

25 October 2024

Heather Gray
Lead Ombudsman
Australian Financial Complaints Authority
GPO Box 3
Melbourne VICTORIA 3001
Via email: consultation@afca.org.au

Dear Ms Gray,

RE: Draft AFCA Approach to Superannuation Death Benefit Complaints

The FSC welcomes the opportunity to comment on AFCA's draft updated approach to the paying of Superannuation Death Benefits.

The FSC welcomes much of the proposed changes noting that tightening the language in the Draft Approach document will help to provide certainty to Trustees in their decision making. That said, there are several areas which warrant further guidance and or clarity from AFCA, and these are unpacked below.

About the Financial Services Council

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services. Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, and financial advice licensees.

The financial services industry is responsible for investing more than \$3 trillion on behalf of over 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is one of the largest pools of managed funds in the world.

Summary of Recommendations

1. AFCA review the Draft Approach document in light of *Wan v BT* where Anastassiou J made comments as to the hierarchy, or lack thereof of potential death benefit recipients.
2. AFCA refine the wording in the summary of the Draft Approach to ensure it is consistent with the rest of the document and does not create an unnecessarily broad definition of who might be entitled to financial support.
3. AFCA clarify how it will treat new information provided by a complainant that was not previously available to the Trustee in its determination of case outcomes and how it intends to deal with objections lodged outside of the determination time period.
4. AFCA provide clarity in relation to when the spousal relationship severs, specifically that this relationship ceases with the completion of a divorce or following a period of separation.

5. AFCA provide guidance in relation to the concept of stepchildren, specifically as to when a stepchild/stepparent relationship is severed.
6. AFCA provide clarity in relation to what period of estrangement is sufficient for a Trustee not to make provision for an adult child in the payment of death benefits.
7. AFCA revert to the original wording of the Approach Document in relation to the basic test of independence, removing references that are in the past tense and provide clarity on the distinction between a truly interdependent relationship and a mere flatmate.
8. AFCA remove the general expectation that a child adopted out or has been born out of a surrogacy arrangement is generally considered to remain a biological child for the purposes of paying death benefits.
9. AFCA provide clarity about how the inclusive definition of children may relate to Indigenous Kinship arrangements.
10. AFCA provide guidance in relation to the standard of proof expected to show a financially dependent relationship between the superannuation customer and an adult child.
11. AFCA provide worked examples as to how Trustees may approach the apportioning of death benefits where there are minor children of varying ages.
12. AFCA provide a case study regarding its expected approach in relation to exercising discretionary decision making.
13. AFCA provide further guidance as to the application of the considerations given to not apportioning death benefits where there is evidence of abuse or violence contributing to the death of the customer. This includes the level of evidentiary support that is acceptable and how AFCA defines contributing or 'involvement'.
14. AFCA remove the word 'exceptional' in relation to circumstances where trustee responsibilities for a minor party are given to a person other than the surviving parent.
15. AFCA amend the definition of Legal Professional Representative to clarify how Enduring Power of Attorney, which ceases at death, is captured.
16. AFCA provide further clarity about the treatment of binding nominations to pay an LPR where it is known that the estate is insolvent.

AFCA's Approach in Light of Wan v BT Funds Management Limited

The FSC notes that much of AFCA's Draft Approach document appears to be inconsistent with the various court decisions relating to Wan v BT Funds Management Limited. In that case Anastassiou J. noted that there was no intended hierarchy between a dependent, legal personal representative, or other relevant potential beneficiaries:

"I respectfully disagree with the blanket adoption of the asserted guiding principles from the former SCT in relation to the exercise of a trustee's discretion in this context. I do not accept that when AFCA comes to assess whether a trustee's decision to affirm a non-binding nomination is fair and reasonable, it should give preference to the interests of a complainant who was a dependant of the deceased, or had been in an interdependency relationship with the deceased... I note that cl 6.3(e)(v) of the Trust Deed expressly provides that when exercising its discretion in the context of a non-binding nomination, the Trustee is to pay the death benefit to

one or more of the member's dependants, legal personal representative or such other persons permitted by superannuation law, in whatever proportions it decides. The specification of these classes of potential beneficiaries does not create an ex-ante preference for one class of beneficiaries over others.¹

Noting this judgement, there are several parts of the Draft Approach that appear inconsistent with this decision. For example:

- In 1.3 *Summary* it is noted that 'preference is generally given to those dependents who might have expected to continue to receive financial support from the member'
- In 3.3.2 *Purpose of Superannuation Death Benefits* it is noted that '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'
- In 3.3.3 *Who Had An Expectation of Ongoing Financial Support?* it is noted that "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.
- In 3.4 *When Might Adult Children Receive a Share of a Superannuation Death Benefit?* it is noted that adult children would generally not be expected to receive a share of their parent's death benefit except in specific circumstances.
- In 3.6 *When Can A Superannuation Death Benefit Be Paid to A Deceased Member's Estate?* it is noted that a discretionary decision to pay the member's LPR would generally only be fair and reasonable if there are no dependents.

While the FSC acknowledges this statement does not necessarily form binding precedent, this finding by Anastassiou J in this case gives rise to potential future inconsistencies and increasing uncertainty for superannuation funds in distributing death benefits. Given the decision in *Wan v BT*, the FSC recommends that AFCA review the document again in light of this case law.

RECOMMENDATION 1

AFCA review the Draft Approach document in light of *Wan v BT* where Anastassiou J made comments as to the hierarchy, or lack thereof of potential death benefit recipients.

Differing Approaches Between Regulatory Bodies

The FSC notes that the payment of death benefits, already a complicated matter, is made more complicated by different regulatory bodies having different guidance or interpretations. The wider superannuation industry would benefit from more cohesive non-prescriptive guidance in relation to the payment of death benefits especially where there are different views by regulatory bodies or where State or Territory legislation could throw further uncertainty on whether a person is an eligible dependant or not (e.g. adopted children or children through surrogacy).

For example, there is seemingly a disconnect between financial dependency from a tax withholding perspective from the ATO in contrast to APRA and AFCA's guidance to date. This creates

¹ *Wan v BT Funds Management Limited* [2022] FCA 302; 160 ACSR 81, 110

complexity in for Trustees in trying to determine who to pay death benefits to.

There also exists differences between who is treated as a child under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and under state and territory laws where the child has been adopted or was born out of a surrogacy arrangement. Further details are provided under Recommendation 7. These uncertainties can expose superannuation trustees to a requirement to seek judicial guidance or otherwise be joined in proceedings relating to disputes between prospective beneficiaries – this does not promote a quick, just, and efficient manner to distribute death benefits and has significant prospects to raise the cost, burden, and delay of administering the distribution of death benefits in superannuation.

Additionally, the ATO's definition of a stepchild, and specifically in the context of when a stepchild relationship ceases as a result of death or marital breakdown of the biological parent differs with other organisations. This specific issue is unpacked further below.

On-Going Right to Receive

In the Summary of the Draft Approach, it is noted that preference is given to ‘those dependants who might have expected to continue to receive financial support from the member or who had an **ongoing right to receive financial support** from the member’ (emphasis added). The FSC submits that, although this is merely meant to be a summary statement, it may cast the net quite wide in setting the expectations of potential beneficiaries as to their right to claim on a customer's death benefit. The statement may also be contradictory to other parts of the Draft Approach where, for example in paragraph 3.4, it is noted that the death benefit is not intended to ‘right past wrongs’.

RECOMMENDATION 2

AFCA refine the wording in the summary of the Draft Approach to ensure it is consistent with the rest of the document and does not create an unnecessarily broad definition of who might be entitled to financial support.

AFCA Decision Making

In Paragraph 3.1 of the Draft Approach document, it is noted that AFCA stands in the shoes of the Trustee and the insurer. It goes on to note that “this means AFCA is **not** confined to considering only the information that was before the trustee or the insurer when it made its decision” (emphasis added). Given AFCA's role in determining if a Trustee has made a correct decision, the FSC questions whether the use of the word ‘not’ is an error.

As a Trustee can only make decisions based on the facts provided, it would be a perverse outcome that there would be a finding against the Trustee based on information that was not provided to it or provided to it late (often customers lodge a complaint after the 28-day objection period and the Trustee has already paid the death claim). If there was new information provided to AFCA, it would be expected that that information be provided to the Trustee for reconsideration.

Further clarity is needed in relation to this statement.

RECOMMENDATION 3

AFCA clarify how it will treat new information provided by a complainant that was not previously available to the Trustee in its determination of case outcomes and how it intends to deal with objections lodged outside of the determination time period.

Who Is A Dependant

Spouses

Clarification is needed as to the meaning of spouse and when this relationship severs, specifically in relation to divorce. On the completion of a divorce, it should be explicit that the surviving person is not the 'spouse' of the deceased.

Further guidance is also needed in relation to when a relationship with a spouse dissolves after a period of separation. A 2006 Superannuation Complaints Tribunal Paper took the approach that an undissolved marriage required that a marital spouse be considered but not necessarily made provision for. Clarity is sought as to the appropriate period of time that a couple should be separated for before the Trustee does not have to make provision for them.

RECOMMENDATION 4

AFCA provide clarity in relation to when the spousal relationship severs, specifically that this relationship ceases with the completion of a divorce or following a period of separation.

Stepchildren

Further guidance is required in relation to the dependency relationship for stepchildren. Specifically, when does the dependency relationship for a stepchild cease? In some instances although there has been a separation between a stepparent and a natural parent, parental responsibilities or an otherwise close relationship may remain. There may also be instances where the natural parent died before the superannuation customer, who is the stepparent, and, in this case, the stepparent may or may not continue parental responsibilities for the stepchildren.

The FSC notes that the law relating to this generally conflicting and unclear. For example, the *Family Law Act 1975* expressly allows for the continuation of a stepchild/stepparent relationship even after the end of the relationship between the stepparent and the natural parent of the child, as did the decisions in *Scott-Mackenzie v Bail* [2017] VSCA 108 and *James v Rost, Lanagan V Rost* [2022] VSC 98. However, superannuation legislation still does not define a stepchild and when a stepchild/stepparent relationship ends.

RECOMMENDATION 5

AFCA provide guidance in relation to the concept of stepchildren, specifically as to when a stepchild/stepparent relationship is severed.

Estranged Adult Children

Further guidance is required as to AFCA's approach to estranged adult children. Specifically, what period of estrangement is appropriate for a Trustee to consider the child but not necessarily make provision for them.

RECOMMENDATION 6

AFCA provide clarity in relation to what period of estrangement is sufficient for a Trustee not to make provision for an adult child in the payment of death benefits.

Factors to Be Considered in Determining Whether an Interdependency Relationship Exists

The updated Draft Approach document changes the language for the basic test of interdependence from present tense to past tense, i.e. from “have a close personal relationship” and “live together” to “had” and “lived” respectively. This may be mis-interpreted to consider any person who may have previously lived with the member.

The current wording is reflective of the SIS Act, placing the individual in the situation at the point immediately before death and their relationship status at that point.

Clarity is required to provide distinction between a mere flatmate and an interdependent relationship. Anecdotally, some superannuation funds have experience where a former ‘flatmate’ has produced evidence of a relationship of the kind that might be typified as an interdependent relationship. This includes showing photos of attending family events together.

It’s important that actual interdependent relationships are protected from claims such as these and further guidance from AFCA provides comfort to funds about these definitional issues. AFCA should revert to the original wording.

RECOMMENDATION 7

AFCA revert to the original wording of the Approach Document in relation to the basic test of independence, removing references that are in the past tense and provide clarity on the distinction between a truly interdependent relationship and a mere flatmate.

Children Adopted Out

It is noted that the SIS Act definition of child is inclusive, and therefore catches all biological children, under the ordinary meaning of ‘child’, and so AFCA considers that beneficiaries can include a child that has been adopted out and/or any child (biological or not) who was financially dependent on or had an interdependency relationship with the deceased member. The basis of this is typically that a child adopted out is another person’s ‘child’, which we understand may be the legal position under some State and Territory legislation. It follows that the ordinary meaning of ‘child’ may differ depending on the facts of the case.

Further clarity is sought as to AFCA’s approach on this matter and the FSC specifically recommends that the expectation that a child that has been adopted out not be automatically considered to be a SIS Act dependant child and that the primary consideration should be the child’s relationship of dependence or interdependence to the deceased.

Surrogacy

As noted above, the SIS definition of child is inclusive and captures biological children. Further clarity is sought as to AFCA’s approach on the matter of children born out of surrogacy arrangements and whether AFCA would view the child being the biological child of the surrogate parent would be considered as a SIS Act dependant under the child definition.

RECOMMENDATION 8

AFCA remove the general expectation that a child adopted out or has been born out of a surrogacy arrangement is generally considered to remain a biological child for the purposes of paying death benefits.

Indigenous Kinship Arrangements

The inclusive definition of children also raises questions as to the treatment of Indigenous Kinship arrangements. Clarity is required as to how this principle may be applied to families that treat non-biological children as children.

RECOMMENDATION 9

AFCA provide clarity about how the inclusive definition of children may relate to Indigenous Kinship arrangements.

Proving Dependency

Clarity is sought as to AFCA's approach to the burden of proof for proving dependency for adult children. Where there is a financial arrangement for an adult child, Trustees may receive proof in the form of bank statements or other evidence of financial transactions but in some cases may need to rely on statutory declarations that a person was receiving an ongoing benefit from their deceased parent.

Guidance as to AFCA's expectations as to proof would help ensure consistency of decisions among Trustees.

RECOMMENDATION 10

AFCA provide guidance in relation to the standard of proof expected to show a financially dependent relationship between the superannuation customer and an adult child.

What Are The Relevant Considerations In Distributing Superannuation Death Benefits?

Apportioning Payment Among Minor Children

Further guidance is required as to AFCA's approach to apportioning amounts to pay for minor children. For example, would an age to percentage ratio be an appropriate way to apportion benefits to ensure that a younger child receives more of the death benefit given their financial needs as a minor will need to be met for longer. Clarification of AFCA's approach on this is warranted to understand how the Authority views the differences between what is sufficient to raise a child who is, for example, one year old, versus ten, versus sixteen.

Regarding Case Study 3, because the benefit is \$500,000 each child receives a reasonable amount. However, further clarity is needed where the death benefit amount is significantly smaller and portions of it would likely not provide much for young minor children.

RECOMMENDATION 11

AFCA provide worked examples as to how Trustees may approach the apportioning of death benefits where there are minor children of varying ages.

Exercising Discretion

Further guidance would be appropriate regarding how AFCA expects Trustees to approach exercising discretionary decision making (that is, upon a non-binding nomination) in distributing a death benefit under a proportionate distribution when there are multiple beneficiaries, including spouses. For example, it may be helpful for AFCA to provide a case study where a proportionate distribution approach may be considered fair and reasonable (e.g. something which exists in

intestacy rules where in certain jurisdictions, the spouse receives X amount as a default amount and the remainder is split between beneficiaries). As an indication, a case study which illustrates AFCA's expected approach with a figure of \$500,000 to \$1 million where it might be fair and reasonable for a spouse to receive the entire death benefit in priority over any other beneficiaries such as adult children.

It is important, of course, that this approach does not interfere with unfettered discretion obligations in fulfilling Trustee obligations.

RECOMMENDATION 12

AFCA provide a case study regarding its expected approach in relation to exercising discretionary decision making.

Abuse

The FSC is supportive of the policy intent of not paying death benefits to a person whose violence or abuse has contributed to the deceased person's death. However, the definition of 'was involved in the death of the deceased member' requires some clarity. For example, would evidence suggesting that a person died by suicide as a result of violence or abuse in the relationship be an acceptable reason not to apportion death benefits to the inflicting party.

Further guidance is required as to the acceptable level of evidence in support of this and how it is expected to be applied.

RECOMMENDATION 13

AFCA provide further guidance as to the application of the considerations given to not apportioning death benefits where there is evidence of abuse or violence contributing to the death of the customer. This includes the level of evidentiary support that is acceptable and how AFCA defines contributing or 'involvement'.

Trusts for Minors

The Draft Approach document suggests that 'a trustee other than the surviving parent would only be appropriate in ***exceptional*** circumstances' (emphasis added). The FSC submits that although there would be a strong expectation that the surviving parent would be the most appropriate person to administer a trust related to a minor, it is probably not the case that it is only in the most exceptional cases that this wouldn't be true for example, there are situations where the surviving parent is not in a position to look after the children (because of, for example, drug dependencies or incarceration) and the grandparent or another family member has stepped in to the guardian relationship. That is to say, the word exceptional seems too strong of a word in this instance the FSC submits that it should be replaced with softer language.

The word exceptional creates a strong precedent and a high bar for the allotting of trustee responsibilities to a person other than the parent, and AFCA should adopt a more flexible approach in this regard.

RECOMMENDATION 14

AFCA remove the word 'exceptional' in relation to circumstances where trustee responsibilities for a minor party are given to a person other than the surviving parent.

Definition of Legal Professional Representative

The definition provided for legal professional representative (LPR) requires further clarification specifically in relation to how it currently captures an Enduring Power of Attorney (EPOA). EPOA's cease at the death of a member and so, would not be, in a fund's determination, an LPR.

RECOMMENDATION 15

AFCA amend the definition of Legal Professional Representative to clarify how Enduring Power of Attorney, which ceases at death, is captured.

Paying a Legal Personal Representative Where the Estate is Insolvent

Further clarity is required as to AFCA's approach to death benefit payments where there is a binding nomination to pay the LPR but the Trustee knows that the estate is insolvent and therefore the superannuation benefit will likely be used to discharge some of that insolvency.

RECOMMENDATION 16

AFCA provide further clarity about the treatment of binding nominations to pay an LPR where it is known that the estate is insolvent.

If you would like to discuss anything in this submission, please do not hesitate to contact me.

Yours sincerely,

Kirsten Samuels
Policy Director, Superannuation and Innovation