)(i) and E.1 (definition of “Superannuation Complaint”) of the AFCA Rules, or whether any such agreement would be effective (J: [50]-[52], [106]).
4. The Court should have found that the parties had agreed that a complaint such as the 2018 Complaint could be determined by AFCA under the AFCA Rules, pursuant to Rules B.2.1(e)(i) and E.1 (definition of “Superannuation Complaint”) of the AFCA Rules, and that that agreement was effective.

### ***Submissions***

166 AFCA submits that, on the making of the 2018 Complaint by Mr Edgecombe, there arose a contract between AFCA, MetLife and Mr Edgecombe by which MetLife agreed to comply with binding determinations of AFCA in relation to the 2018 Complaint. It submits that the contract was relevantly constituted by the AFCA Rules and that cl A.15.3 of the AFCA Rules relevantly provided that a determination made by AFCA is final, and is binding upon the parties if accepted by the complainant within 30 days.

167 AFCA submits that the arbitral contract that was made between AFCA, MetLife and Mr Edgecombe upon the making of Mr Edgecombe’s complaint did not depend upon Mr Edgecombe’s having had a prior contractual relationship with MetLife.

168 A “Superannuation Complaint”, mentioned in the chapeau to cl B.2.1 of the AFCA Rules is defined in the glossary to have “the meaning set out in section 1053 of the Corporations Act”. A “superannuation complaint” is defined in s 1053(3) to mean a “complaint made in accordance with” s 1053(1).

169 AFCA submits that, as the parties agree that the 2018 Complaint was not made in accordance with s 1053(1), as a matter of contract, the AFCA Complaint was not a “Superannuation Complaint” for the purposes of the AFCA Rules.

170 The definition of “Superannuation Complaint” in the AFCA Rules provides relevantly as follows:

Accordingly:

- (a) a complaint about an insurer’s decision under an insurance policy held by the trustee of a Regulated Superannuation Fund or an Approved Deposit Fund will:
  - (i) if all of the time limits in rule B.4.1.1 have been met, be considered as a Superannuation Complaint, by joining the insurer to a complaint against the trustee's decision;
  - (ii) otherwise, be considered as a non-superannuation complaint against the insurer; ...

171 AFCA notes that it is common ground that the time limits in cl B.4.1.1 had not been met.

172 AFCA submits that it therefore follows that as a matter of contract, the 2018 Complaint is able to be considered in AFCA’s “general” (that is, non-superannuation) jurisdiction, pursuant to cl B.2.1, as it was not a superannuation complaint made in accordance with s 1053(1). It submits that, further and in any event, it was specifically contemplated by the AFCA Rules as a complaint that could be made under AFCA’s general jurisdiction because it had been made after the expiry of the time limits in r B.4.1.1 and therefore it was considered a “non-superannuation complaint”.

173 AFCA submits that generally speaking, parties are perfectly free to make arbitral agreements of whatever kind they choose and that it is therefore not apparent, particularly given the one-shop stop objectives of the AFCA Scheme, why it could be contended that AFCA should be the “only person in the world” who could not have resolved the dispute between MetLife and Mr Edgecombe by way of arbitration and in accordance with the parties’ contract.

174 MetLife submits that the central issue raised by Grounds 3 and 4 is whether it is open to AFCA to contractually expand the scope of the AFCA Scheme (being a statutory scheme) so as to permit AFCA to determine certain categories of complaint within the AFCA Scheme, notwithstanding that if its construction of s 1053(1) is accepted, such complaints would be excluded from the AFCA Scheme.

175 MetLife submits that although participation in the AFCA Scheme may be technically, although perhaps not practically, consensual, the scope of the AFCA Scheme is defined by statute. It submits that to the extent that the AFCA Rules purport to empower AFCA to determine

complaints with the AFCA Scheme that are excluded from the scheme by the Corporations Act, they are of no effect: citing by way of analogy, *Adamson v New South Wales Rugby League Limited* (1991) 31 FCR 242.

176 MetLife submits that it is not suggesting that the AFCA Scheme would be void to the extent that it is inconsistent with s 1053, but rather that to the extent that the AFCA rules purporting to define the scope of the AFCA Scheme are inconsistent with s 1053, they would have no effect.

177 MetLife acknowledged that if there had been a clear intention between the parties to establish a bespoke scheme through a collateral contract sitting alongside the AFCA Scheme, that might have given rise to an ad hoc contract, but in this case, as the primary judge found, there was no such clear intention.

### ***Consideration***

178 The contractual provisions in the AFCA Rules cannot consensually be expanded beyond statutorily defined limits. Significant aspects of the AFCA Scheme depended on statutory authority, particularly with respect to “complaint[s] relating to superannuation”. The AFCA Rules do not operate solely with contractual authority.

179 To the extent that the AFCA Rules purport to operate inconsistently with the statutory framework for the establishment and operation of the AFCA Scheme in the Corporations Act, they have no effect.

180 We respectfully agree with the primary judge’s reasoning at J [106]:

The consensual manner with which those rules take effect are one of the incidents of the scheme that provide the foundation for the reasoning that they do not involve the exercise of judicial power. However, that does not mean that once submitted to they are exclusively contractual in character. In important respects they depend upon statutory authority for their operation. They operate on the basis that they have been approved by ASIC as rules that give effect to the statutory requirements that must apply to the AFCA Scheme. Those requirements include s 1053. If Metlife’s construction were to be accepted and there was indeed a statutory prohibition upon certain complaints being considered under the AFCA Scheme then it is difficult to see how a provision of the scheme that was contrary to that prohibition might nevertheless operate consensually in the absence of clear manifestation of an intention by the parties to establish a dispute resolution procedure outside the confines of the AFCA Scheme as provided for by the Corporations Act.

181 Grounds 3 and 4 of the amended notice of contention must be dismissed.

## Grounds 5 and 6

### *Introduction*

182 AFCA contends that the primary judge erred in not finding that there was an ad hoc agreement between the parties that it could determine the 2018 Complaint. It alleged in its amended notice of contention that:

5. The Court erred in fact and law in finding that there was no ad hoc agreement between the parties that the 2018 Complaint could be determined by the First Respondent (J: [125]).
6. In the alternative to paragraphs 3-4 above, the Court should have found that there was an ad hoc agreement between the parties that the 2018 Complaint could be determined by the First Respondent, on the basis of the matters set out at paragraph 27 of the First Respondent's Defence dated 4 September 2019.

183 The matters set out in AFCA's defence referred to the communications between AFCA in relation to an earlier complaint in 2017 and the 2018 Complaint, in particular AFCA's advice to MetLife and Mr Edgecombe on 12 February 2019 that it considered it had jurisdiction to deal with both complaints (**Jurisdiction Decision**), the provision of joint submissions by MetLife addressing both complaints on 18 March 2019 and 2 April 2019, AFCA's determination of both complaints on 12 April 2019 (**Determination**), Mr Edgecombe's acceptance of the Determination on or about 15 April 2019 and the absence of any complaint by MetLife to AFCA prior to 15 April 2019 about the Jurisdiction Decision or the Determination.

### *Submissions*

184 AFCA submits that the matters outlined above constituted conduct giving clear assent to AFCA determining the 2018 Complaint.

185 MetLife submits that *even if* the evidence identified by AFCA did support the conclusion that MetLife assented to AFCA determining the 2018 Complaint, on no view could that evidence be said to support the conclusion that MetLife consented to AFCA determining the 2018 Complaint *outside* the AFCA Scheme.

### ***Consideration***

186 An essential premise to the ad hoc agreement contention sought to be advanced by AFCA in Grounds 5 and 6 of the amended notice of contention is that the parties had agreed that the determination should proceed independently of the AFCA Scheme.

187 AFCA, however, does not challenge any of the following factual findings of the primary judge at J [125] that:

All the dealings of the parties were undertaken on the basis that they were giving effect to the AFCA Rules under the AFCA Scheme. There was no evidence of a consensus to the effect that a decision would be made outside the AFCA Scheme by reference to the AFCA Rules even though they were not applicable between the parties. Nor is there evidence from which it may be inferred that the parties agreed by conduct that the 2018 Complaint would be determined on the basis of the AFCA Rules even if the AFCA Scheme did not apply to the 2018 Complaint (because it was a superannuation complaint of a kind that could not be considered under the AFCA Scheme). Therefore, AFCA acquired no further authority than that conferred by the AFCA Scheme to determine the 2018 Complaint.

188 There is a further difficulty with the ad hoc agreement contentions advanced by AFCA, given its alleged status as an arbitrator pursuant to an ad hoc agreement. As the primary judge recently observed in *MetLife Insurance Limited v Australian Financial Complaints Authority (No 3)* [2022] FCA 849 at [51]:

... AFCA had no interest in advancing a claim that there had been *ad hoc* agreements which bound Metlife to the terms of the determinations. If there had been such agreements then they would fall outside the statutory aspects of the AFCA Scheme. In that event, it would be [a] matter for Mr Edgecombe to seek enforcement. As with any consensual arbitrator, AFCA would have no interest in seeking to enforce its own determination.

189 Grounds 5 and 6 of the amended notice of contention must be dismissed.

### **DISPOSITION**

190 We consider that the appeal is to be allowed, the decision below set aside and our tentative view is that orders should be made:

- (a) varying order 2 made by the primary judge on 27 January 2022 to replace “the determinations” with “the determination in respect of complaint 507677 and did not have authority to make the determination in respect of complaint 600361” ; and
- (b) setting aside orders 3 and 4 made by the primary judge on 27 January 2022 and instead providing that:

- (i) the application be allowed insofar as it relates to complaint 600361 and otherwise be dismissed; and
- (ii) the cross-claim be allowed insofar as it relates to complaint 507677 and otherwise be dismissed; and
- (c) setting aside order 2 made by the primary judge on 16 February 2022.

191 There remains outstanding the estoppel and acquiescence contentions advanced below before the primary judge. The parties have asked for an opportunity to consider our reasons for judgment before proposing any form of orders for a remittal of these proceedings to the primary judge to address these issues. We will give the parties an opportunity to address this issue and otherwise formulate proposed orders to give effect to these reasons.

192 We therefore order that:

- (1) Within fourteen (14) days the parties file an agreed form of orders, or in default of agreement, any submissions as to the form of the appropriate orders reflecting the reasons of the Court.
- (2) Subject to any further directions, the final orders of the Court will be made on the papers.

I certify that the preceding one hundred and ninety-two (192) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Middleton, Jackson and Halley.

Associate: 

Dated: 27 October 2022