

**12 January 2024**

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Dear Ministers

### **Proposed reform to superannuation death benefits**

I am writing to recommend 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 Regs**).

Specifically, I recommend the proposal set out in the **Attachment**. The proposal is to simplify and improve the framework by amending the SIS Act to require that all superannuation death benefits form part of the estate of deceased person, except where that person has made a binding death benefit nomination.

In the Law Council's view, the proposal would:

- provide greater certainty and autonomy for all members of superannuation funds in their succession planning;
- be consistent with key rule of law principles, by:
  - providing a clear, consistent and statutorily authorised means to distribute superannuation death benefits;
  - determining disputes about distribution through judicial processes, applying settled principles; and
- significantly reduce delays in the provision of superannuation death benefits.

At the very least, the Law Council recommends that the Commonwealth Government give effect to the recommendation made by the Australian Law Reform Commission (**ALRC**) in its 2017 **Report, Elder Abuse—A National Legal Response**, that the structure and drafting of the provisions relating to death benefit nominations in the SIS Act and SIS Regs be reviewed.<sup>1</sup>

I am grateful to the Law Council's National Elder Law and Succession Law Committee (**NELSC**)—an advisory committee of the Law Council, comprised of expert legal practitioners from each state and territory—for its advice in developing this proposal.

## The proposal

Under the SIS framework, the ability of a superannuation fund member to nominate to whom the benefits from their superannuation fund are to be distributed on their death is limited by:

- (1) legislative constraints on death benefit nominations that members can submit, and trustees can give effect to, which are, broadly:<sup>2</sup>
  - nominations must generally name the member's legal personal representative<sup>3</sup> or one or more dependants<sup>4</sup> (or a combination);
  - members can generally only make a binding nomination that is in place for three years and must then be renewed or will lapse;<sup>5</sup>
  - nominations may remain in place for longer than three years (non-lapsing nominations), but these generally require the trustee's consent;<sup>6</sup>
  - where there is no nomination, or there is a nomination that is not in the required form for a binding or non-lapsing nomination, the benefit is generally payable to the member's legal personal representative or one or more dependants (or a combination), either at the trustee's discretion or as prescribed under the governing rules; and
- (2) the governing rules of the fund, which may provide for all or some of the options listed in (1).

The Law Council's proposal is detailed in the Attachment.

The proposal is to amend the SIS Act to provide that a superannuation death benefit forms part of a member's estate, except where it is subject to a binding and non-lapsing nomination made to any person. The nomination could only be modified by the member, a tribunal, or under an authorised power of attorney.

The validity of the nomination would be disputed in the same way as a testamentary disposition, and the member's nomination of a person or persons could only be challenged by application to a court exercising jurisdiction to make orders for family provision.

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<sup>1</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response* ([Report 131](#), May 2017), Recommendation 7.1 (**ALRC Elder Abuse Report**).

<sup>2</sup> SIS Act s 59(1) and (1A) and SIS Regs 6.17A, 6.21 and 6.22

<sup>3</sup> SIS Act s 10: Defined as 'the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person'.

<sup>4</sup> *Ibid*: Defined to include 'the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship'.

<sup>5</sup> SIS Reg 6.17A(7).

<sup>6</sup> SIS Act s 59(1) and (1A).

## Benefits

### Greater certainty and autonomy

A key purpose of the proposal is to provide for greater certainty and autonomy for all members of superannuation funds in their succession planning. In the experience of practitioners, superannuation death benefits have become one of the biggest assets that a person has when they die.

In addition, data suggests that the value of superannuation death benefits is increasing, and further growth is expected.<sup>7</sup> The Australian Prudential Regulation Authority (**APRA**) recently reported that, from June 2017 to June 2022, total superannuation industry assets increased by 35.8 per cent, from \$2.5 trillion to \$3.3 trillion.<sup>8</sup> Further, the Association of Superannuation Funds of Australia reported in 2022 that:<sup>9</sup>

*Total superannuation assets have increased from around \$250 billion in 1996 (or 46 per cent of annual nominal gross domestic product [GDP]) to \$3.3 trillion as at June 2022 (or 150 per cent of annual nominal GDP). The Australian retirement savings pool is now one of the largest in the world.*

In this context, there is an argument that the person who has accrued these expanding assets should have control over their distribution. Legal practitioners have told the Law Council that many older persons have an expectation that their superannuation entitlement will form part of their estate, and they are surprised to learn that they may not have control over its distribution upon their death.

In its 2017 Report, the ALRC recommended that the structure and drafting of the provisions relating to death benefit nominations in sections 58 and 59 of the SIS Act and regulation 6.17A of the SIS Regs be reviewed.<sup>10</sup> This recommendation adopted the suggestion for such a review by Blue J in *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 12.<sup>11</sup> His Honour stated that, considering the ‘ambiguities, uncertainties and potentially unintended consequences’ of that framework, it was ‘highly desirable that those provisions be reviewed by the Commonwealth and recast’.<sup>12</sup>

His Honour observed that there was ‘a strong desire by members of superannuation funds to be able to make non-lapsing nominations’;<sup>13</sup> however whether to permit that, and on what terms, was a matter of policy.<sup>14</sup> His Honour canvassed several policy options, and concluded the point by stating that:<sup>15</sup>

*Whichever policy option is adopted, it is desirable that it be a simple universal rule applying to all binding nominations as opposed to the current situation involving multiple alternatives adopted by superannuation fund trustees to permit their members to make fixed term or indefinite binding nominations in compliance with the legislation.*

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<sup>7</sup> See APRA, Statistics: Annual superannuation bulletin – highlights ([Report](#), 31 January 2023).

<sup>8</sup> *Ibid* 4.

<sup>9</sup> Association of Superannuation Funds of Australia Limited, *The Australian superannuation industry* ([Report](#), September 2022) 21.

<sup>10</sup> ALRC Elder Abuse Report, Recommendation 7-1.

<sup>11</sup> *Ibid* [7.40].

<sup>12</sup> *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 12 [512].

<sup>13</sup> *Ibid* [513].

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid* [514].

The ALRC recommended a review be conducted by Treasury, and that the review involve key government agencies and stakeholders, including superannuation industry bodies and the Law Council.<sup>16</sup> In endorsing the review, the ALRC referred to the importance of a person having autonomy in the distribution of their assets:<sup>17</sup>

*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.*

### Consistency with rule of law principles

The proposed reform would also enhance one of the key rule of law principles, that the law be readily known and available, and certain and clear.<sup>18</sup>

Practitioners have told the Law Council that binding death benefit nominations (where available) are rarely used and are not well understood. Further, very few binding nominations are created with the assistance of a person who understands the law, and who can advise on the best methods for distribution of the death benefit on the member's death.

Where there is not a binding death benefit nomination and, under the governing rules, the recipient(s) of the benefit is to be determined at the trustee's discretion (in the absence of a binding nomination), in order to properly exercise that discretion and manage possible disputes, trustees will typically undertake a process along the following lines:

- the trustee seeks to identify any person who may have a claim to the payment;
- the trustee allows time for potential claimants to submit a claim;
- the trustee evaluates the claims against the governing rules in the fund and the provisions in the SIS Act and Regulations about who may receive a death benefit;
- the trustee notifies claimants of a preliminary decision, and invites objections and further submissions ('claim staking'); and
- the trustee ultimately makes a final decision, and then makes a payment unless a complaint is lodged.

Complaints about a trustee's decision are made to the Australian Financial Complaints Authority (**AFCA**). The Law Council understands that parties in these proceedings are often self-represented.

The experience of practitioners is that many estates are administered informally, within a few weeks, without recourse to the court. Of the matters that proceed to court, the majority receive a grant of probate or administration within six to 10 weeks.

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<sup>16</sup> ALRC Elder Abuse Report [7.44]-[7.45].

<sup>17</sup> Ibid [7.42].

<sup>18</sup> Law Council of Australia, Policy Statement Rule of Law Principles ([Policy Statement](#), March 2011) Principle 1.

Under the proposal, if there is a challenge, there is substantial, well-understood and easily assessable jurisprudence to determine the matter. Specifically:

- a challenge to the formal and essential validity of the nomination would be determined in accordance with the law relating to wills; and
- a challenge to the distribution of the death benefit—that is, whether the benefit should be paid to someone other than the person nominated or determined by the will or intestacy laws—would be disputed in accordance with the legislation allowing family provision claims.

### Delays

The Law Council believes that this proposal would assist in addressing the delays that are increasingly occurring in the payment of superannuation death benefits.

Two of the Law Council's Constituent Bodies—the Law Institute of Victoria and the Law Society of New South Wales—recently raised concerns with the Law Council about delays in the payment of death benefits by superannuation funds, and the resolution of complaints about these delays by the AFCA.

Members of these Constituent Bodies, in addition to members of the Law Council's NELSC, have advised that, anecdotally, superannuation trustees are taking between six months and two years to pay out benefits, depending on the complexity and number of claims. This includes in circumstances where members' clients—dependants of the deceased—are experiencing significant financial hardship and rely on the prompt processing of claims to meet daily living expenses. These experiences have been reflected recently in media reports.<sup>19</sup>

In one such media report, the AFCA states that, in the 2022–23 financial year, complaints regarding delays in the payment of superannuation death benefits have more than tripled.<sup>20</sup> In addition, in its 2022–23 Annual Review, the AFCA reported that complaints about superannuation death benefits were higher in that financial year (599) than in any of the previous four years.<sup>21</sup>

The Law Council understands, based on feedback from experienced practitioners within the NELSC, that reasons for these delays in payment of superannuation death benefits are thought to include:

- more claims by family members for the payment of the death benefit;
- increasingly complex family arrangements, resulting in contests about superannuation death benefit determinations at the claims-staking stage;
- complexities and inefficiencies in the SIS Act relating to the definition of 'dependant' and the payment of interim lump sums;<sup>22</sup>
- the considerable consolidation in the superannuation industry which has generally increased the size of superannuation funds—funds are finding that full integration of

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<sup>19</sup> Matilda Marozzi, 'Widows' distress compounded by delays to late husbands' Cbus Super payouts', ABC Radio Melbourne, ([Online](#), 6 June 2023); Michael Atkin, 'Superannuation payout delays throw spotlight on 'harrowing' ordeal for families', ABC News, ([Online](#), 10 September 2023).

<sup>20</sup> Michael Atkin, 'Superannuation payout delays throw spotlight on 'harrowing' ordeal for families', ABC News, ([Online](#), 10 September 2023).

<sup>21</sup> AFCA, 2022-23 Annual Review ([Report](#), October 2023) 86.

<sup>22</sup> SIS Regs reg 6.21(2)(a).

administration systems is taking time to implement, and there are resourcing issues arising from shortages of adequately trained staff at senior levels;<sup>23</sup> and

- unnecessary requests for information or documentation, and administrative errors.

These delays reflect trustees being required to make more complex decisions, involving increasingly large amounts of money, while dealing with more contests. Practitioners observe that, under the current claims staking process, there is no open testing of evidence or claims made, even though the amounts in dispute are often hundreds of thousands of dollars. As a result, a trustee sometimes appoints investigators. This can be a time-consuming process that lacks transparency.

The Law Council believes that the proposal in the Attachment would address many of these issues.

### **Contact and next steps**

We would be pleased to arrange a meeting to further discuss this proposal and the issues raised in this letter. In the first instance, please contact [REDACTED] if you would like to discuss this matter further.

Yours sincerely



**Greg McIntyre SC**  
**President**

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<sup>23</sup> KPMG, Super Insights 2023 ([Report](#), May 2023) 4: 'Five new mergers were announced in calendar year 2022, and at least thirteen mergers were consummated in the year 1 July 2021 to 30 June 2022. Consolidation has produced a dramatic change in the superannuation landscape, and as at 30 June 2022 there were three funds over \$150 billion with one of these over \$250 billion'.

**Attachment – the proposed reform**

The Law Council's **proposal** is that:

- (a) the *Superannuation Industry (Supervision) Act 1993* (Cth) be amended to mandate that all superannuation death benefits form part of the estate of a deceased person, to be dealt with according to normal succession laws and processes, except where (at death) the deceased has made a valid death benefit nomination;
- (b) death benefit nominations may only be made, modified or revoked by:
  - (i) the superannuation fund member personally;
  - (ii) a court, tribunal or authority of competent jurisdiction; or
  - (iii) an attorney who, by an enduring power of attorney, has expressly conferred authority to make, amend, confirm or revoke the member's nomination, provided that:
    - the attorney acts in accordance with that authority; and
    - by doing so, the attorney, and any related person, does not benefit unless the possibility of a benefit is expressly allowed by the enduring power of attorney;
- (c) only one type of death benefit nomination is available. That nomination is non-lapsing, binding, does not limit who can be nominated, permits cascading nominations, and is executed with the same formality as a will;
- (d) the validity of a death benefit nomination may be disputed in the same way as a testamentary disposition;
- (e) the actual or default decision of the superannuation fund member regarding a death benefit nomination may be challenged only by application to a court exercising jurisdiction to make orders for family provision; and
- (f) the superannuation death benefit would be 'ring-fenced' within a person's estate, to avoid it being subject to estate debts.