

To: Director  
Superannuation Insurance and Governance Unit  
Member Outcomes and Governance Branch  
Retirement, Advice and Investment Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

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### **Submission on Legislating the Objective of Superannuation**

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Dear Director

The focus of my submission is the position of death benefits within the superannuation system. Death benefits are an excellent point to focus on when considering the purpose of superannuation because they highlight the necessity for a clear purpose but also the difficulty following through on a clear purpose.

Death benefits are currently at odds with the proposed purpose set out in the consultation paper. By definition, death benefits are paid out in circumstances where the person who has contributed to the superannuation funds is not able to use them to support their dignified retirement.

Given the impossibility of death benefits fulfilling the primary purpose of superannuation they have fallen into a no man's land. The current death benefit system partially sees them as an asset – it allows people to create binding nominations to distribute death benefits to their estate and then as they wish along with their other assets. However, where there is no binding nomination, which means that the super trustees have a discretion to distribute death benefits, there is no clear purpose to guide the exercise of discretion by the trustees.

The legislation that governs trustees distributing death benefits is primarily reg 6.22 of the *Superannuation Industry (Supervision) Regulations 1994*, which provides that death benefits must be distributed to 'dependants' or the deceased's estate before any other party. Most super trust deeds grant the trustee a discretion to choose between dependants and the deceased estate. The exercise of this discretion by trustees rarely comes before the Courts, but has come frequently before the Australian Financial Complaints Authority and the Superannuation Complaints Tribunal. When regulating the trustees' discretion AFCA and the SCT have consistently referred to the purpose of the superannuation system. The following paragraph is frequently repeated in AFCA and SCT decisions:

The purpose of superannuation is to provide retirement benefits for a superannuation member and his or her spouse in retirement. In the event of death, a superannuation death

benefit is to provide for anyone who was financially reliant on or had an expectation of ongoing financial support from the superannuation member, had the member not died.<sup>1</sup>

AFCA and the SCT use this understanding of purpose to closely control the distribution of death benefits by trustees. In an empirical analysis I have done (currently under peer review), the dominant outcome is AFCA distributes death benefits to dependants who are financially dependent on the deceased, not to other dependants like adult children, nor to the estate. In the analysis of 119 AFCA cases 90% of financial dependants received a benefit and less than 5% of non-financial dependants received a benefit when they were competing with a financial dependant. Critically, I found that non-binding nominations by the deceased had no statistically significant observable effect on AFCA's decisions.

On one hand, the example of what AFCA is doing with death benefits demonstrates the critical importance of legislating a purpose for superannuation. AFCA and the SCT have gone out on their own to find a purpose for death benefits in superannuation, which is being used to override expressions of wishes by the deceased (other than in valid binding nominations).

On the other hand, AFCA and the SCT's interpretation of the purpose of death benefits shows the difficulty of finding a coherent purpose for superannuation. They have attempted to extrapolate from the purpose of providing income in retirement to the provision of lump sums to those not in retirement. The rather tenuous connection they have drawn is that death benefits are to support those who would have been supported by those funds if the deceased had survived until retirement and received the income. However, a primary category of people benefited are minor children. For any deceased person who is not at the cusp of retirement, their superannuation would not have been likely to support their minor child because, if by the time they had survived until retirement, the minor child would likely have been an adult child and not financially dependent. Payment of death benefits to minor children is much more consistent with superannuation having a purpose of inheritance or of providing for children who lose a carer. Indeed, the prioritisation of minor children over adult children means that AFCA is actually seeing the purpose as providing compensation for minor children who lose a caregiver.

If death benefits were to be reconciled with the purpose proposed in the consultation document they would not be paid out in a lump sum to anyone under the retirement age. A possible reconciliation would be for death benefits to be paid into other people's superannuation accounts. For example, instead of a de facto partner being paid out a lump sum at the age of 40, that sum is paid into her superannuation account for her retirement.

This alternative would likely produce serious criticism when it means a minor child is not immediately provided for on their parent's death – especially if that is what the deceased parent wanted. However, that criticism's moral weight derives from the conception of superannuation as an asset that I own and should be leaving to support my minor child. It is

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<sup>1</sup> *AFCA Determination 601401* (7 February 2019); *D18-19-187* [2019] SCTA 87 (21 May 2019) [75]; *D19-20-018* [2019] SCTA 141 (21 August 2019) [80]

simply very difficult to get away from that understanding of superannuation when it comes to death benefits.

In conclusion, legislating an objective for superannuation may be beneficial. However, it will depend whether the existing superannuation system is reformed to be consistent with that purpose. I can't see a legislated purpose providing any check on inconsistent changes in the future if areas like death benefits (or tax concessions) have not been reformed to be consistent with that purpose now. If the government has no intention of reforming difficult areas like death benefits to be consistent with its legislated purpose then I recommend it formulate a separate purpose for death benefits and incorporate that in the legislation.