



THE LAW SOCIETY
OF NEW SOUTH WALES

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Mr Jonathan Smithers
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Law Council of Australia
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By email: mike.clayton@lawcouncil.asn.au

Dear Mr Smithers,

Superannuation death benefit nominations

Issues have been raised with the Law Society by members of the Elder Law, Capacity & Succession Committee (Committee) about the legal and regulatory framework governing superannuation death benefit (benefit) nominations and the impact on fund members and their families.

The issues concern:

- the uncertainty created by the complex arrangements for nominations available to fund members;
- the further uncertainty created by the broad discretion afforded to trustees regarding the distribution of benefits;
- the delays involved in distributing benefits; and
- the widespread misunderstanding of these arrangements amongst fund members.

Background

The *Superannuation Industry (Supervision) Act 1993* (SIS Act) and *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations) permit funds to make governing rules that invite a fund member to nominate another person as the recipient of the member's benefit.¹

The types of nominations offered and the rules for distributing benefits are a matter for each fund, and generally set out in the fund's trust deed. There are strong financial incentives for funds to be "compliant funds" in the sense that they provide trust deeds that comply with the operating standards set out in the SIS Regulations.² Nevertheless the details of trust deeds vary from fund to fund and are regularly amended by the funds.

¹ SIS Act s 59 and SIS Regulations Part 6.

² The relevant operating standards are prescribed by SIS Act Part 3 and set out in SIS Regulations Part 6.

Observations

Nominations and the trustee's discretion

Making a death benefit nomination can be a complex and uncertain process. The Australian Prudential Regulation Authority describes five different death benefit arrangements that are offered by Australian funds.³ They are:

- (a) automatic reversionary benefit (where the trustee exercises no discretion as to the distribution of the benefit);
- (b) non-binding nomination (also described as “preferred” or “nominating a beneficiary”, meaning the trustee has full discretion as to the distribution of the benefit);
- (c) binding nomination;⁴
- (d) non-lapsing nomination;⁵ and
- (e) complete discretion of the trustee if none of these nominations has been made and the reversionary benefit is not applicable.

The arrangement most commonly offered is a non-binding nomination. Some funds do not offer a binding nomination and there is no obligation for them to do so.

The rules about who can be nominated, and the implications of the choice of nominee on the distribution of the benefit also vary from fund to fund. The rules of compliant funds provide that, upon the death of a member, the fund will distribute the benefit to one or more “eligible recipients”. This term is usually (but not always) defined as:

- the member’s legal personal representative (LPR), usually the executor or the administrator of their estate; or
- a dependant of the member.⁶

A “dependant” includes (but is not limited to):

- a spouse or child of the member;⁷ and
- a person in an “interdependency relationship” with the member.⁸

“Dependant” may also include a dependant of the member at common law: for example, an aunt, cousin, friend or other person who is financially dependent on the member.

Under a compliant fund’s rules,⁹ a nomination which is described as binding and non-lapsing will bind the trustee if, in the trustee’s view, the nominee is an eligible recipient at the date of death. However, the recipient’s eligibility – and thus the validity of the nomination - may come into question for a range of reasons, for example, if at the date of death:

³ Australian Prudential Regulation Authority, *Prudential Practice Guide: SPG 280—Payment Standards for Regulated Superannuation Funds and Approved Deposit Funds* (2012) [55].

⁴ See SIS Act s 59(1A) although this section does not comprehensively cover that category.

⁵ SIS Act s 59(1)(a).

⁶ This definition reflects the wording in SIS s 59(1A).

⁷ SIS Act s 10.

⁸ See SIS Act s 11.

⁹ See, for example, the Australian Super general Product Disclosure Statement and Binding Death Benefit Nomination forms available at www.australiansuper.com/tools-and-advice/learn/product-disclosure-statements.

- the beneficiary has predeceased the member; or
- the beneficiary is not a dependant.

It is an established principle of trust law that, pursuant to a general duty to administer a trust personally, a fund trustee “must not permit others – the settlor, the beneficiaries or someone else – to dictate to them the manner in which their discretion ought to be exercised unless the trust instrument so requires.”¹⁰ Nor may a trustee delegate the exercise of a discretion except as permitted by the trust deed or by legislation.¹¹

Accordingly, whether a nomination is described as binding or non-binding, a trustee who considers a recipient’s eligibility to be in question may consider they have a duty – or at least consider it prudent – to overrule the nomination and to exercise a discretion to distribute the benefit to one or more other persons they consider eligible.

As a result, there are many instances of trustees having exercised their discretion contrary to the member’s intentions and the expectations of nominated dependants or family members.

Information for members

For members, navigating these complex arrangements is made more difficult when the fund provides poor quality information. Compliant funds must disclose to their members “information that the trustee reasonably believes the member reasonably needs for the purpose of understanding the right of that member to require the trustee to provide the benefits”.¹² A review of fund websites indicates a range in the quality and ease of use of information for members. In some cases it is voluminous, spread across several documents and difficult to navigate.

As a result, it is common for members and their families to be unaware of how the benefits will, or could, be treated. Members may mistakenly believe they have a binding nomination in place or believe their benefit will be treated as part of the estate according to the provisions of a will (when this is not necessarily the case). There is a need for clearer, more comprehensible information for members in this area.

The distribution process

Another concern is the period of time taken by trustees to distribute benefits. In exercising their discretion trustees usually conduct a claims-taking process which involves identifying every potential claimant, locating them and obtaining a notice as to whether they intend to make a claim. Typically, after the fund has received notices of claim or non-claim, any claims are assessed by the trustee, a preliminary decision is made as to how the benefit will be distributed, and further submissions are invited and considered before a final decision is made. Some trustees will not make a decision until they have received notices of claim or non-claim from all potential beneficiaries.

This process can take months or even years. It can be especially prolonged in cases involving blended families where there may be competing claims amongst first and second spouses, children and stepchildren. Families waiting for a decision have no

¹⁰ G Dal Pont, *Equity & Trusts* (6th ed), Sydney, Thomson Reuters, [22.40].

¹¹ *Ibid*, [22.45]; Australian Law Reform Commission, *Elder Abuse – A National Response*, 14 June 2017, [7.17].

¹² SIS Regulations reg 6.17A(3).

recourse, as complaints about delays can only be made to the Australian Financial Complaints Authority (“AFCA”) once a trustee’s decision has been made.

The following two cases were reported by a Committee member:

- (a) A client was the nominated recipient of her de facto spouse’s benefit which amounted to more than \$60,000.00. However, at the time of death there were few other assets of value and she lacked the funds to pay for his funeral. A death certificate would not issue until after the funeral. Delays in releasing the benefit meant that his funeral and burial could not be carried out. As a result his body remained at the morgue for over four months until the fund released the benefit.
- (b) A client had been the de facto spouse of the deceased for 22 years, and was his nominated recipient and the beneficiary of his estate. Even after probate was granted, the fund declined to release the benefit to the client without the consent of the deceased’s wife, from whom he had separated 26 years ago. The deceased’s wife had dementia and the process took 20 months.

In cases where a benefit represents the family’s largest asset, long delays can cause the family real financial hardship.

Complaints and legal proceedings

Increasingly, when a trustee makes a decision that contradicts the deceased’s intentions and the family’s expectations, family members are responding by formally disputing the decision. Before 1 November 2019 disputes concerning benefits could be filed with the Superannuation Complaints Tribunal (SCT); since that date they are filed with AFCA. The SCT has reported that in 2017-2018 it received 509 complaints concerning death benefit distributions – 22.5% of all complaints lodged that year and 39% more than in the previous year.¹³

The Australian Law Reform Commission (ALRC) in its recent inquiry into elder abuse found that:

The discretionary nature of the payment of death benefits in many cases gives rise to many complaints to the SCT. The Tribunal reported that, between January and March 2017, complaints concerning the distribution of death benefits comprised the ‘biggest single complaint category’, amounting to 21.5% of complaints received.¹⁴

Tribunal proceedings, however, do not necessarily provide relief to disappointed family members. A review of reported SCT decisions since 2007 reveals that in at least 19 instances the Tribunal’s decisions differed from both the member’s non-binding nomination and the trustee’s decision.

For example, in the recent decision of *D18-19/072* [2018] SCTA 206 the differences were as follows:

Beneficiary	Nomination	Trustee	Tribunal
Deceased’s father	0%	100%	50%
Deceased’s husband	100%	0%	50%

¹³ Superannuation Complaints Tribunal, *Annual Report 2017-2018*, pp 31-32.

¹⁴ Australian Law Reform Commission, *Elder Abuse – A National Response*, 14 June 2017, [7.31].

In *D18-19/069* [2018] SCTA 204 the differences were as follows:

Beneficiary	Nomination	Trustee	Tribunal
Deceased's LPR	100%	15%	50%
Deceased's daughter	0%	85%	50%

The need for reform

In our view this is an area in need of reform. In its inquiry into elder abuse, the ALRC reviewed the legislation and noted the increase in complaints to the Tribunal, while also noting the principles of trust law requiring a trustee's discretion (where it applies) to be exercised fully and personally, subject only to the provisions of the trust deed and governing legislation.¹⁵ The ALRC recommended that, due to the uncertainty and ambiguity concerning binding death benefit nominations, the structure and drafting of the provisions relating to death benefit nominations in SIS Act and Regulations should be reviewed.¹⁶ We endorse this view.

The ALRC referred to the decision in *Retail Employees Superannuation Pty Ltd v Pain*, in which Blue J found that it was 'highly desirable' that the particular provisions 'be reviewed by the Commonwealth and recast'.¹⁷ He said there was a 'strong desire by members of superannuation funds to be able to make non-lapsing nominations', but said that it was 'a question of policy whether and on what terms binding nominations are permitted and this is exclusively a matter for the Commonwealth Parliament and the Commonwealth Government'.¹⁸

Options for reform

Options for legislative reform (which are not mutually exclusive) include:

1. Requiring funds through their trust deeds to offer binding, non-lapsing nominations that allow a member to nominate anyone.
2. Requiring that a member's nomination will endure until the member gives explicit instructions to the contrary.
3. Requiring funds through their trust deeds to offer alternative or "cascading" nominations (similar to "cascading" provisions in a will) in case a nominee predeceases the member.
4. Requiring funds through to give simple, clear, practical information to new fund members when they join and every five years thereafter, which covers key information including the consequence of a non-binding nomination.
5. Requiring funds to determine a claim within a prescribed period of time, after which a complaint may be made to AFCA.
6. Reforms to the effect that if there is no binding nomination in place at the date of death, the benefit passes to the member's LPR to be dealt with as part of the estate.

It would also be helpful to clarify whether, if a member loses the capacity to make a nomination, their attorney can confirm or make a binding nomination.¹⁹ In this regard, relevant considerations include:

¹⁵ Ibid, [7.17]-[7.45].

¹⁶ Ibid, Recommendation 7-1.

¹⁷ [2016] SASC 12 (8 August 2016) [512].

¹⁸ At [513].

¹⁹ Note that such provision would operate subject to the terms of the Power of Attorney.

- whether the trustee should be required to accept a nomination by an attorney; and
- whether an attorney should only be able to confirm a nomination that has lapsed (or is about to lapse) or be able to make a new nomination.

Recommendations

We endorse the findings of the ALRC regarding the importance of being able to make a binding nomination:

The ability to make a [binding death benefit nomination], like the ability to make a will, is a key aspect of advance planning and an exercise of autonomy by older people and fund members generally. Both the language and types of nominations vary greatly. The expanding scope and value of superannuation means that clarity in understanding from the perspective of fund members and trustees is important.²⁰

We consider it should be a simple process for a member to make a binding nomination of any person and, unless the recipient has predeceased the member, the nomination should stand. Where there is no binding nomination in place, it should not be a matter for the trustee to determine how the benefit is treated.

It is a general principle of succession law, expressing community expectations, that upon a person's death their property should pass to their dependants according to their intention. In our view this principle should apply to the distribution of superannuation benefits just as it applies to the distribution of their estate. Accordingly, we recommend consideration be given to reforms that, in the absence of a binding nomination being in place, treat the benefit as part of the deceased's estate, for distribution pursuant to the will or the laws of intestacy. As discussed above, such reforms should be considered in the context of the principles of trust law as regards the powers of trustees.

This approach has several advantages:

- It gives effect to the member's intentions and provides certainty for nominees.
- It is simple to understand and communicate.
- It would simplify and expedite the assessment and distribution process, improving efficiencies for funds and benefitting nominees.
- It would simplify the administration of the estate overall.
- It would reduce the number of complaints about decisions.

We acknowledge, however, that as the general principles of trust and superannuation law continue to apply to the extent that they are not expressly excluded by the operation of the SIS Act,²¹ our recommended approach should be considered in the context of those general principles.

Further considerations

The options and recommendations set out above should be considered in the context of current family provision legislation in each state and territory.

In New South Wales there are notional estate provisions which can result in benefits being subject to a family provision claim, despite their sitting outside the estate. This

²⁰ Australian Law Reform Commission, *Elder Abuse – A National Response*, 14 June 2017, [7.42].

²¹ See G Dal Pont, *Equity & Trusts* (6th ed), Sydney, Thomson Reuters, [28.50].

means a trustee's decision in the exercise of their discretion can be the subject of both a complaint to AFCA and a family provision claim in the courts. In other jurisdictions, benefits are quarantined from family provision claims as they sit outside of the estate. As the ALRC noted, in those jurisdictions "if a member's superannuation death benefit is substantial, the ability to remove the funds from the operation of family provision laws gives a member significant control after death."²²

We would be pleased to work with you to advocate for legislative reform in this area. If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,



Elizabeth Espinosa
President

²² Ibid, [7.34].