

26 September 2024

Superannuation Death Benefit Payments

Policy proposals to support improved consumer outcomes

1(a) Electronic binding nominations

A valid binding death benefit nomination (BDBN) can help streamline the claims process for dependants, and reduce turnaround times for claims handling. Most funds offer BDBNs. Three-year lapsing nominations, as prescribed under SIS, remain common but need to be updated or they cease to be valid. They are also required to be completed in writing and physically witnessed.¹ This can be a barrier to members commencing the process of completing the BDBN form or finalising the process prior to lodgement, with some abandoning the process mid-stream.

Permitting a technology-neutral approach to completing and updating lapsing BDBNs would streamline the process of completion for members and potentially increase their uptake. With digital document execution and witnessing facilities now widely available, consideration should be given to allowing members and witnesses to electronically sign binding death benefit nomination forms.

In addition, amendments to the Electronic Transactions Regulations (ETR) are recommended. The ETR currently excludes subordinate legislation made under the SIS Act. The impact of the subordinate legislation being excluded from the ETR, is that it is not possible to electronically execute a Binding Death Nomination form.

Policy recommendations

- Amend SIS Regulation 6.17A to permit funds to accept SIS lapsing binding death benefit nominations completed and signed electronically (including witness signatures).

1(b) Renewal of existing lapsing binding nominations

Once a lapsing binding nomination is in place, it makes sense for the renewal of that nomination to be able to be completed electronically because the witness requirements in SIS Reg 6.17A do not apply to renewals of nominations.

Policy recommendations

- Allow electronic BDBN renewals if the renewal confirms the previous nomination.

2. Harmonisation of death certificate contents

In finalising a death benefit distribution, trustees require confirmation of the death of the member. Delays can result both from ensuring the trustee has the appropriate information to confirm the passing of the late member as well as receiving the relevant documentation quickly and efficiently.

¹ SIS regulation 6.17A

There is currently inconsistent information being included in death certificates across states and territories. Specifically, in Tasmania and on simple certificates in Victoria², the cause of death is not included. This can lead to delays when there is insurance policy containing exclusions (such as pre-existing medical conditions) attached to the claim. A cause of death can also be used to verify that there are no suspicious circumstances relating to the death that may indicate that claimants were involved in the death such that claimants are barred by law from receiving payment (under the forfeiture rule).

Ideally, death certificates should be in a consistent format across all jurisdictions. This would avoid having to request further information at the time of a member's passing, supporting more empathetic consumer interactions and timely payment of benefits.

Policy recommendations

- Amend relevant federal, state and territory-based regulation and government agency processes to harmonise death certificate content provided by state and territory-based registries.

3. Government agency support for trustees to locate and contact potential beneficiaries

Trustees utilise a variety of means to locate potential beneficiaries after the death of a member. The ability to access contact details held by government agencies such as the ATO, Centrelink, and Medicare could support trustees to contact potential beneficiaries in circumstances where they are unable to obtain these via other means (for example, provision by family members).³

The ATO currently provides a service whereby if a member is 'lost or likely to be lost', superannuation funds can seek a more current address or further information. It may be possible to extend the use of this service to include contact details of potential beneficiaries of a death benefit. This would assist in circumstances where a superannuation fund has the name of a potential beneficiary but no other contact details, as sometimes occurs.

Policy recommendations

- Government agencies to provide trustees with potential beneficiaries' contact details upon request, for the purpose of the trustee communicating with them regarding the death benefit payment process. Relevant agencies should be appropriately trained and resourced to field these queries directly from trustees and be able to respond.

4. Government agency support for potential beneficiaries to locate a deceased member's superannuation

There may be circumstances in which a potential beneficiary is aware that someone has passed away, however they do not know which superannuation funds the deceased person was a member of. To help people in these circumstances, the ATO could upon request provide details of a deceased person's fund name to potential beneficiaries. This would assist them to know which fund to approach in relation to a possible claim.

² There are two types of death certificate available in Victoria, a simple certificate that does not include the cause of death and a 'death certificate – cause of death'.

³ Section 16A of the Privacy Act (Cth) provides that personal information can be disclosed in pursuit of the 'establishment.....of a legal or equitable claim.'

Policy recommendations – The ATO to provide, upon request, details of a deceased person’s fund name to potential beneficiaries, subject to appropriate protocols around identification requirements being established and consideration of controls required to mitigate potential fraud risk.

5. Recognising First Nations kinship arrangements under superannuation legislation

The kinship structures that bind First Nations communities together can be complex and may not be adequately reflected in superannuation legislation. Community members can have kinship relationships that extend beyond the current definition of ‘dependant’ under superannuation law. This can limit the effectiveness of death benefit nominations, and certainty relating to the distribution of superannuation benefits, for First Nations members.

The law should be amended to allow trustees to explicitly and separately consider First Nations kinship arrangements when allocating death benefits to potential beneficiaries, in addition to the existing classes of potential beneficiaries.

Superannuation fund trustees are currently constrained in these circumstances.

Under the *Superannuation Industry Supervision Act 1993* ([the SIS Act](#)), trustees may only allocate death benefit payments to one of [four classes](#) of people:

1. the deceased's spouse (see the definition of ‘dependant in [section 10](#))
2. the deceased’s child of any age ([section 10](#))
3. a person in an ‘**interdependency relationship**’ with the deceased ([section 10A](#))
4. a person who is a ‘**financial dependant**’, even in the absence of an ‘**interdependency relationship**’. This is because [section 10](#) uses the word ‘**includes**’ before listing spouses and children. That inclusive language makes the section non-exhaustive. Therefore, relevant case law and AFCA determinations have long held ‘**financial dependants**’ are a fourth category to whom death benefits can be paid, even though they are not explicitly listed in the SIS Act.⁴

Adopting the approach in *Faull*, the Australian Financial Complaints Authority (AFCA)’s 2022 *Approach to Death Benefit Complaints* specifically includes ‘financial dependants’ as a class to whom death benefits can be paid, without the need to satisfy the interdependency criteria in [section 10A](#) below. The AFCA approach specifically states:⁵

*The concept of financial dependence generally requires the provision of **regular financial contributions** towards the other person’s living expenses, **even if the amounts are small***

The AFCA approach also stipulates:⁶

⁴ *Faull v Superannuation Complaints Tribunal* [1999] NSWSC 1137 ([26 November 1999](#)) at [30](Rolfe J)(*Faull*). This definition ‘financial dependant’, whether whole or partial, has been upheld in numerous subsequent cases, for example: *Wan v BT Funds Management Limited* [2022] FCA 302(*Wan*) at [73]-[75], [139], [153] and [196]-[197](Anastasiou J). In *Wan*, the applicant did not establish they were a financial dependant. However, the same definition of financial dependant was used as in *Faull*, mainly - the provision of ‘regular’ financial contributions towards a dependant’s living expenses.

⁵ AFCA, *Approach to Superannuation Death Benefits Complaints* ([January 2022](#)), 6. For example, in *Faull*, the financial benefit was equivalent to \$30 a week.

⁶ AFCA, *Approach to Superannuation Death Benefits Complaints* ([January 2022](#)), 9.

Unless the amount of the death benefit is small, the proportions allocated between the spouse, infant child and adult child should seek to reflect the extent of each person's financial dependency relative to the total amount of the death benefit.

Where a death benefit is paid owing to an **'interdependency relationship'**, as defined in [section 10A](#), allocation is constrained by requiring **all four** of the following addition criteria be satisfied between the deceased and the potential beneficiary:

1. they have close personal relationship
2. they live together
3. one or each of them provides the other with financial support, and
4. one of each of them provides the other with domestic support and personal care.

This limited list is based on a highly traditional and narrow conception of historic nuclear families in certain cultures. It does not account for the broader kinship relationships accepted to exist among First Nations people.

All provisions should be similarly amended which currently preclude the payment of death benefits to potential beneficiaries who were, at the time of death, in recognised First Nations kinship relations with the deceased.

This means that at a minimum, in addition to the provisions above, the following provisions should also be amended as needed:

- [section 31](#)
- [section 55A](#)
- [Division 6.2](#) of the *Superannuation Industry (Supervision) Regulations 1994*.

Policy recommendation

- Amend the SIS Act and related regulations to enable a person in a kinship relationship with a First Nations person to be recognised as a dependant when paying a superannuation death benefit. Appropriate controls should be included to mitigate risks of fraud, financial abuse and other forms of financial crime.

6. Protecting victims of crime

The legal and regulatory framework for death benefits should prevent people who have been convicted of crimes such as abuse, assault and family violence from claiming their victims' death benefit.

Community expectations are that trustees will consider issues of crime and abuse if they are apparent, but the regulatory environment constrains that consideration. Where a perpetrator is an eligible dependant, a charge or finding does not negate their entitlement to their victim's superannuation death benefit. This applies even if the perpetrator has been convicted of family violence offences, or in cases when there was proven systemic abuse which indirectly contributed to the cause of the victim's death.

Under existing laws, an abuser can receive a victim's superannuation death benefit unless they are the direct cause of that person's death. Theoretically, the trustee can intervene where an eligible

dependant has been convicted of a member's murder under the Common Law principle of the forfeiture rule, that prevents murderers benefitting from their crime. Beyond this most extreme circumstance, however, there is a lack of protection from the distribution of abuse victims' death benefit payments being made to perpetrators.

In considering changes, it will be important to ensure that the rights of other dependants are not eroded. For example, the trustee should retain their discretion to pay benefits to other dependants rather than the deceased member's estate (to protect their entitlements), whilst withholding payment to perpetrators in substantiated cases of family violence.

Further, the protocols around the Trustee excluding a potential beneficiary on the basis of violence-related crimes should be well defined.

There should be some protections afforded to a trustee acting on the orders/convictions that are set out in the SIS Act and Regulations (similar to those that exist in relation to Family Law matters). The trustee should not be conducting its own investigations but be provided with the order/conviction and not have to exercise a discretion to exclude the person from receiving part or all of the death benefit.

Policy recommendations

- Expand the Forfeiture Rule to include violence-related crimes. This law currently prevents murderers from inheriting their victim's super. There should be a broader application of the Rule to prevent those convicted of violent crimes against the deceased member from receiving their victim's death benefit, regardless of whether the crime contributed to the victim's death.
- Investigate legislative reforms that would allow super funds to withhold death benefits on receipt of court (or similar) orders/judgements substantiating the violence-related crime against the deceased member.
- The types of orders or convictions that apply so that the perpetrator is excluded from consideration in the death benefit distribution process should be set out in the regulations so that the trustee has certainty in the same way as other forfeiture and bankruptcy orders.

7. Regulatory framework for 'unmeritorious complaints' about the distribution of death benefits

A common reason for the delay in distribution of death benefits is where there are competing claims in relation to the benefit. In these circumstances there is no lack of trustee diligence, but trustees are unable to negotiate a settlement between the parties.

The recently released AFCA Independent Decision Review assessed a random sample of AFCA complaints that proceeded to decision noted that 'in several cases a party had a weak or even hopeless case and was advised by AFCA accordingly from an early stage. Despite that detailed advice, the parties insisted on proceeding with the full AFCA process through to determination.'⁷

⁷ AFCA Independent Decision Review 2023-2024, 'An Overview' para 52.

Unmeritorious complaints relating to death benefit distributions, that AFCA decides to deal with have the capacity to cause undue delay of payments to beneficiaries and can exacerbate delays in payment and emotional and financial stress being suffered for extended periods.

Policy recommendations

- AFCA should be encouraged to more actively apply its powers in relation to unmeritorious complaints, which permit it to decide that it is not appropriate to continue to consider a complaint in circumstances where the complaint is without merit.⁸

Concurrently, consideration should be given to encouraging a more expeditious withdrawal of unmeritorious complaints about the distribution of superannuation death benefits.

⁸ AFCA Rule A.8.3