



Law Council
OF AUSTRALIA

Consultation on approach to superannuation death benefits

Australian Financial Complaints Authority

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- New South Wales Bar Association
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- Northern Territory Bar Association
- Law Society Northern Territory
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- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
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The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council of Australia acknowledges the contributions of the Law Society of New South Wales in the preparation of this submission, in addition to the:

- National Elder Law and Succession Law Committee;
- Legal Practice Section's Australian Consumer Law Committee; and
- Legal Practice Section's Superannuation Committee.

General comments

1. The Law Council of Australia welcomes the opportunity to contribute to the consultation by the Australian Financial Complaints Authority (**AFCA**) on a draft revised approach to superannuation death benefit complaints (the **draft Approach**).
2. The draft Approach document represents 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.
3. On 12 January 2024, we wrote to the Hon Dr Jim Chalmers MP, and the Hon Stephen Jones MP, recommending reform to the superannuation death benefit framework in the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regulations**), as proposed by our National Elder Law and Succession Law Committee. In that letter, we:
 - expressed concern about the serious financial hardship and emotional stress that is caused by delays in the processing of death benefit claims by superannuation funds, particularly as they relate to vulnerable individuals, who rely on the prompt processing of claims to meet daily living expenses;
 - raised concerns about the resolution of complaints about these delays by AFCA;
 - observed that AFCA had stated in a media report that, in the 2022–23 financial year, complaints about delays in the payment of superannuation death benefits had more than tripled;¹ and
 - observed that, in its 2022–23 Annual Review, AFCA reported that complaints about superannuation death benefits were higher in that financial year (599) than in any of the previous four years.²
4. AFCA's consultation on the draft Approach is timely, in light of the concerns summarised above, and given the further successive record number of complaints about superannuation death benefits that were lodged with AFCA for the 2023–24 financial year (708).³
5. We acknowledge that the objectives of the draft Approach are to:
 - assist stakeholders to better understand how AFCA reaches decisions on key issues; and
 - support transparency and efficiency in the fair and reasonable distribution of death benefits.⁴

The amendments to the draft Approach, suggested below, are intended to further these objectives, and improve on the draft Approach in a number of areas.

¹ Michael Atkin, 'Superannuation payout delays throw spotlight on 'harrowing' ordeal for families', ABC News, ([Online](#), 10 September 2023).

² Australian Financial Complaints Authority ('AFCA'), 2022-23 Annual Review ([Report](#), October 2023) 86.

³ AFCA, 2023-24 Annual Review ([Report](#), October 2023) 80.

⁴ AFCA, *AFCA Approach Consultation – Superannuation jurisdiction* ([Consultation Paper](#), October 2024) 5.

Accessibility

6. The Law Council has received feedback that the draft Approach is not presented in a way that allows for a novice in this particular area of law to sufficiently understand the content of the document.
7. Noting that the draft Approach is aimed at trustees, AFCA staff and the general public,⁵ it should be written so that it can be clearly understood by potential complainants. While trustees and many legal practitioners routinely deal with the issues addressed in the draft Approach, many complainants are unrepresented, and they rarely have previous experience navigating these issues.
8. Consequently, it is important to clearly explain how AFCA will deal with the issues in a way that a novice to this area of law will understand. This submission identifies some sections of the draft Approach that may benefit from additional clarification and redrafting.

Different laws in different jurisdictions

9. The draft Approach does not contemplate different laws in different jurisdictions affecting the trustee's (or AFCA's) decision about the payment of the death benefit.
10. For example, we have received concerns from the Law Society of New South Wales that the draft Approach does not contemplate the notional estate regime operating within New South Wales. Whilst 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.⁶ It is unclear, in light of this omission from the draft Approach, how AFCA would address the issue of competing jurisdictions, in the event that a notional estate order is made.
11. Another example is the adoption of children, which is governed by State and Territory laws. This is elaborated on later in this submission, in respect of proposed section 3.2.1 of the draft Approach.
12. Moreover, the final paragraph in section 3.3.5 of the draft Approach refers to the 'forfeiture rule', though not by that name. We raise, for AFCA's awareness, that in two jurisdictions—the Australian Capital Territory and New South Wales—application of the common law's forfeiture rule is affected by legislation,⁷ which may not produce the strict application of the forfeiture rule.⁸

Decisions made by AFCA

13. When a member dies, there are three decisions that the trustee—or AFCA if exercising the decision-making authority of the trustee—may need to make, namely:
 - (a) to identify the persons who are eligible to receive the member's death benefit (eligible person) under superannuation legislation and the fund governing rules. Although mentioned in proposed section 3.3.4 of the draft Approach,

⁵ AFCA, *The AFCA Approach to superannuation death benefit complaints* ([Consultation Draft](#), October 2024) 1.

⁶ *Succession Act 2006* (NSW) Ch 3, Pt 3.3, Div 2.

⁷ *Forfeiture Act 1991* (ACT); *Forfeiture Act 1995* (NSW).

⁸ An example of the legislative modification of the rule is *Re Settree Estates; Robinson v Settree* [2018] NSWSC 1413.

this decision should be clearly stated as a fundamental consideration in the determination process;

- (b) to determine if the member made a nomination (whether binding or non-lapsing), that binds the trustee to pay the death benefit to the person nominated; and
 - (c) if the trustee or AFCA is not bound to pay the death benefit to a nominated person—because there is no relevant nomination, or the nominated person is not an eligible person—then the trustee or AFCA must decide to whom the death benefit is paid.
14. We recommend that this be clearly stated at the start of the draft Approach, and that proposed sections 3.1 and 3.3 of the draft Approach are amended to clearly state this position.
 15. Decisions (a) and (b) are evaluative decisions, meaning that they depend on findings of fact (e.g., whether the claimant is an eligible person, or whether the member has made a binding nomination), and the application of found facts to the requirement for an eligible person contained in the governing rules.
 16. Decision (c), if it arises, is a discretionary decision, meaning there may be variance in the responses. We recommend that the draft Approach clearly and concisely articulates this.

Case studies

17. As a matter of principle, we endorse the use of case studies in the draft Approach to illustrate how context shapes decision-making approaches. This is particularly important in highly sensitive and emotive settings, such as those concerning complaints about the distribution of assets following a death.
18. Comprehensive and detailed case studies provide critical guidance to stakeholders by allowing real-world, in-depth exploration of complex issues. Case studies are also an important mechanism to build confidence and trust, by ensuring neutral and informed decision-making.
19. Whilst we acknowledge that the draft Approach increases the number of case studies from three to five, a broader sample of case studies should be provided to better reflect the numerous potential variables that can arise in practice. By way of comparison, some Australian Taxation Office rulings, for instance, contain a substantially greater number of case studies.⁹
20. Further, the case studies in the draft Approach do not explain the three-step decision process referred to above, and do not demonstrate adequate consideration of relevant issues. The case studies do not provide comprehensive information about the circumstances of the member, complainant, and any other relevant person, including information about the member's wishes, and the date and manner in which any wishes were expressed (apart from a brief reference in case study 4).
21. We are concerned that the case studies in the draft Approach lack the necessary detail, and do not adequately address typical extenuating circumstances that must be considered when determining a distribution of a death benefit, in accordance with the law. For example, in the case study at section 4.1.4 involving a former legal spouse

⁹ See, e.g., Australian Taxation Office ('ATO'), *Self Managed Superannuation Funds Ruling* ([SMSFR 2012/1](#)).

and a de facto spouse, a distribution of 100 per cent of the 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.¹⁰

22. We have received feedback that some of the more common and contentious scenarios of disputed death benefit distributions should be considered for inclusion in the draft Approach, including disputes within the following categories:
- where a dependant¹¹ 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; and
 - where there are property settlement proceedings on foot at time that the member dies, and the death benefit may be subject to superannuation splitting under family law legislation.¹²
23. In addition, we note that the case studies in the draft Approach are silent about taxation implications. Notably, death benefits received by a "death benefits dependant" which are not taxable.¹³ Accordingly, it may be appropriate for the draft Approach to include any relevant weighting that this factor may have in making a determination.

Specific comments

Section 1.3—Summary

24. Proposed section 1.3 of the draft Approach does not accurately state the law regarding decisions (a), (b), and (c), outlined above, and it incorrectly states the law regarding the third (discretionary) decision. This section—and the draft Approach more broadly—should be redrafted to address these inaccuracies.
25. The Federal Court of Australia outlined the correct approach in *Wan v BT Funds Management Limited*:¹⁴

Having regard to the manifest purpose of that express discretionary power; namely, that the Trustee may decide to nominate various persons from within the defined classes under the Trust Deed, objectively it could not give proper and genuine consideration to the exercise of that power without first ascertaining the state of affairs so far as the financial interests of beneficiaries are concerned.

¹⁰ See *Family Law Act 1975* (Cth) Pts VIII B and VIII C; *Family Law (Superannuation) Regulations 2001* (Cth).

¹¹ *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

¹² See *Family Law Act 1975* (Cth) Pts VIII B and VIII C; *Family Law (Superannuation) Regulations 2001* (Cth).

¹³ *Income Tax Assessment Act 1997* (Cth) s 302.195.

¹⁴ [2022] FCA 302 [117]-[119]. On appeal, the Full Court of the Federal Court of Australia did nothing to disapprove this approach: *Wan v BT Funds Management Limited* [2022] FCAFC 189.

Accordingly, I conclude that without taking the aggregate provision made for the Applicant into account, the Trustee would not have a proper understanding of the financial, or economic, effect of the deceased's nomination, in respect of which it had the discretionary power to affirm, reject or vary as it saw fit ... [T]he objective significance of the aggregate provision made for the Applicant is surely relevant to any analysis by AFCA of whether the Trustee's Fourth Decision was fair and reasonable in all the circumstances.

... in my view, the aggregate provision made by the deceased for the Applicant from the whole of his assets, within and outside his estate at the time of his death, objectively bespeaks an intention on his part to make substantial provision for the Applicant (albeit not exclusively so). That is a compelling factor which supports AFCA's conclusion that the Trustee's decision was fair and reasonable having regard to the Applicant.

26. This approach was recently applied by AFCA in *Case 983377 (concerning AustralianSuper Pty Ltd)*.¹⁵ In its determination, AFCA stated that:

*... while financial dependence is a relevant, and often very important, factor to be taken into account in determining the distribution of a death benefit, it needs to be balanced against other considerations.*¹⁶

Further, in its determination, AFCA referred to *Wan* as establishing that an 'other consideration' was distribution from the member's estate.¹⁷ The draft Approach does not reflect this.

27. We also note, for AFCA's consideration, a recently published study of the distribution of superannuation death benefits by Tobias Barkley and Xia Li.¹⁸ The study states that AFCA's practices have not changed since *Wan*, where those practices were found to be inconsistent with the legislation.¹⁹ Given that the draft Approach continues to reflect the 'old' (now incorrect) law, this should be rectified.

Section 3.1—Introduction

Section 3.1.2—Binding nomination

28. The draft Approach:

- uses the term "binding nomination" to refer to nominations that comply with the form requirements under SIS Regulation 6.17A and lapse after three years, unless renewed; and
- uses the term "non-lapsing nomination" to refer to nominations that are binding if they comply with requirements under the superannuation fund's governing rules and that do not lapse upon the expiration of a time period.

¹⁵ AFCA, *Superannuation Determination, Case 982277 (concerning AustralianSuper Pty Ltd)*, 5 February 2024.

¹⁶ *Ibid* 5.

¹⁷ *Ibid* 7.

¹⁸ Tobias Barkley and Xia Li, '[An Empirical Study of the Distribution of Superannuation Death Benefits](#)' (2024) *Sydney Law Review* 46(2) 199.

¹⁹ *Ibid*.

29. We acknowledge that this terminology is consistent with how superannuation trustees describe these forms of nomination. However, we suggest that the proposed terminology may not be clear to consumers, because consumers may have the impression that a non-lapsing nomination is not binding. We suggest that the following amendments be made to section 3.1.2 of the draft Approach (new text underlined, deleted text struck through):

Some fund governing rules may require the trustee to pay the death benefit in accordance with the member's binding nomination ~~or in accordance with a non-lapsing nomination~~ (which may be a nomination that lapses after three years or is non-lapsing—see section 3.7 of this Approach (When is a binding nomination valid?)). AFCA cannot alter these kinds of distribution, unless the binding nomination ~~or non-lapsing nomination~~ made by the member was invalid at the time of the member's death.

30. Consequential amendments would then be required elsewhere in the draft Approach. Specifically, the fourth paragraph of draft section 3.7 would need to be consequentially amended, as follows:²⁰

The requirements set out above do not apply to ~~non-lapsing~~ nominations that the fund's governing rules permit to be made as non-lapsing nominations. The formal requirements for a non-lapsing nomination to be binding will be set out in the fund's governing rules, and they may provide for circumstances when the nomination will become invalid (for example, where the member enters into or terminates a spousal relationship). ~~The governing rules of some funds have the effect that expired binding nominations become non-binding nominations.~~

31. The last sentence in the above paragraph should be relocated to the end of the third paragraph of the same section. This is because this sentence relates to binding nominations under Superannuation Industry (Supervision) Regulation 6.17A, not to non-lapsing nominations. To assist with clarity, this sentence would more appropriately sit in the third paragraph of section 3.7, as follows:

Once the nomination has expired, the trustee is no longer bound by it. This is the case regardless of whether the member has seen or understood information from the fund alerting them to the expiry of the nomination. The governing rules of some funds have the effect that expired binding nominations become non-binding nominations.

Section 3.1.4—Fair and reasonable

32. The fourth paragraph of draft section 3.1.4 references “the trustee and the insurer”. However, under the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**), insurers do not have a role in determining who receives a superannuation benefit upon the death of member. To avoid confusion, we suggest that references to the insurer are omitted from this section. Further, the first sentence of the fourth paragraph should be amended to read: “*When AFCA determines a complaint about the payment of a death benefit*”.

²⁰ The second paragraph of section 3.6, at page 10 of the Draft Approach, would require consequential amendment, however we have suggested more extensive amendments to section 3.6 at page 19 of this submission.

33. The fifth paragraph in draft section 3.1.4 includes the following wording:

... AFCA expects trustees to consider each death benefit claim on its own facts. Circumstances will arise from time to time where applying general principles may not result in a fair outcome, and AFCA expects trustees to review each proposed decision about a death benefit claim, to satisfy themselves that the decision is fair and reasonable.

34. These statements could give the impression (to trustees and consumers) that AFCA expects all death benefit decisions to be individually assessed by the directors of the trustee. In practice, the volume of death benefits that are processed by superannuation funds requires delegated decision making, and the adoption of policies and procedures that are designed to promote consistency in decision-making (so that similar fact situations result in similar decisions).

35. For these reasons, the fifth paragraph does not assist trustees or consumers and should be deleted. This paragraph could be replaced by a general statement to the following effect:²¹

While this Approach includes guidance about a range of matters, trustee decision-making should reflect that differences in fact scenarios may give rise to different considerations and justify different outcomes.

36. If the fifth paragraph is not deleted, the words 'and reasonable' should be added to the third line so that it reads "*where applying general principles may not result in a fair and reasonable outcome*".

37. In respect of the structure of proposed section 3.1.4, consideration should be given to relocating the second and fourth paragraphs. As these paragraphs are general in nature, they would be more appropriately placed earlier in the document, such as under the "Introduction" heading at section 3.1.

Section 3.2—Superannuation legislation

38. We suggest that there should be a statement in draft section 3.2 that the governing rules may further restrict the people who can receive all or part of a death benefit, so that this limitation is highlighted in the introductory section.

Section 3.2.1—Who is a dependant?

Descriptions of "spouse" and "child"

39. The descriptions of the terms "spouse" and "child" that appear in the first paragraph of draft section 3.2.1, are inconsistent with the definitions of these terms in the SIS Act,²² and are also inconsistent with the further explanation of these terms that appears later in draft section 3.2.1.

40. To avoid confusion and the potential for inconsistent information being provided, we suggest that the list of dependants in the first paragraph of draft section 3.2.1 provide for "*a spouse*" and "*a child*", with no further elaboration. Alternatively, the list could

²¹ The final paragraph in section 3.6, at page 10 of the Draft Approach, would require consequential amendment, however we have suggested more extensive amendments to section 3.6 at page 19 of this submission.

²² *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

state: “a spouse (see explanation later in this section)” and “a child (see explanation later in this section)”.

Spouse

41. The commentary on pages 4 and 5 of the draft Approach, about the first limb of the SIS definition of “spouse”, is potentially confusing. We particularly refer to the fourth paragraph under the “Spouse” heading at page 4, as follows:

There is no definition of ‘de facto relationship’ or ‘de facto spouse’ under superannuation legislation. However, common law factors for a de facto spousal relationship may be used to determine whether two people live with each other on a genuine domestic basis in a relationship as a couple. These factors include ...

42. The reason why there are no definitions of “de facto relationship” and “de facto spouse” in the SIS Act is because these terms are not used in the SIS Act. We suggest that this paragraph be amended as follows:

~~*There is no definition of ‘de facto relationship’ or ‘de facto spouse’ under superannuation legislation. However, AFCA’s approach is that common law factors for a de facto spousal relationship may be used to determine whether two people live with each other on a genuine domestic basis in a relationship as a couple. These factors include ...*~~

43. It would also be of assistance if the list of eight factors that immediately follow this paragraph were accompanied by a statement that these common law factors are not to be treated merely as a “checklist”, but that the task is “evaluative” and “impressionistic”.²³
44. Consideration should also be given to specifically referring to when a spousal relationship is considered by AFCA to have been terminated.

Child

45. For clarity, the paragraphs that relate to the definition of “child” at page 5 of the draft Approach should explain the relationship between the definition in the SIS Act and the governing rules, consistent with the explanation that is provided for the definition of “spouse”.
46. We suggest that this section be redrafted as follows:

~~*The definition of child will depend on the fund’s governing rules and may refer to the SIS definition which includes:*~~

Under the SIS definition, “child” includes:

- *an adopted child*
- *a step-child*
- *an ex-nuptial child*
- *a child of a person’s spouse*

²³ See *Lingard v Commonwealth Bank Officers Superannuation Corporation Pty Limited* [2024] FCA 174.

- *someone who is a child of the person within the meaning of the Family Law Act 1975 (Cth).*

~~*Unless specified in a fund's governing rules, there is no age requirement in the definition of a child.*~~

The fund's governing rules could exclude some people who would qualify under the SIS definition—for example, there could be an age requirement in the governing rules.

~~*The SIS definition is inclusive and includes a person's biological child. AFCA considers this can also include a biological child who has been adopted away from the deceased member unless the trust deed says otherwise.*~~

47. The final paragraph (above) is potentially problematic and we suggest it be deleted, for the following reasons:

- Adoption is governed by State and Territory laws that provide that the effect of adoption is that the child is, at law, a child of the adoptive parents and ceases to be at law as a child of the birth parents.²⁴
- We accept that there is some uncertainty as to the interaction between State and Territory laws and federal superannuation legislation, and it is unclear whether State laws are intended to be applied under the SIS Act only in respect of the specific definition of “adopted child”, or in respect of adoption generally. As a result, it is not clear that AFCA's position, as set out in the draft Approach, is the correct legal interpretation.
- Recognising a child who has been adopted away as a dependant represents a material departure from the usual operation of adoption laws, and would indicate that very material changes to industry practice are expected.
 - Adoption records are not public, and identifying a child of a member who has been adopted away is likely to be impossible in many circumstances (and only possible in other circumstances by intrusive questions).
 - The possibility of a late claim some years after the member's death, by a child who was adopted away and was not known about when the benefit is paid, is also a concern.

Interdependency relationship

48. The structure of the explanation of interdependency relationship on pages 5 and 6 of the draft Approach is unclear as to which factors are required to be met, and which factors are to be taken into account.

49. In particular, the location of the paragraph below the heading “Living apart test” indicates that this is a factor to take into account under the SIS Regulations, rather than as part of the basic test. We suggest that the heading, “Living apart test”, is deleted, and the paragraph underneath this heading is relocated to appear under the heading, “Basic test”, perhaps before the sentence on page 5 that states: “*The SIS Regs provide further guidance about what factors should be taken into account ...*”

²⁴ See, e.g., *Adoption Act 2000* (NSW); *Adoption Act 1984* (Vic).

50. The first paragraph that appears under the heading, “Factors to be considered in determining whether an independency [sic] relationship exists”²⁵ on page 6 of the draft Approach includes the following sentence:

While an interdependency relationship need not satisfy all of these factors, AFCA generally considers such a relationship must include a mutual commitment to a shared life and a sense of permanence.

51. We query the legal basis for this statement, as SIS Regulation 1.04AAA does not place any greater emphasis on mutual commitment or permanence over the other factors listed, and we are unaware of any case law that suggests the contrary. We therefore suggest that this sentence be deleted.

Financial dependant

52. As a general comment, we understand that a wide variety of financial support arrangements have been considered sufficient for a person to qualify as financially dependent. Accordingly, we caution that some of the statements in the draft Approach, regarding financial dependency, unnecessarily narrow the categories of people who might qualify on this ground.

53. At page 6 of the draft Approach, the first paragraph under the heading, “Financial dependant”, states:

The concept of financial dependence requires more than occasional financial support. It generally requires the provision of regular financial contributions for everyday living expenses, even if the amounts are small.

54. Financial dependency does not “require” more than occasional financial support—all the facts need to be considered. While it may be helpful to establish “regular financial contributions for everyday living expenses”, this is not essential.²⁶

55. We suggest that this statement is qualified, to avoid giving the impression that financial dependency requires, in all cases, that the person demonstrate that the member made regular contributions. For instance, this statement could be replaced with the following statement:

Whether a claimant was financially dependent on the member, at the member’s death, involves a consideration of all the circumstances relating to the complainant and member without any preconceived or presumed notions of dependency.

²⁵ There is a typographical error in this heading.

²⁶ See, e.g., AFCA, Superannuation Determination, [Case 922589](#) (concerning *AustralianSuper Pty Ltd*), 24 March 2024: AFCA held that the fact that brothers paid \$32.50 per week to a boat storage company, for the cost of storing their boat, made the surviving brother a financial dependant of the deceased brother. The storage fees are not “everyday living expenses” and would not be regarded as the brother providing “financial support” by most people.

56. Alternatively, a general statement could be inserted below the existing paragraph, as follows:²⁷

These are not the only circumstances where financial dependency can arise, however the nature and frequency of payments may be relevant to the question of whether a person was financially dependent on the member.

Examples of financial support

57. We welcome the initiative of providing examples of financial support under the heading “Financial dependant”, at page 6 of the draft approach. However, we consider the examples are somewhat unclear and incomplete. For clarity, we recommend that this paragraph be redrafted as follows:

The financial support provided by the deceased member may include:

- *paying part or all of the ~~rent/mortgage~~ accommodation expenses, such as rent, mortgage repayments, rates, utility bills, insurance premiums, maintenance costs, and costs of repairs and improvements*
- *paying part or all of food ~~or~~ clothing expenses utilities, insurance costs*
- ~~*carrying out or paying for repairs and alterations to the home*~~
- *paying part or all education or medical expenses*
- *paying part or all transport or travel expenses*
- *making child support payments*

Child support

58. The third paragraph under the “Financial dependant” heading states:

We consider payment of education or medical expenses for a child and making child support payments are financial support of the child, not the child’s parent or guardian.

59. Regarding payment of child support, we query whether this statement accurately reflects the legal position. Child support is provided to a carer of a child based on a formula that compares the relative incomes of each parent or non-parent carer and the amount of care they provide to the child. Its purpose is to assist the parent or non-parent carer with the costs of caring for the child. A carer who is entitled to child support can spend the payments in any way they choose, and they have no legal obligation to spend any amount of a child support payment on the child.²⁸

60. For the purpose of assessing whether a person is financially dependent, child support payments should be considered financial support for the parent carer (as well as for the child). The payment of education or medical expenses for a child could also be considered as financial support for the parent (as well as the child) in some circumstances, because the parent who has less care of the child may be making

²⁷ See *Reeves v Nulis Nominees (Australia) Limited* [2022] FCA 627 at [21].

²⁸ See Child Support Australia, *What does Child Support Cover in Australia?* ([Web Page](#), 2024).

these payments partly with the intention of supporting the parent who has more care, for instance, so that parent carer's financial resources are not depleted by the cost of the child's medical or education expenses.

61. We suggest that the sentence referred to in paragraph 58 is deleted, or redrafted to more accurately reflect the legal position.

Former spouses

62. For the reasons referred to in paragraphs 52 to 57 of this submission, we suggest that the final paragraph under this heading be amended as follows:

A former spouse may also claim they were financially dependent because they had not received a property settlement. However, ~~unless the deceased member was making regular contributions to support them (including to a joint mortgage)~~ the mere fact that their overall financial position might be improved by a death benefit distribution does not make them financially dependent on the deceased member at the date of death”.

Section 3.3—What are the relevant considerations in distributing superannuation death benefits?

Section 3.3.2—Purpose of superannuation death benefits

63. The second paragraph of section 3.3.2, on page 7 of the draft Approach, states (emphasis added):

*The **generally accepted** purpose of a superannuation death benefit is primarily to provide for those people who were financially reliant on the deceased member at or around the date of death and who might have expected continuing financial support from the member but for the member's death. This will usually include a surviving spouse, minor children, a person who was in an interdependency relationship with the member and anyone who was financially dependent on the deceased member.*

64. The words “generally accepted” have been newly inserted into the draft Approach. However, describing the formulation as “generally accepted” is not correct in a technical sense, nor does it accurately state the case law (see extract from *Wan* above, in response to draft section 3.1).
65. We recommend that this paragraph be redrafted. At a minimum, we suggest that the start of the first sentence is amended as follows: “~~The AFCA considers that the generally accepted~~ purpose of a superannuation death benefit is ...”.²⁹
66. We also query AFCA's suggestion that a child's share of a death benefit is to be pro-rated or weighted to their age, and whether they are a minor”. In that regard, the

²⁹ The fourth paragraph in section 3.6, at page 10 of the draft Approach, would require consequential amendment, however we have suggested more extensive amendments to section 3.6 at page 19 of this submission.

remarks of Justice Mortimer (as her Honour then was) in *EEU20 v Meat Industry Employees' Superannuation Fund Pty Ltd (Trustee)*³⁰ (at [96]) are pertinent:

There is no suggestion that, by law, the deceased was "required to support" the spouse. There was no evidence about what facts might have given rise to such a legal obligation, yet the trustee and then the Tribunal had been prepared to give the spouse the overwhelmingly greatest proportion of the death benefit.

The concept of "dependency" which might be said to be the governing concept in the trust deed, and an important factor in the exercise of the discretion to distribute, is not age limited. While children becoming adults may well be a factor, much will depend on the factual circumstances. As I have noted, even with younger children, there may well be facts (and may have been here) which suggested they might not have been financially dependent on a deceased member. The Tribunal appeared to use age as a determinative criterion when it had no basis to do so.

Section 3.3.3—Who had an expectation of ongoing financial support?

67. Part of the first paragraph under the heading, "Who had an expectation of ongoing financial support?" provides, at page 7 of the draft Approach (emphasis added):

*Anyone who was being financially supported by the deceased member just before the member died, and who had a reasonable expectation that this support would be ongoing, **would generally have high priority** in the allocation of a death benefit.*

68. We have concerns about the drafting of this paragraph, which does not refer to the need for the complete picture to be considered. For instance, if the member made a non-binding nomination (or a Will) on the date of death, purporting to leave all of their death benefit to someone else, we query whether the draft Approach is suggesting that the trustee ought not give that nomination the highest "priority" (provided that the nominated person is an eligible recipient).

69. The second paragraph under the heading, "Who had an expectation of ongoing financial support" states, at page 8 of the draft Approach:

Generally, a child would be expected to be financially dependent on a parent up to the age of 18. However, there will be exceptions to this if regular support, such as for further education expenses, has been provided, or was reasonably expected to be provided, after age 18.

70. We also query the drafting of this paragraph. The second sentence is not an exception to the first sentence: the first sentence deals with financial dependency of minor children, whilst the second sentence deals with the separate issue of financial dependence of adult children.

71. Further, as mentioned above in relation to financial dependants, financial support is not necessarily regular. We also reiterate the significance of the remarks made in *EEU20 v Meat Industry Employees' Superannuation Fund Pty Ltd (Trustee)*.

³⁰ [2020] FCA 1359.

72. Moreover, whilst we acknowledge that the drafting of this paragraph recognises that there will be circumstances where the child has received regular support beyond the age of 18, the single example supplied in the draft Approach is limited to circumstances where “further education expenses” have been provided.
73. We suggest that an expansion of the commentary on exceptions to the general rule that children reach financial independence at age 18 is warranted, given the current cost-of-living and housing affordability trends. Young people are increasingly receiving financial support beyond the age of 18, as recognised in Government support policies and schemes, such as the Services Australia Youth Allowance, that considers a young person to be financially dependent until they reach the age of 21.³¹
74. We suggest that this paragraph be redrafted to address these concerns, as follows:

Generally, a child would be expected to be financially dependent on a parent up to the age of 18. A child aged 18 or older may also have been receiving financial support from the member, or have reasonably expected that the member would continue to provide financial support.

75. The third paragraph outlines some relevant factors in determining the appropriate allocation of a death benefit, including the extent and expected duration of financial support, and the relative ages of minor children. We suggest that this paragraph outline a broader range of factors that would be relevant, including:

- the age of the spouse;
- the type, duration, and extent of dependency of the spouse and child;
- the health needs of the spouse and child;
- the member’s wishes; and
- the terms of the member’s Will.

Section 3.4—When might adult children receive a share of a superannuation death benefit?

76. The final bullet point of draft section 3.4 should be amended slightly, as follows, to more accurately reflect the relevant test:

the trustee considers it to be fair and reasonable for a small part of a death benefit to be allocated to an adult child in recognition of their relationship with the deceased member, even if there was no financial dependency.

Section 3.5—Can a person claim reimbursement of funeral expenses from a death benefit?

77. We suggest the following change to the sole paragraph under draft section 3.5:

~~Under superannuation legislation, there is no provision to allow funeral expenses to be paid from a death benefit. A person who has paid funeral expenses is not a dependant by reason only of paying the deceased member’s funeral expenses.~~

³¹ Services Australia, *Dependent or independent* ([Web Page](#), 2024).

78. The sentence that we have proposed to delete from draft section 3.5—while technically correct—is irrelevant and potentially misleading. This is because, whilst the relevant superannuation legislation controls *payment* of death benefits to eligible persons, the legislation does not control the *use* of death benefits, once paid.
79. As drafted, this paragraph suggests that there is some connection between the payer and the deceased, and that connection may well be relevant to exercising a discretion between eligible recipients.

Section 3.6—When can a superannuation death benefit be paid to a deceased member’s estate?

80. The second paragraph under the heading, “When can a superannuation death benefit be paid to a deceased member’s [legal personal representative] LPR?”, at page 10 of the draft Approach, includes (emphasis added):

... a discretionary decision to pay the member’s LPR would generally only be fair and reasonable if there are no dependants. This is because a distribution to the LPR could mean that the death benefit is used to pay creditors. It is not a purpose of a superannuation death benefit to meet debts of a deceased member’s estate.

81. The emphasised statement gives the impression that the payment to the member’s estate should normally be limited to circumstances where there are no dependants. The reason provided (that a distribution to the LPR could mean that the death benefit is used to pay creditors) is not applicable for solvent estates—where the assets of the estate are sufficient to pay creditors there should not be a concern that a superannuation benefit paid to the LPR will be used to pay debts.
82. We understand that superannuation funds routinely collect information on the assets and liabilities of the member’s estates when assessing death benefits, and consider the solvency of the estate as a factor in deciding whether a payment should be made to the LPR. That is, the approach is not to assume that a superannuation benefit might be used to pay creditors, but to collect information to assess whether this might happen. Our view is that this practice is appropriate.
83. The emphasised statement also does not reflect the legal position. There may a range of circumstances where payment to the member’s LPR is fair and reasonable. For example, payment to the LPR may be fair and reasonable where:
- a member has expressed such wishes, via a non-binding nomination or other expression; and
 - where the member has made a recent Will that expresses a deliberate intention that superannuation death benefits be paid to their estate.

Such matters were considered relevant in *Wan*, where the death benefit was paid to the LPR rather than a spouse.

84. We suggest that section 3.6 is either deleted or is redrafted to more accurately reflect the case law, which we submit requires that all relevant circumstances should be considered in deciding who a death benefit is to be paid to and there is no presumption that payment should not be made to the LPR unless there are no dependants (see comments in paragraphs 24 to 27 of this submission).

Section 3.7—When is a binding nomination valid?

85. The heading of draft section 3.7, and the first line of this section, should explicitly refer to a *lapsing* binding nomination. Whilst the fourth paragraph of section 3.7 clarifies that “the requirements set out above do not apply to non-lapsing nominations”, this differentiation should be made clear upfront.
86. The second paragraph (“*The persons nominated must be dependants at the date of the member’s death*”) is incorrect. A person may be nominated if they are a dependant or an LPR.

Section 4.1—Case studies

Section 4.1.3—Case study 3: children and expectation of financial support

87. In respect of case study 3 on page 12 of the draft Approach, we suggest the following amendment be made to the last paragraph, under the heading “AFCA Approach”, for clarity:

A fair and reasonable decision would be for \$100,000 of the death benefit to be distributed to the minor child, to be held on trust for them, and the remainder to be distributed equally between each of the children (including the minor child, with their share of the remainder also to be held on trust for them).

Section 5.1—Definitions

88. For the reasons mentioned earlier in this submission about section 3.2.1 of the draft Approach, we suggest that the definition of “dependant” be redrafted to accurately reflect the definitions of “spouse” and “child” in the SIS Act.