



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC/ELCSC:BMsh251024

25 October 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
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By email: Chelsea.DeSilva@lawcouncil.au

Dear Dr Popple,

AFCA Consultation paper - Approach to superannuation death benefit complaints

The Law Society appreciates the opportunity to provide input for a Law Council submission in response to the Australian Financial Complaints Authority (**AFCA**) Consultation paper - *Approach to superannuation death benefit complaints*, which explains the purpose of the revised draft *AFCA Approach to superannuation death benefit complaints, October 2024 (draft Approach)*. The Law Society's Business Law and Elder Law, Capacity and Succession Committees contributed to this submission.

General comments

The Law Society welcomes the clarification provided by the draft Approach as an important measure to aid the streamlining of the complaints handling process for superannuation death benefit claims, and to provide more certainty for affected parties. We have previously expressed our concern about the serious financial hardship and emotional stress caused by delays in the processing of death benefit claims by superannuation funds, particularly as they relate to vulnerable individuals.¹ We have also previously noted that additional delays are being experienced by our members as a result of the significant and increasing volume of complaints lodged with AFCA.² Notably, complaints about delays in handling death benefit claims increased seven-fold between 2021 and 2023.³ The consultation on the draft Approach is timely in light of the further successive record number of financial complaints lodged with AFCA for 2023-2024.⁴

¹ Law Society letter to the Law Council, *Delays in processing superannuation death benefit claims*, dated 18 September 2023, attached.

² Ibid.

³ ASIC, "Improving superannuation member services — Dealing with death benefit claims", *News*, 1 May 2024, online: <https://asic.gov.au/about-asic/news-centre/news-items/improving-superannuation-member-services-dealing-with-death-benefit-claims/>.

⁴ AFCA, "Financial complaints rise further 9% to record 105,000 in 2023-24", Media release, 1 August 2024, online: <https://www.afca.org.au/news/media-releases/financial-complaints-rise-further-9-to-record-105000-in-2023-24>.

Our comments in response to specific consultation paper questions are outlined below.

2. Are there any unintended consequences that you envisage may result from the Approach?

The Law Society is concerned that the draft Approach does not contemplate the notional estate regime under NSW legislation. While superannuation death benefits may not form part of the estate, the *Succession Act 2006* (NSW) provides that the relevant court may designate the benefit as “notional estate” if a family provision order is made and the actual estate cannot cover the provision.⁵ It is unclear, in light of this omission, how AFCA would address the issue of competing jurisdictions in the event a notional estate order is made.

3. Do you have any suggestions for how AFCA could amend the Approach to better achieve the objectives of the Approach?

The Law Society notes the objectives of the draft Approach are to assist stakeholders better understand how AFCA reaches decisions on key issues, and to support transparency and efficiency in the fair and reasonable distribution of death benefits. The amendments outlined below are proposed to better achieve these objectives.

Expectation of ongoing financial support – financial dependence

We note the draft Approach provides at paragraph 3.3.3 that, “[g]enerally, a child would be expected to be financially dependent on a parent up to the age of 18”. While we acknowledge that it is also recognised there will be exceptions in circumstances where the child has received regular support beyond that age, the single example supplied to illustrate this is limited to circumstances where “further education expenses” have been provided. In our view an expansion of the commentary on exceptions to the general rule that children reach financial independence at age 18 is warranted, given current cost of living and housing affordability trends. Young people are increasingly requiring financial support beyond the age of 18 as recognised in government programs such as Centrelink which, for the purposes of Youth Allowance, considers a young person to be financially dependent until they reach the age of 21.⁶

Case studies

As a matter of principle, we endorse the use of case studies to illustrate how context shapes decision-making approaches. This is particularly important in highly sensitive and emotive settings such as those concerning complaints about distribution of assets following a death. Comprehensive and detailed case studies provide critical guidance to stakeholders by allowing real-world, in-depth exploration of complex issues. They are also an important mechanism to build confidence and trust by ensuring neutral and informed decision-making.

While we acknowledge the increase in the number of case studies from three to five in the draft Approach, in our view a broader sample should be provided to better reflect the numerous potential variables that arise in practice. By way of comparison, some ATO rulings, for example, contain a substantially greater number of case studies.⁷ We are also concerned that

⁵ *Succession Act 2006* (NSW) Ch 3, Pt 3.3, Div 2.

⁶ Services Australia, Australian Government, Dependent or independent for Youth Allowance as a job seeker, online: <https://www.servicesaustralia.gov.au/dependent-or-independent-for-youth-allowance-job-seeker?context=43921>.

⁷ For example, *Self Managed Superannuation Funds Ruling SMSFR 2012/1*, online: <https://www.ato.gov.au/law/view/document?DocID=SFR/SMSFR20121/NAT/ATO/00001> contains 15 case studies.

the case studies in the draft Approach lack the necessary detail or do not adequately address typical extenuating circumstances that must be considered when determining a distribution of death benefit in accordance with the law. For example, in the case study at 4.1.4 involving a former legal spouse and a de facto spouse, a distribution of 100% of death benefit is proposed to be made to the de facto spouse without any consideration of the treatment of superannuation as an asset in a divorce or separation.⁸

Some of the more common and contentious scenarios of disputed death benefit distributions in our members' experience that we suggest being considered for inclusion in the draft Approach fall under the following categories:

- Where a dependant⁹ disputes a distribution to a non-dependant beneficiary.
- Where a beneficiary without a binding nomination disputes a distribution to a beneficiary under a binding nomination.
- Where the dispute involves the deceased's estate as a beneficiary.
- Where there are property settlement proceedings on foot at the time the member dies and the death benefit may be subject to superannuation splitting under family law legislation.¹⁰

In addition, we note that the case studies are silent in respect of taxation implications. Notably, death benefits received by a dependant are not taxable.¹¹ We suggest it may be appropriate for the draft Approach to include any relevant weighting this factor may have in making a determination.

Please do not hesitate to contact Sonja Hewison, Policy Lawyer on 02 99260219 or sonja.hewison@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,



Brett McGrath
President

Encl.

⁸ See *Family Law Act 1975* (Cth) Pt VIIIB and Pt VIIC and Family Law (Superannuation) Regulations 2001 (Cth).

⁹ *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

¹⁰ n 10.

¹¹ *Income Tax Assessment Act 1997* (Cth) ss 302-195.

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18 September 2023

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Dear Dr Popple,

Delays in processing superannuation death benefit claims

I am writing to raise an issue that may be of concern to legal practitioners nationally. This letter is informed by the Law Society's Elder Law, Capacity and Succession Committee.

Recently, significant delays in processing superannuation death benefit claims (Claims) by superannuation funds (Funds), have been the focus of considerable media attention.¹ The Australian Financial Complaints Authority (AFCA) has noted a sharp increase in complaints about the timeliness of processing Claims, which it has described as a 'systemic issue' affecting much of the industry.²

Our members have similarly observed delays in their recent dealings with Funds on behalf of their clients. By way of example, the timeline below sets out a member's experience in lodging a Claim with a large industry Fund, and subsequent communications with AFCA, which remain ongoing:

Date	Action
21 March 2023	The claim was lodged, together with all supporting documentation.
16 May 2023	The applicant sought an update from the Fund and was advised that the claim could take up to 12 months to process. No specific timeframe was provided.
16 May 2023	The applicant lodged a complaint with AFCA.
2 June 2023	The Fund contacted the applicant to apologise for the delay. No timeframe for processing the claim was provided.

¹ Matilda Marozzi, 'Widows' distress compounded by delays to late husbands' Cbus Super payouts', *ABC Radio Melbourne*, (Online, 6 June 2023), <https://www.abc.net.au/news/2023-06-06/widows-struggle-to-access-late-husbands-superannuation-cbus/102441446>.

² Michael Atkin, 'Superannuation payout delays throw spotlight on 'harrowing' ordeal for families', *ABC News*, (Online, 10 September 2023), https://www.abc.net.au/news/2023-09-10/superannuation-death-payout-delays/102828186?utm_source=abc_news_app&utm_medium=content_shared&utm_campaign=abc_news_app&utm_content=other.

22 June 2023	AFCA contacted the applicant noting that the complaint remained open, and that a caseworker would be assigned.
2 August 2023	AFCA informed the applicant that a caseworker would be assigned in approximately 13 weeks.

We are concerned about the very significant financial hardship and emotional stress caused by excessive delays in processing Claims, particularly as they relate to vulnerable individuals. In many cases, applicants are wholly financially dependent upon the deceased, and rely on the prompt processing of Claims to meet basic living expenses. We also note that AFCA is currently experiencing a record volume of complaints,³ which, in our members' experience, has led to additional delays for consumers seeking assistance in dealing with Funds.

Accordingly, we would be interested in collaborating with the Law Council further to consider possible policy options to address this issue, which may include, for example, advocating for mandatory timeframes or benchmarks for Funds to process Claims, and or increased resourcing for AFCA.

Please contact Nathan Saad, Policy Lawyer on (02) 9926 0174 or by email: nathan.saad@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,



Cassandra Banks
President

³ Australian Financial Complaints Authority, 'Record 97,000 complaints taken to AFCA in 2022-23', (Media Release, 28 July 2023), <https://www.afca.org.au/news/media-releases/record-97000-complaints-taken-to-afca-in-2022-23>.