

# Superannuation binding death benefit nominations and kinship structures

Taking further action on the  
Banking, Superannuation & Financial Services Industry Royal Commission

Discussion Paper

March 2019

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# Consultation process

## Request for feedback and comments

Treasury welcomes comments and feedback on this discussion paper. Submissions may be lodged electronically or by post. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions **will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence**. Automatically generated confidentiality statements in emails are not sufficient for this purpose. If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

Closing date for submissions: 24 May 2019

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The principles outlined in this paper have not received Government approval and are not yet law. Accordingly, this paper is merely a guide as to how the principles might operate.

## Background

### Context

The final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) was tabled in Parliament on 4 February 2019. The Financial Services Royal Commission noted that some Australians encounter difficulties accessing and making effective use of some aspects of the superannuation system.<sup>1</sup>

The Financial Services Royal Commission suggested that the Government explore, in consultation with relevant Aboriginal and Torres Strait Islander peoples, difficulties they face making binding death benefit nominations.

The Financial Services Royal Commission also heard about several other issues faced by Aboriginal and Torres Strait Islander people in accessing their superannuation, such as satisfying the identification requirements of superannuation funds and some funds not offering the early release of superannuation on severe financial hardship grounds. While these other issues are important, the scope of this paper is limited to the specific Financial Services Royal Commission suggestion to explore the difficulties Aboriginal and Torres Strait Islander people face making binding death benefit nominations.

### Financial Services Royal Commission statement

The Financial Services Royal Commission final report included the following statements about binding death benefit nominations:

*A question arose in the course of the Commission's proceedings about whether the law as it now stands permits Aboriginal and Torres Strait Islander peoples to make binding death nominations in respect of their superannuation that reflect the kinship structures of the peoples concerned.*

*As Treasury pointed out in its submissions, nominations can be made in respect of a person with whom the nominator has 'an interdependency relationship'. The notion of an interdependency relationship is broad. Lest there be doubt, however, **I urge consultation with relevant Aboriginal and Torres Strait Islander peoples about whether they, as the relevant users of the system, see difficulties about binding death benefit nominations that should be met.***<sup>2</sup>

The Financial Services Royal Commission was made aware of this death benefits issue through evidence provided by the Australian Securities and Investments Commission (ASIC) and a representative of a large superannuation fund.

Specifically, the Financial Services Royal Commission heard evidence about the Lockhart River community, and the difficulties that some Aboriginal and Torres Strait Islander people faced when accessing their superannuation entitlements due to complexities associated with Indigenous kinship structures. One suggestion was that the definition of 'dependant' should be expanded in a way that accommodates the kinship structures operating in Aboriginal and Torres Strait Islander communities.<sup>3</sup>

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<sup>1</sup> Financial Services Royal Commission, *Final Report* (2019), vol. 1, 253.

<sup>2</sup> Financial Services Royal Commission, *Final Report* (2019), vol. 1, 254.

<sup>3</sup> Financial Services Royal Commission, *Transcript of proceedings from 13 August 2018* (2018), 4704, 4706, 4717.

Submissions to the Financial Services Royal Commission made by the Department of The Prime Minister and Cabinet (PM&C) and ASIC also referenced this issue. PM&C's submission stated "there is merit in exploring the impact the current legislation has for Aboriginal and Torres Strait Islander kinship structures, in particular whether death benefits and relevant insurances can be claimed and made available to support nominated and culturally appropriate family members and kinship communities".<sup>4</sup> ASIC's submission stated that "processes could be put in place to recognise the unique kinship structures".<sup>5</sup>

This paper explores the law surrounding the distribution of superannuation death benefits, Aboriginal and Torres Strait Islander peoples' kinship structures, and how these kinship structures are accommodated elsewhere in the law.

The Government will use the feedback received through submissions on this paper to decide what law changes, if any, are required to address how kinship structures of Aboriginal and Torres Strait Islander people are treated by laws applying to superannuation death benefits.

## Superannuation death benefits

The distribution of superannuation following a member's death is a relatively complex area of the superannuation system. Superannuation monies do not automatically form part of a deceased's estate. Instead, the *Superannuation Industry (Supervision) Act 1993* (SIS Act) provides that:

- a) the governing rules of a fund may permit a member to complete a notice that nominates a recipient(s) of their death benefits;
- b) the trustee must comply with this notice if it is valid; and
- c) the notice must nominate a legal personal representative (legal representative) or dependant(s).<sup>6</sup>

### Types of death benefit nominations

There are broadly four types of death benefit nominations:

1. **Binding death benefit nomination:** This is a written direction from a member to their superannuation trustee setting out how they wish some or all of their superannuation death benefits to be distributed. The nomination is generally valid for a maximum of three years and lapses if it is not renewed. If this nomination is valid at the time of the member's death, the trustee is bound by law to follow it.
2. **Reversionary beneficiary:** A member in receipt of an income stream can nominate a beneficiary to whom the payments automatically revert upon the death of the member. If the nomination is valid at the time of the member's death, the trustee is bound by law to follow it.
3. **Non-binding death benefit nomination:** This is a written guide by a member about how they wish some or all of their superannuation death benefits to be distributed after their death. However, even if the nomination is valid at the time of the member's death, the trustee

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<sup>4</sup> The Department of the Prime Minister and Cabinet (Commonwealth of Australia), *Royal Commission, Round 5 Superannuation Submissions* (2018), 2.

<sup>5</sup> ASIC, *Royal Commission, Round 5 Superannuation Submissions* (2018), 15-16.

<sup>6</sup> Section 59(1A), SIS Act.

retains ultimate discretion to distribute the superannuation death benefits to the deceased's dependants or estate.

4. **Non-lapsing binding death benefit nomination:** This is a written direction by a member to their superannuation trustee establishing how they wish some or all of their superannuation death benefits to be distributed. These nominations, if permitted by the trust deed, generally remain in place forever unless the member cancels or replaces it with a new nomination. If this nomination is valid at the time of the member's death, the trustee is bound by law to follow it.<sup>7</sup>

Trustees are required to deal with death benefit distributions according to the governing rules of the superannuation entity, but are not required by law to offer any of these death benefit nominations to their members. This results in the types of death benefit nominations available to superannuation members varying across superannuation funds, depending on the rules of the fund.

## Who can receive a superannuation death benefit

Binding and non-binding death benefit nominations can only be made to the deceased's legal representative or dependant under superannuation law. A reversionary beneficiary must be a dependant under superannuation law.

### Legal representative

A legal representative is defined in superannuation law 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'.

### Dependant

A dependant is defined in superannuation law as 'the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship'.<sup>8</sup>

A child of a deceased person under superannuation law includes the deceased's biological child and also extends to an adopted child, a step child, an ex-nuptial child and a child of the person within the meaning of the *Family Law Act 1975*.<sup>9</sup>

### Interdependency relationship

There are two alternative tests for an interdependency relationship under superannuation law: the basic test and the disability test. The deceased's superannuation fund will determine whether an interdependency relationship exists.

Under the **basic test**, two people are in an interdependency relationship if they have a close personal relationship, they live together, one or each of them provides the other with financial support and one or each of them provides the other with domestic support and personal care.<sup>10</sup>

In addition, the superannuation regulations specify the following circumstances of the relationship, where relevant, should be taken into account in determining whether two persons have an interdependency relationship:

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<sup>7</sup> These nominations are made under s59(1)(a), SIS Act.

<sup>8</sup> Section 10(1), SIS Act.

<sup>9</sup> Section 10(1), SIS Act.

<sup>10</sup> Section 10, SIS Act.

- the duration of the relationship;
- whether or not a sexual relationship exists;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life;
- the care and support of children;
- the reputation and public aspects of the relationship;
- the degree of emotional support;
- the extent to which the relationship is one of mere convenience; and
- any evidence suggesting that the parties intend the relationship to be permanent.<sup>11</sup>

It is not necessary that each of these factors exists in order for an interdependency relationship to exist. Instead, each factor is to be given the appropriate weighting depending on the circumstances.

The **disability test** provides that two people are in an interdependency relationship if they have a close personal relationship and either or both suffer from a disability that means that they cannot meet one or more of the other requirements of the test (i.e. cohabitation, financial support or domestic support and personal care).<sup>12</sup>

### Trustee discretion

In the absence of a valid binding death benefit nomination, the deceased's superannuation trustee(s) will use their discretion to decide which dependant(s) the death benefit is paid to, or make a payment to the deceased's legal representative. The decision must be in accordance with the terms of the trust deed and subject to superannuation law.

If the trustee cannot identify a dependant or legal representative of the deceased after reasonable enquiries, the trustee may distribute the benefits to other persons in accordance with the trust deed or deposit the benefit in unclaimed superannuation with the Australian Taxation Office.<sup>13</sup>

In all of these situations, superannuation trustees are required to pay member's benefits as soon as practicable after the member dies.

### Taxation of superannuation death benefits

Definitions of dependency also have implications for the tax treatment of superannuation death benefits.

Tax laws use similar definitions of 'dependant' for the taxation of superannuation death benefits. For example, the deceased person's spouse or de facto spouse, child under 18 years old and person in an interdependency relationship with the deceased are classified as a dependant under both superannuation and taxation law. Importantly, superannuation and taxation law use the same definition of interdependency relationships. A key difference between superannuation and taxation law is that a child of the deceased over 18 years old is always a dependant under superannuation law but not always under taxation law.

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<sup>11</sup> Regulation 1.04AAAA, *Superannuation Industry (Supervision) Regulations 1994* (SISR).

<sup>12</sup> Regulation 1.04AAAA, SISR.

<sup>13</sup> Regulation 6.22, SISR.

Tax law provides that the deceased's dependants generally pay lower rates of tax on superannuation death benefits than the deceased's non-dependants. Tax law uses a 'look through' approach when superannuation death benefits are distributed to the deceased's legal representative.<sup>14</sup> This involves determining whether the final recipient of the superannuation monies will be a dependant or a non-dependant of the deceased. This method is used to generate equivalent tax outcomes between superannuation death benefit distributions paid directly to the deceased's dependant and to the deceased's dependants via the deceased's estate.

### Benefits of making a superannuation death benefit nomination

A deceased's assets other than superannuation are generally distributed in accordance with their Will. As superannuation is not automatically included as an asset in a deceased's estate, it may not be accounted for by the deceased's Will.

Making a superannuation death benefit nomination thus enables a superannuation member to direct their superannuation death benefits to their preferred dependant, rather than relying on trustee discretion to distribute their superannuation assets. This can ensure the superannuation death benefit distribution complements their Will, allowing the superannuation member's entire asset pool to be distributed according to their wishes. This can also reduce the risk of claims against the superannuation member's estate by other beneficiaries.

## Kinship structures

The traditional social structure of Aboriginal and Torres Strait Islander communities is based around broader kinship systems that adopt a different definition of a 'family' compared with that of an 'Anglo-Celtic' system.<sup>15</sup>

The 'collectivist' kinship system which is a characteristic of Aboriginal and Torres Strait Islander communities means that people think of themselves in terms of their affiliation with other people and their community. There are various kinship structures that are unique to each Aboriginal and Torres Strait Islander community. These define how individuals relate to each other in terms of their roles, responsibilities and obligations.<sup>16</sup>

These kinship structures are cohesive forces which bind people together and provide psychological, financial, emotional and other practical support. In Aboriginal and Torres Strait Islander societies the family structures and the rights and obligations underlying them are extended to the whole society. As an individual moves out from the immediate family to the local group and to the total linguistic group, he or she is able to identify all other members of the groups by the same relationship terms which apply in the family.<sup>17</sup> The cultural responsibilities associated with these kinship structures are not limited to when a family member is incapacitated or unable to care for a dependant in some way, they apply even when more immediate family members (in the "Anglo-Celtic" sense) are capable of caring for those family members.

As mentioned on pages 4 and 5 of this paper, superannuation law uses quite specific definitions of 'dependant' and 'interdependency relationship'. The use of these definitions may result in people who are considered to be dependants within Aboriginal and Torres Strait Islander kinship structures

<sup>14</sup> Section 82.75, *Income Tax Assessment Act 1997*.

<sup>15</sup> Morphy, F. *Lost in translation? Remote Indigenous households and definitions of the family*. *Family Matters* (2006), 73, 23–31.

<sup>16</sup> Secretariat of National Aboriginal and Islander Child Care, *Growing up our way: Practices matrix* (2011).

<sup>17</sup> Peters-Little, F. *The community game: Aboriginal self definition at the local community level*, AITSIS Research Discussion Paper No. 10 (2000).

not being, or encountering difficulties being, recognised as dependants for the purpose of superannuation death benefit distributions.

Examples that illustrate the types of issues Aboriginal and Torres Strait Islander people may encounter when attempting to access superannuation death benefits include:

1. A young adult nominates their brother to receive their superannuation death benefits. This is consistent with the expectations of their community's kinship structures. However, upon the death of the young adult, the superannuation trustee does not consider their brother to be a dependant of the deceased under superannuation law. As a result, the trustee deems the nomination invalid and distributes the death benefit according to their discretion instead.
2. An aunt takes in a niece without formally adopting her, but treats her as one of her children. On the death of this individual, only her biological or adopted children immediately qualify as a dependant of the deceased for the purpose of superannuation death benefit distributions. In this case, the individual's niece will need to prove to the relevant superannuation trustee that she was in an interdependency relationship with her aunt to access her aunt's superannuation death benefits.

## Kinships structures in other areas of law

Below are some examples of how kinship structures are accommodated elsewhere in the law.

### Wills and intestacy

Wills enable individuals to distribute assets as desired in the event of their death, provided the formal requirements specified in the relevant State and Territory legislation are met.

The law also provides limited grounds to challenge a Will. The legal grounds to challenge a Will differ across the States and Territories. For example, in Victoria the validity of a Will can be challenged after a person dies if:

- a) the deceased did not have the capacity to make a Will at the time they signed it;
- b) they made the Will under the influence of others; or
- c) a person the deceased had a responsibility to provide for, believes they haven't been left a fair share of the deceased's assets.<sup>18</sup>

Where a person does not have a valid Will at the time of their death, or their Will does not dispose of all of their estate, the rules, set out in State and Territory legislation, generally determine who will benefit from the deceased's estate. In Victoria, for example, intestacy generally occurs through an application for a Grant of Letters of Administration to be made to the Supreme Court. When distributing the intestate estate, the Victorian courts will prioritise the deceased's partner, then children, then parents, then siblings.<sup>19</sup>

Courts in some States and Territories also have the power to rule that a deceased's superannuation benefits are part of the deceased's notional estate. These courts then have wide powers to order how the notional estate is distributed. However, this power is limited to circumstances where there

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<sup>18</sup> Legal Aid Victoria, *'Challenging a Will'*, <<https://www.legalaid.vic.gov.au/find-legal-answers/wills-and-estates/challenging-will>>.

<sup>19</sup> Legal Aid Victoria, *'If someone dies without a Will'*, <<https://www.legalaid.vic.gov.au/find-legal-answers/wills-and-estates/if-someone-dies-without-will>>.

is a family provision claim and there are insufficient assets in the deceased's estate to satisfy the provision order.<sup>20</sup>

These laws also limit who can challenge a Will and an intestate estate. For example, in Victoria, any person who can show that the person who made the Will had a 'moral duty' to provide for them can challenge a Will.

In NSW there are specific provisions relating to the application for distribution of Indigenous persons' estates. This involves allowing the personal representative of an Indigenous intestate, or a person claiming to be entitled to share in an intestate estate *under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged*, to apply to the court for an order for distribution of the intestate estate.<sup>21</sup>

Regardless of which ground a person is using to contest a Will or an intestate estate, legal advice is generally required.

## Family law

There is no specific provision in the *Family Law Act 1975* (Cth) (Family Law Act) that requires the court to consider the kinship structures operating in Aboriginal and Torres Strait Islander communities when ordering the division of property (including superannuation), after a marriage or de facto relationship has ended. By contrast, kinship is a consideration under the Family Law Act when resolving parenting matters. Section 61F of the Family Law Act requires the court to have regard to any kinship obligations of a child's Aboriginal or Torres Strait Islander culture when identifying a person or persons who have exercised, or who may exercise, parental responsibility for a child of Aboriginal or Torres Strait Islander descent.

In property proceedings, the court has a general, very broad discretion under section 79 of the Family Law Act (or section 90SM for de facto couples), to consider the parties' respective contributions (both financial and non-financial) to the marriage/de facto relationship, and their future needs, when making orders for the division of property following the breakdown of a relationship. The court has a fairly broad discretion to determine how the property should be distributed between the parties. However, the court can only make a property order if the court is satisfied that, in all circumstances, it is just and equitable to make the order. The court also has power to bind third parties (for example, a superannuation trustee), when making orders.

There is no specific legislative requirement to take into account kinship structures when determining what is 'just and equitable'. However, in considering the future needs of each party, the court can take into account the responsibilities each party has to another person they have a duty to maintain.

The Australian Law Reform Commission, in a discussion paper released in October 2018 as part of its '*Review of the Family Law System*' proposes that 'The definition of family member in s 4(1AB) of the *Family Law Act 1975* (Cth) should be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family' (Proposal 9-8).<sup>22</sup> This definition is relevant in relation to the family violence definition, provisions guiding the making of parenting orders and provisions relating to family violence orders. This proposal seeks greater alignment between the notion of a family in the Family Law Act and Aboriginal and Torres Strait Islander family structures.

The Australian Law Reform Commission is currently finalising this review of the family law system.

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<sup>20</sup> See, eg, Sections 75-90, *Succession Act 2006* (NSW).

<sup>21</sup> Section 133(1), *Succession Act 2006* (NSW).

<sup>22</sup> Australian Law Reform Commission, *Review of the Family Law System Discussion Paper* (October 2018), Australian Law Reform Commission <[https://www.alrc.gov.au/sites/default/files/dp86\\_review\\_of\\_the\\_family\\_law\\_system\\_4.pdf](https://www.alrc.gov.au/sites/default/files/dp86_review_of_the_family_law_system_4.pdf)>.

## Unpaid family and domestic violence leave

Section 106(B) of the *Fair Work Act 2009* (Cth) references Aboriginal and Torres Strait Islander kinship rules regarding when an employee may take unpaid family and domestic violence leave. Specifically, this section states that a close relative of the employee is a person who 'is related to the employee according to Aboriginal or Torres Strait Islander kinship rules'.

## Discussion questions

1. How do the kinship structures of Aboriginal and Torres Strait Islander communities influence the preferred distribution of superannuation death benefits by these people?
2. How do superannuation funds currently deal with kinship relationships?
3. Are there case studies or examples where kinship structures are not appropriately considered by superannuation trustees when they are distributing superannuation death benefits?
4. Do the kinship structures of Aboriginal and Torres Strait Islander communities mean these people have dependants that the current superannuation law does not recognise as dependants?
5. How could the law that applies to superannuation death benefits take into account the kinship structures of Aboriginal and Torres Strait Islander communities?
  - a. What information, guidance and/or support will superannuation trustees need to distribute a superannuation death benefit according to a kinship relationship?
  - b. Are there other models in the law that would assist superannuation trustees to make death benefit distributions that reflect the kinship structures of Aboriginal and Torres Strait Islander communities?
6. Do Aboriginal and Torres Strait Islander people have any difficulty accurately identifying relationships for the purpose of superannuation death benefit distributions?
7. Are there differences in the barriers faced by Aboriginal and Torres Strait Islander women and men in making binding death benefit nominations?