

SUBMISSION

Submission to Treasury —
Discussion Paper on
Superannuation binding
death benefit
nominations and kinship
structures – March 2019

31 May 2019

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Manager, Retirement Benefits Unit
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: superannuation@treasury.gov.au

31 May 2019

Dear Sir / Madam,

Discussion Paper on Superannuation binding death benefit nominations and kinship structures – March 2019

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Discussion Paper on Superannuation binding death benefit nominations and kinship structures (Discussion Paper).

About ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$2.7 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 15.6 million Australians with superannuation.

If you have any queries or comments in relation to the content of our submission, please contact me on (03) 9225 4021 or by email fgalbraith@superannuation.asn.au.

Yours sincerely

Fiona Galbraith

Director, Policy

General comments

The death of a member of a superannuation fund who has not made or updated a superannuation binding death benefit nomination of beneficiaries can result in a contested claim involving significant time and heightened conflict among an extended range of family members.

ASFA member organisations were of two views as to the preferred way of addressing the issue of recognising indigenous kinship structures and binding death benefit nominations: -

- some member organisations considered that the best way to address the issue would be through increased recognition of, and guidance about, the potentially broader application of the definition of 'dependant', including financial dependence and interdependency, with no need to link to specific concepts such as kinship
- other member organisations thought that the issue necessitated specific action being taken and provided substantive responses to the questions asked in the Discussion Paper.

Specific questions in the Discussion Paper

Question 1. How do the kinship structures of Aboriginal and Torres Strait Islander communities influence the preferred distribution of super death benefits by these people?

The kinship structure binds Aboriginal and Torres Strait Islander communities together and can be complex. Some member organisations considered that these structures currently are not adequately reflected in superannuation legislation, as community members can have kinship and family relationships that can on occasion extend beyond the definitions of eligible dependants as permitted under superannuation law.

In many instances the preferred distribution of the superannuation of an Aboriginal or Torres Strait Islander may be in accordance with the kinship structure and therefore to persons not necessarily related by blood to the superannuation member. There are two schools of thought as to this

1. that distribution to these persons would not be in accordance with dependency relationships as currently defined under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations) – together referred to as the SIS Legislation
2. that it may be possible to find financial dependency or interdependency between the parties that would satisfy the definition of dependant for the purposes of paying a superannuation death benefit.

Question 2. How do superannuation funds currently deal with kinship relationships

Appropriate communication with Aboriginal and Torres Strait Islander communities and meeting the regulatory requirements can pose a challenge for the superannuation industry.

In many cases the trustee may not be aware that a member is indigenous unless their community has provided this information. Generally, once the trustee becomes aware that the deceased member was part of a kinship structure, it will endeavour to obtain details of the kinship structure for the purposes of claim staking.

Superannuation trustees are bound by the fund's trust deed as well as relevant legislation, in particular the SIS Legislation. Where a trustee obtains information about a kinship structure, the various relationships within the kinship structure must then be tested against the current superannuation law.

Individuals identified within a kinship structure must be a dependant of the deceased member as defined under section 10 of the SIS Act, which defines a dependant as including a spouse of the person, any child of the person and any person with whom the person has an interdependency relationship.

As this is an inclusive definition this means that, while the persons listed are automatically considered to be dependants, the definition is not confined to the persons listed. As a consequence the definition has generally been taken to include a person who is financially dependent on the deceased member, including partial financial dependence, and even circumstances of mutual financial dependence.

In the instance where, after making reasonable enquiries, the trustee is unable to find a dependant of the member or a legal personal representative then, subject to the fund's trust deed, it can pay the death benefit to any individual, even where they are not a dependant.

Definitions of dependency also have implications for the tax treatment of superannuation death benefits, but the definitions for these purposes are contained in the taxation legislation.

One member organisation provided a relevant case study as follows: -

We had a death benefit case for a Maori family that we dealt with in November 2016. The first decision was to pay all biological children and exclude the non-biological child, however, once challenged the second decision was to include the non-biological child, based on the fact that the SIS definition of a 'child' is inclusive.

The non-biological child was not formally adopted, however, was for all intents and purposes treated like a child i.e. he lived with the parents and called them 'mum' and 'dad'. Written confirmations were sent to the trustee by the Executor/Administrator and other family members confirming the non-biological child was indeed regarded by his parents as a 'son' and treated in the same way as were biological children.

The following was clarified with regards to the SIS definition of a 'child':

- *evidence of a close family relationship between the deceased and the child may be enough to establish a relationship of 'child'*
- *the definition of 'child' in SIS was not limited to the categories of child listed in the provision but rather should be interpreted with a view to deciding what is intended to be covered and how the definition should be approached*
- *evidence that the 'child' was regarded as their child by the deceased and formed a part of the family unit.*

This is an example where, under the current law, it was possible to pay a superannuation death benefit to a non-biological child.

Another member organisation advised as follows: -

We distribute superannuation death benefits using the same business procedure for all superannuation members regardless of whether or the member is Aboriginal and Torres Strait Islander. The assessment of valid death benefit nominations strictly complies with the dependant and interdependency relationship definitions as prescribed in the Superannuation Industry (Supervision) Act 1993 (SIS Act).

Although kinship structures are not treated any differently in the death benefit distribution process, they should be addressed through regulation as a criterion when processing the death benefit claim because the current definitions do not consider 'family' members in the kinship structure as described in the Discussion Paper.

The basic or disability tests could be used to determine whether an interdependency relationship exists. Several additional circumstances of the relationship, as described in the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations), could also be considered where relevant. However, in the view of this member organisation, 'family' members in the kinship structure are likely to not pass either of these tests or be recognised based on the prescribed circumstances.

Consequently, the member organisation advocates the expansion of the definition of 'dependant' and 'interdependency relationship'. In the view of the member organisation the expansion should not be confined to Aboriginal and Torres Strait Islander peoples' kinship structures but should apply to the wider community.

The enactment of the Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004 extended the definition of 'dependant' to include, in relation to a person, 'any person with whom the person has an interdependency relationship'. The introduction of the interdependency provision enabled surviving same-sex partners to access a death benefit distribution directly from a superannuation fund.

The member organisation believes that the definition of 'interdependency relationship' should be extended to mandatorily consider a person who is (or was) a guardian or primary care giver of the member, for example, due to foster parent arrangements, disability or age care, or a person who was the recipient of ongoing care or guardianship by the superannuation member for an extended period of their life. The duration of the care giving / receiving or guardianship would need to be determined by the regulations.

The primary 'care giver' and 'care receiver' relationship should not be restricted to 'family' as defined in a traditional 'Anglo-Celtic' system, but also consider non-related members of the community, consistent with Aboriginal and Torres Strait Islander kinship structures. This circumstance should apply to both indigenous and nonindigenous members.

The member organisation believes that legislative change is warranted to cater for members who do not have potential beneficiaries who fit into the definition of a 'dependant' or 'interdependency relationship' to provide such members with the option to nominate who they would like to receive the benefits (e.g. their parents, siblings, nephews/nieces, or other extended family members. This would provide members who do not have a 'dependant' or 'interdependency relationship' to direct their superannuation death benefit payments according to their nomination, rather than relying on the trustee's discretion or having the benefit paid to their estate.

To reduce the complexity / difficulties for members in making a valid death benefit nomination, the member organisation suggests changes be made to the regulations to include categories of people who can be verified with certainty (e.g. via a birth certificate, government support document etc.) rather than 'broad principle' categories which would add ambiguity for both members and superannuation trustees.

For the above reasons, the member organisation submits that any amendments to the legislation should include

- the extended definition of dependant and interdependency relationship as described above
- categories of people who can be nominated as a beneficiary where the member does not have a 'dependant' or 'interdependency relationship'. This will enable members who do not have a 'dependant' to have the option to make a valid nomination and reduce the reliance on the Trustee's discretion to make those decisions.

Question 3. Are there case studies or examples where kinship structures are not appropriately considered by super trustees when they are distributing super death benefits?

Awareness levels in the superannuation industry of kinship structures is sometimes not as well developed as it could be.

One member organisation has provided us with a case study of a superannuation death benefit distribution matter which was dealt with recently by one of their superannuation trustees, where kinship was considered: -

A member passed away and did not have a valid nomination held on file. The deceased member had five adult children and had a close relationship with his sister.

Prior to the member's passing he had provided the Trustee with a letter explaining: -

- *he was of Aboriginal descent*
- *he did not agree with 'British laws' regarding superannuation dependency*
- *he wanted his intentions known for the distribution of his superannuation benefits*
- *his sister was his next-of-kin*
- *his sister would follow his wishes and distribute the estate in the way he had asked her to do*
- *the close relationship they had with his sister, who also cared for him during his treatment and in the period leading up to his death*
- *he had no contact with his children in the last 15 years*
- *instructions to pay all of his superannuation and life insurance proceeds to his sister for her to carry out his wishes and as compensation for providing care.*

The Trustee was able to determine that the deceased member's sister was in an interdependency relationship with the member at the time of his death.

Whilst the written kinship request received from the member stipulated that his sister was to receive 100% of the benefits, the trustee was under an obligation to recognise and consider the deceased member's five children. Each of the five children was contactable and able to validate their relationship with the deceased member.

Upon the death of the member the trustee paid a quarter of the superannuation death benefit to the deceased member's sister and, due to the adult children being recognised as dependants under the SIS Legislation, paid the remainder of the superannuation death benefit to the five adult children in equal shares.

Question 4. Do the kinship structures of Aboriginal and Torres Strait Islander communities mean these people have dependants that the current superannuation law does not recognise as dependants?

Depending on the trustee's interpretation and application of the definition of dependant, in particular with respect to financial dependence and interdependency, it is possible that some people who are considered to be dependants within Aboriginal and Torres Strait Islander kinship structures may encounter difficulty in being recognised as a dependant for the purpose of the distribution of a superannuation death benefit.

It is common for interdependency relationships and / or financial dependency, as defined under section 10A of the SIS Act, to exist in Aboriginal and Torres Strait Islander communities, as indeed they do in other communities. All members will face the same evidentiary burdens, and similar constraints, to establish that a relationship of interdependency existed or to provide evidence of financial dependency.

Question 5. How could the law that applies to super death benefits take into account the kinship structures of Aboriginal and Torres Strait Islander communities?

As each kinship and community has differing family and kinship structures based on their individual tribal culture it may be difficult for a trustee to develop a process to recognise and understand kinship structures. Similarly, as these kinship structures are not formalised in a form of written document, this adds additional complexity for a trustee when trying to understand the kinship structure in order to pay out a superannuation death benefit. These factors create a higher risk for a trustee to be reasonably satisfied that the person to whom they are considering paying a superannuation death benefit is eligible in accordance with the kinship structure.

Possible legislative changes which could be considered could include an amendment to the SIS Act and corresponding that would enable a person in a kinship relationship with an Aboriginal or Torres Strait Islander to be recognised as a dependant when paying a superannuation death benefit. If such amendments are considered it will be important to ensure that the amended definition is sufficiently broad to include these kinship relationships, as there is a risk that a more prescriptive approach inadvertently may create unnecessary restrictions.

Consideration could also be extended to amending the definition of dependant under taxation law to enable payments made to a person within a kinship structure to be tax free.

The definition of 'legal personal representative' could be amended to recognise an individual, nominated by the community as the representative of the estate and of the kinship structure of the community, to be authorised to deal with the trustee as a 'legal personal representative' of the deceased member's estate.

Question 5a. What information, guidance and/or support will super trustees need to distribute a superannuation death benefit according to a kinship relationship?

Member organisation suggested various measures which could be developed to assist superannuation trustees to distribute a death benefit in accordance with a kinship relationship, including: -

- a mechanism to ensure that the trustee is aware that the deceased member was indigenous
- appropriate communication with indigenous communities, including
 - recognising that the definitions in superannuation, with respect to eligibility to be paid a death benefit, can be confusing and often unhelpful
 - providing information and advice about the payment of superannuation death benefits, including lump sums versus death benefit income streams
- improving awareness within the superannuation industry
 - of levels of kinship structures within Aboriginal and Torres Strait Islander communities
 - that it is rare for indigenous persons with primary care of children (e.g. grandmother, aunt, sibling, cousin) to seek to regularise / formalise the relationship through legal means such as adoption or legal guardianship
- encouraging trustees to practice greater flexibility when
 - considering kinship across the industry, including developing as consistent an approach as possible (subject to fund trust deeds)
 - liaising with the community, including considering the possibility of treating an individual, nominated by the community as the representative of the estate and the kinship structure of the community, as a de facto 'legal personal representative' to assist in determining how the superannuation benefit should be distributed.

This could be achieved through consultative and appropriate guidance and support from regulators (APRA in particular) for trustees and other decision-making bodies (such as AFCA) to address the existing challenges in distributing superannuation benefits created by differing interpretations of the legal requirements. This could include guidance from APRA as to the interpretation and application of definitions of dependant, kinship structures, financial dependence and interdependency.

- consistent protocols to assist indigenous people with
 - verifying their identity, in order to facilitate access to their superannuation accounts and/or insurance entitlements
 - evidencing interdependency and / or financial dependence
 including accepting statutory declarations from recognised organisations or professions such as medical practitioners, lawyers, nurses and police officers as to
 - the identity of the member; and / or
 - family relationships within the kinship structure
- establishment of processes to enable the member, or others, to alert the trustee that family violence is an issue and ideally a superannuation death benefit should not be paid, directly or indirectly, to identified individuals
- the possibility of the government
 - prescribing common terminology / definitions (such as ‘child’, ‘family’ and ‘extended family’). In so doing consideration should be given to the Australian Institute of Family Study work on defining ‘family’ for Aboriginal and Torres Strait Islander people <https://aifs.gov.au/cfca/publications/strengths-australian-aboriginal-cultural-practices-fam/defining-family>
 - publishing the considerations used by various government departments in the process of making determinations and administering benefits and payments with respect to Aboriginal and Torres Strait Islanders.

By way of example, Centrelink and the ATO administer various allowances, e.g. for children in care, family benefits etc, for Aboriginal and Torres Strait Islander peoples. As such, these government department will have an internal framework, such as a decision tree, that is used to determine who is considered to be a child and/or family and entitled to benefits. Ideally trustees, when deciding on the distribution of a superannuation death benefit, should be able to utilise a publicly available ‘benefits framework decision tree’ as utilised by government departments.

- a mechanism whereby, after an Aboriginal and Torres Strait Islander member has passed away, trustees are given access to relevant information held by the ATO and Centrelink with respect to the recipients of claims or payments relating to the deceased member
- the facilitation of access to indigenous communities, in order to discuss the resources and support it needs with respect to superannuation and the distribution of death benefits.

Question 5b. Are there other models in the law that would assist super trustees to make death benefit distributions that reflect the kinship structures of Aboriginal and Torres Strait Islander communities?

Examples of where there has been flexibility in the approach adopted when dealing with Aboriginal and Torres Strait Islander communities include: -

- AUSTRAC, Australia’s financial intelligence agency with regulatory responsibility for Anti-Money Laundering and Counter-Terrorism Financing (AML / CTF) updated its online compliance guide to clarify the obligations with respect to the identification of people of Aboriginal and/or Torres Strait Islander background. AUSTRAC recommends that superannuation funds adopt a flexible approach to the identification and verification of persons of Aboriginal and/or Torres Strait Islander heritage, while remaining mindful of social and cultural sensitivities.¹⁵ Examples include statements by a referee confirming the identity of the individual and the names by which they have been known
- The ATO permits Aboriginal and Torres Strait Island individuals to apply for a tax file number without the usual 100 points of identification

¹ AUSTRAC announcement 4 July 2016 - [Improved access to financial services for Indigenous customers](#)

- The Register of Births, Deaths and Marriages in Victoria provides support and assistance to Aboriginal and Torres Strait Islanders to access services, along with keeping records updated to enable individual identities and family relationships to be evidenced. They have developed effective ways to engage and communicate with regional and local communities and organisations in order to recognise individuals who are Aboriginal and Torres Strait Islanders and their relationships
- The Department of Human Services provides a range of support and payments for Aboriginal and Torres Strait Islander individuals. They have specialists and officers, contact centres and remote services support teams specifically trained to deal with indigenous individuals and communities.

The existing definition of 'dependant', as defined in sub-section 10(1) of the SIS Act, is an inclusive definition and, as such, arguably can accommodate a relatively broad application of the definition.

If APRA were to provide appropriate guidance as to the interpretation and application of definitions of dependant, kinship structures, interdependency and financial dependence, this would enable trustees to amend and adopt governance policies which acknowledge and support overcoming challenges with respect to the distribution of superannuation death benefits and supporting beneficiary services.

Question 6. Do Aboriginal and Torres Strait Islander people have any difficulty accurately identifying relationships for the purpose of super death benefit distributions?

Member organisations have advised that the definition of dependant and the concept of a binding and non-binding nominations can be confusing. Although this is not confined to indigenous members, the existence of kinship structures does make the definition of dependant more difficult for indigenous members to identifying relationships for the purpose of superannuation death benefit distributions.

Language, literacy and numeracy barriers can limit members' understanding about superannuation. Aboriginal and Torres Strait Islander people can face significant language barriers if English is not their first language. Cultural differences, as reflected in the kinship structure, can result in significant differences between who the trustees may determine to be a dependant and who an indigenous member and their community may consider to be eligible under their next of kin structure.

It is not just the issue of identifying these relationships - consideration also needs to be given to issues with respect to access to remote indigenous communities and the ability of Aboriginal and Torres Strait Islander people to be able to correctly complete forms and provide identification documents. Evidence before the Royal Commission demonstrated that Aboriginal and Torres Strait Islander communities face difficulty in filling out forms and providing documentation.

As noted above, for AML / CTF and identification issues trustees can utilise AUSTRAC's revised guidelines <http://www.austrac.gov.au/aboriginal-andor-torres-strait-islander-people> to be able to rely on alternative documentation sources. The possibility of a similar approach being adopted for the payment of superannuation death benefits could be explored - in terms of evidencing such relationships local elders or other persons within the community may be able to vouch for the status of the various kinship relationships.

Binding death benefits nominations need to be updated every three years, however, it can prove difficult for trustees to update and maintain the contact details of indigenous members. As many remote communities are only consistently contactable via post, with telephone / internet at times unreliable or not accessible, this can make it more difficult to ensure that superannuation members in these communities are provided with the opportunity to update their binding death nomination every three years.

It would be challenging for all trustees to establish facilities in these remote communities. Consideration could be given how to support and recognise the service that financial counsellors provide in these remote communities through assisting Aboriginal and Torres Strait Islanders to fill out forms and to interact with their superannuation fund.

Question 7. Are there differences in the barriers faced by Aboriginal and Torres Strait Islander women and men making binding death benefit nominations?

As with the general population, Aboriginal and Torres Strait Islander women have significantly lower superannuation balances than men, primarily due to their work patterns and wage levels.² Aboriginal and Torres Strait Islander people also have lower life expectancies than non-Indigenous Australians.³

The issue of establishing identity applies equally to women and men e.g. lack of access to computers and the internet; English not being a first language; lack of access to / difficulty in obtaining certificates (birth, death and marriage), driver’s licences and passports.

There do not appear to be any differences in the regulatory barriers faced by Aboriginal and Torres Strait Islander women and men making binding death benefit nominations, although there may be cultural issues that create more barriers for women.

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² Indigenous Superannuation Working Group - [Indigenous Super Summit Report 2015](#)

³ <http://www.aihw.gov.au/rural-health-life-expectancy/>