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Parliamentary Joint Committee on Corporations and Financial Services
Financial Services Regulatory Framework in Relation to Financial Abuse

By email: corporations.joint@aph.gov.au

Financial Services Regulatory Framework in Relation to Financial Abuse

About the Super Members Council

We are a strong voice advocating for the interests of more than 11 million Australians who have over $1.5 trillion in retirement savings managed by profit-to-member superannuation funds. Our purpose is to protect and advance the interests of super fund members throughout their lives, advocating on their behalf to ensure superannuation policy is stable, effective, and equitable. We produce rigorous research and analysis and work with Parliamentarians and policy makers across the full breadth of Parliament.

The Super Members Council (SMC) thanks the Parliamentary Joint Committee on Corporations and Financial Services for the opportunity to comment on the Financial Services Regulatory Framework in Relation to Financial Abuse.

Financial institutions play a crucial role in protecting consumers from financial abuse. By implementing protective measures, the financial services sector, including superannuation funds, can help prevent financial abuse, increase support for victim-survivors and safeguard Australians in vulnerable circumstances.

A system-wide approach to protect and support victim-survivors is welcome as financial abuse is often hard to detect and may involve a range of components of a person's finances.

Executive Summary

This submission incorporates feedback from SMC member funds and will address:

- How SMC has defined financial abuse for the purposes of this submission.
- What SMC member funds are currently doing to identify and protect against financial abuse.
- Conditions in which financial abuse may occur in superannuation.
- Specific recommendations to reduce or prevent the likelihood of financial abuse in superannuation.
- Further measures that can be implemented within the financial services sector to proactively prevent and detect financial abuse.

Recommendations

SMC recommends that:

1. The government urgently investigate the legislative reform needed to give trustees the ability to not pay a death benefit to a beneficiary where there is evidence of all types of abuse. In such circumstances, trustees must be presented with sufficient evidence of the abuse, to a standard held appropriate by an independent third party, such as Australia's judicial system.
2. The government undertake a comprehensive assessment of the number of women who were coerced into accessing their superannuation during the COVID-19 early release scheme (ERS) and the detrimental financial impact this will have on their retirement. This information is critical to informing future policy decisions and avoiding unintentionally facilitating abusive behaviour. The recommendation to undertake a comprehensive assessment also aligns with the Government's intent to end family violence as per the *National Plan to End Violence against Women and Children 2022-2032*.
3. The ATO manages the application and approval of financial hardship claims in the same way it does for compassionate grounds claims. Only where a person is eligible would the ATO send a release request to the fund; **or** the government develops a tool providing super funds look-through visibility to the individual's past engagement with the superannuation system, focusing on applications made (and processed) for the early release of benefits.
4. The Government consider legislative or regulatory changes that may be required to facilitate a greater level of sharing of information across financial institutions, consumer bodies and enforcement bodies to enable more opportunities to protect Australians from financial abuse whilst maintaining appropriate levels of information security and privacy.
5. Improved regulatory guidance materials to assist super funds put in place processes to assist in the prevention and detection of financial abuse.
6. Improved education and support services to older Australians about their rights and what constitutes financial abuse.

Summary

The definition of financial abuse for the purposes of this submission

The Terms of Reference for this inquiry does not include a definition of financial abuse. To specify the scope of this submission and ensure clarity, SMC will use the ASIC MoneySmart definition, that is that financial abuse is:

> *when someone takes away your access to money, manipulates your financial decisions, or uses your money without consent.*[1]

Financial abuse is recognised in domestic and family violence legislation in every Australian State and Territory. While there are differences in the wording choices and emphases, the framing of the definitions is that it is abuse perpetuated within the context of a domestic relationship, whether as a spouse, partner, or family member. Financial abuse is a type of domestic and family violence, but perpetrators are not limited to family members, particularly for Elder Abuse. In 2016, the Australian Law Reform Commission conducted an inquiry into Elder Abuse and considered financial abuse against 'older persons' by anyone in trusted relationship with that person including formal and informal carers, supporters, representatives, and others.

[1] ASIC, Financial abuse, moneysmart.gov.au

What SMC member funds are doing to identify and protect against financial abuse

Work to prevent and detect financial abuse and assist victim-survivors is ongoing and requires a committed and systemic approach to ensure that trustees are equipped to identify and support members in need.

Circumstances involving financial abuse are often complex. According to the Survey of Older People, conducted in 2022 by the Australian Institute of Family studies, 15 per cent of people aged 65 and older living in the community reported an experience of at least one of 5 subtypes of elder abuse in the 12 months preceding the survey. Of those who reported financial abuse, only 30 per cent sought help or advice regarding the abuse.[2]

Super funds have safeguards in place to protect member accounts and personal information. They also have general and broad policies, processes and guidance in place that focus on protecting members and the fund from financial crime. These processes also assist member-facing staff to support all members.

Super funds are reporting entities under Australia's anti-money laundering and counter terrorism financing (AML/CTF) regime and build into their operating policies an AML/CTF framework. Super funds also have financial crime teams dedicated to member protection. The financial crime team's work includes investigating unusual transaction behaviours including lump sum withdrawals or changes in member withdrawal behaviour. Transaction monitoring is a critical tool for identifying and preventing financial abuse. Super funds apply transaction monitoring to identify suspicious or unusual withdrawal patterns that do not fit the profile of the member. Financial Crime team members have specialised training specific to members in vulnerable circumstances and how to identify their potential characteristics.

By way of example, one member fund has indicated they have policies which include:

- Where a member has a guardianship order in place, access to online platforms is blocked and all withdrawals are manual. This provides an additional safeguard to ensure that the trustee has visibility of who is transacting on behalf of the member.
- Escalation processes for team members who believe a person may be in a vulnerable position including how to identify and report the matter to external bodies that can facilitate help and support i.e. welfare support checks.

The processes that SMC member funds have put in place to mitigate, detect, and deter occurrences of financial abuse and support victim-survivors include:

- **Policies and procedures in place for financial crime** involving formal reporting pathways to law enforcement, and tribunal recourse to confirm financial guardianship arrangements for members.
- **Priority-assist teams** that case manage vulnerable members or members facing issues like elder abuse or family violence abuse.
- **Reduced on-line chat functionality** to remove enquiries related to payments or claims so that members must speak to a contact centre specialist for direct advice.
- **Automated detection rules** that will trigger an alert to financial crime teams for further investigation.
- **Financial empowerment** through financial literacy tools and advice.
- **Policies and processes to assist members in vulnerable circumstances** including:
    - providing staff with appropriate training to provide their services competently and to deal with vulnerable members proactively and professionally.

[2] Australian Institute of Family Studies, Elder abuse in Australia: Prevalence, August 2022

- This includes empathy training, and cultural awareness training, on how to identify vulnerable members and training for staff who can provide specialist support.
- Implementing family violence escalation procedures including referrals to community resources and case management.

Fund administrators also have processes in place to detect and mitigate occurrences of financial abuse. Fund administrators follow processes to assist members in vulnerable circumstances. In instances where there may be indicators of possible abuse, such as changes in withdrawal patterns or verbal indicators from members, the administrator may take the following course of action:

- place a stop payment flag on the account pending further investigation.
- escalate the issue for urgent attention to priority assist teams within the super fund.

The super fund will then follow their own internal investigative processes as specified earlier in this document.

Conditions in which financial abuse may occur in superannuation

Access to superannuation may only occur if a condition of release is met. As a result, there are limited opportunities for a perpetrator of financial abuse to gain access to someone's super savings in the accumulation phase. Conditions of release are:

1. **During the accumulation phase:** early release of superannuation including through a claim for financial hardship.
2. **During the retirement phase:** a person is over a certain age and has met a condition of release.
3. **Payment of a death benefit:** a member has died, and their super balance and any associated insurance benefit is paid to a beneficiary.

Death benefits

The payment of death benefits where there is a history of any type of abuse

Under existing laws, an abuser can receive a victim's superannuation death benefit unless they are the direct cause of that person's death. This may be so even if the victim suffered systemic abuse by that abuser which indirectly contributed to the cause of the victim's death.

SMC considers it a perverse outcome and an extension of that financial abuse that trustees are required by law to pay a superannuation death benefit to an abuser (the only current exception is when the abuser has directly caused the victim's death).

Urgent change is needed

As the "eligible dependent", an abuser today would be entitled to their victim's death benefit even if convicted of a domestic and family violence offense, unless they were the direct cause of the victim's death. It is unjust that an abuser should benefit from the death of their victim. We know that more than half (56 per cent) of women and children who died by suicide in Western Australia in 2017 were known to authorities as victims of domestic and family violence.[3] A single abuser can perpetrate various forms of abuse, including emotional, physical, financial, and sexual abuse.

[3] ABC, Research reveals alarming link between family violence and suicide in WA, https://www.abc.net.au/news/2022-12-03/research-reveals-domestic-violence-and-suicide-link/101606198

It is not unreasonable to assume that a valid binding death nomination or a will could be in place, nominating an abuser as the beneficiary, that is the result of financial coercion.

SMC calls for government to urgently investigate the legislative reform needed to give trustees the ability to not pay a death benefit to a beneficiary where there is evidence of any type of abuse. In such circumstances, trustees must be presented with sufficient evidence of the abuse, to a standard held appropriate by an independent third party, such as Australia's judicial system. The proposed reforms would prevent abusers from profiting from their victims' deaths and better protect the superannuation and life insurance benefits of domestic and family violence victims.

How death benefits are paid now

In paying a death benefit, a trustee must comply with the trust deed. The trust deed is read in conjunction with the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and the corresponding regulations which limit to whom the trustee can pay a death benefit. Prior to paying out a death benefit, a trustee will ensure:

- The member has not died in suspicious circumstances; and
- If the member has died in suspicious circumstances, that the potential beneficiary is not the cause of the death.

This is to ensure that the beneficiary, although entitled to the death benefit under the SIS Act in usual circumstances, does not profit from the victim's death. The 'forfeiture rule' is a long-standing principle of common law that prevents individuals who are criminally responsible for someone's death from inheriting or benefiting from the victim's estate. In most Australian jurisdictions, the forfeiture rule applies absolutely to both murder and manslaughter cases. Due to its varying application across States and Territories, the rule can be applied inconsistently:

The precise point of intersection of criminality and loss of inheritance is uncertain. It clearly applies to murder, although there does not need to be a conviction; there may be an acquittal but not if the ground for the acquittal is mental illness. Particular difficulty exists with motor manslaughter, suicide pacts and defensive homicide in the context of domestic violence.[4]

Examples of the application of the forfeiture rule in superannuation and trustee decisions in a suspicious matter have been provided at Attachment A.

A trustee ensures a member has not died in suspicious circumstances by ascertaining the cause of the member's death through the following:

- Cause of death specified by medical practitioner on a full death certificate.
- Finalised Coronial reports.
- Finalised police investigations.
- Independent research such as media articles that may specify the cause of death such as a road accident or drowning, social media posts to family members, go-fund-me pages raising money for the deceased and their family.
- Notification from family members.

If the beneficiary meets the eligibility criteria under the SIS Act and is not the cause of the member's death, the trustee is currently obliged to pay out the death benefit, including any insurance cover, to the beneficiary. This is so even if the beneficiary has a history of abusing the deceased member.

[4] Browne, Darryl; Pollard, Ruth --- "Where from and where to with the forfeiture rule" [2018] PrecedentAULA 55; (2018) 148 Precedent 14, accessed, austlii.edu.au

Recommendation 1

SMC calls for government to urgently investigate the legislative reform needed to give trustees the ability to not pay a death benefit to a beneficiary where there is evidence of any type of abuse. In such circumstances, trustees must be presented with sufficient evidence of the abuse, to a standard held appropriate by an independent third party, such as Australia's judicial system.

Accumulation phase

Early release of superannuation and financial coercion

During the COVID-19 pandemic, the then Federal government announced an early release of super (ERS) scheme relaxing preservation settings and permitting eligible Australians to withdraw up to $20,000 from their superannuation. Although over three million people withdrew a combined $38 billion, the ERS scheme disproportionately impacted women. Women withdrew 21 per cent of their starting super balances, while men withdrew 17 per cent. Additionally, 14 per cent of women accessed their entire super balance, compared to 12 per cent of men.

Prior to the introduction of the ERS, there were limited opportunities for abusive partners to access the superannuation of their partner/spouse. Due to there being no requirement that evidence be provided to prove the individual was eligible for the scheme, for the first-time women's superannuation savings became a widespread target of coercive control. During and after the COVID-19 ERS, SMC member funds reported an increase in cases of financial abuse. The fund member, usually female, contacted the fund to inform them that their superannuation was accessed during the early release scheme because of coercion or a domestic partner fraudulently accessing their superannuation using the member's details.

A survey of 15,000 women by the Australian Institute of Criminology[5] (AIC) revealed more than half of women who had experienced violence before the COVID-19 crisis said the violence had become more frequent, and more severe, since the start of the pandemic. Nearly 5 per cent of respondents indicated they had experienced financial abuse.

> *One in three women (32.7 per cent) who experienced financial abuse reported that their partner had pressured them to give them money or access to their money in the last 12 months [before the survey], of which 43.2 per cent said that this had included their superannuation.*[6]

Women made up 43 per cent of the 3.5 million individuals who applied for early release of super.[7] Extrapolating and applying the AIC data to the COVID-19 ERS statistics, of the 1.5 million women who accessed their super, 70,000 may have done so as the result of coercion.

[5] Australian Institute of Crimonology, Experiences of coercive control among Australian women during COVID-19, 11 March 2021

[6] Ibid., p.27

[7] APRA, The superannuation Early Release Scheme: Insights from APRA's Pandemic Data Collection, apra.gov.au/superannuation early-release-scheme-insights-from-apra's-pandemic-data-collection,

Recommendation 2:

SMC requests the Government undertake comprehensive assessment of the number of women who were coerced into accessing their superannuation during the ERS scheme and the detrimental financial impact this will have on their retirement. This information is critical to informing future policy decisions and avoiding unintentionally facilitating abusive behaviour. The recommendation to undertake a comprehensive assessment also aligns with the Government's intent to end family violence as per the *National Plan to End Violence against Women and Children 2022-2032*.

Repeat applications for the early release of superannuation

Allowing for the early release of superannuation on the grounds of severe financial hardship is appropriate in limited circumstances and meets community expectations. However, the COVID-19 ERS provided a new avenue for perpetrators of abuse to access the superannuation savings of victims in the accumulation phase which did not exist before.

In doing so, the ERS had the unintended consequence of raising the profile of early access to super with perpetrators of abuse. This has manifested in ongoing increased awareness of and interest in accessing the super of victim-survivors and potentially, multiple repeat applications by perpetrators of abuse.

An early withdrawal of superannuation on the grounds of financial hardship is only permitted once every 12 months. Within the current system architecture, superannuation funds do not have visibility of whether a member has been granted an early withdrawal on severe financial hardship grounds at another fund in the preceding 12 months. This is likely being exploited by perpetrators of abuse.

Example:

A member makes a financial hardship claim with Fund A. The trustee assesses the information provided and checks eligibility. If eligibility requirements are met, Fund A pays the financial hardship claim.

The member then rolls their balance from Fund A to Fund B and then makes another financial hardship claim despite having made one in the last 12 months.

Fund B has no visibility of the claim made with Fund A. The trustee assesses the claim (likely the same evidence that was provided to Fund A is provided to Fund B). Fund B pays the claim. This process may be repeated across numerous funds.

Given each repeat application may result in up to $10,000 of savings being withdrawn, the potential impact on members suffering abuse is significant. To facilitate greater transparency, SMC recommends that either:

- The ATO manages the application and approval of financial hardship claims in the same way it does for compassionate grounds claims. Only where a person is eligible would the ATO send a release request to the fund; or
- The government develops a tool providing super funds look-through visibility to the individual's past engagement with the superannuation system, focusing on applications made (and processed) for the early release of benefits.

Doing so will tighten system controls and reduce the ability of abusers to manipulate the system and gain access to the super of victim-survivors.

Recommendation 3:

The ATO manages the application and approval of financial hardship claims in the same way it does for compassionate grounds claims. Only where a person is eligible would the ATO send a release request to the fund; **or**

The government develops a tool providing super funds look-through visibility to the individual's past engagement with the superannuation system, focusing on applications made (and processed) for the early release of benefits.

Financial abuse and particularly elder abuse – entering retirement phase

Once a person enters the retirement stage and meets a condition of release, there is a greater opportunity for perpetrators of abuse to access the super savings of victim-survivors. As Australia's ageing population continues to grow, we may see an increase in incidents of financial abuse in superannuation.

Abusive activity cannot always be confirmed by a trustee where the member is not willing to report that abuse or advise they haven't consented to a specific transaction. The reasons for this are numerous and nuanced and may include:

- Shame and embarrassment: many victim-survivors may feel shame or embarrassment about being abused, particularly if the abuser is a family member or someone they trusted.
- Lack of awareness: some people may not realise they are victims of abuse, especially in cases of emotional or financial abuse.
- Cognitive impairment: conditions like dementia or memory loss can make it difficult for some people to recognise or report abuse.
- Low financial literacy: a victim-survivor may not realise that they are the subject of financial abuse due to lower levels of financial literacy.
- Isolation: abusers often isolate victim-survivors from family, friends, and community, making it harder for them to seek help.
- Dependency on the abuser: many people, particularly those most vulnerable, and older Australians, may rely on their abusers for care and may lack alternative resources, making them reluctant to report.
- Protective feelings towards the abuser: If the abuser is a family member, the victim may feel protective and not want to get them in trouble.
- Lack of trust in authorities: Some cohorts of people may distrust or fear authority figures, discouraging them from reporting abuse.
- Inability to communicate due to physical or cognitive limitations.

Where there are no obvious flags of financial abuse, it may require the member to report or confirm cases of financial abuse. Without this information trustees may be limited with how they can identify financial abuse.

To address this, SMC recommends permitting a greater level of sharing of information across financial institutions, consumer bodies and enforcement bodies to enable more opportunities to protect Australians from financial abuse. The AML/CTF framework imposes obligations on reporting entities to report instances of financial crime, including what may be possible financial abuse through a Suspicious Matter Report (SMRs).

The ability to information share information via such mechanisms as SMRs may provide the additional capacity to detect financial abuse without the need for victim-survivor reporting.

Recommendation 4:

The Government consider legislative or regulatory changes that may be required to facilitate a greater level of sharing of information across financial institutions, consumer bodies and enforcement bodies to enable more opportunities to protect Australians from financial abuse whilst maintaining appropriate levels of information security and privacy.

Further measures that can be implemented within the financial services sector to proactively prevent and detect financial abuse

SMC considers that ways to reduce financial abuse, particularly amongst older Australians should include a holistic approach from government and the financial services sector. As such we recommend the following:

- **Improved regulatory guidance materials** to assist financial institutions put in place processes to assist in the prevention and detection of financial abuse. This regulatory guidance material could be in the form of a prudential handbook providing core and supporting standards to assist industry incorporate minimum and unified standards as a part of their governance and risk management frameworks.
- **Education and support services to older Australians about their rights** and what constitutes abuse can empower them to recognise and report it.

Recommendations 5 and 6:

Regulatory guidance materials to assist super funds put in place processes to assist in the prevention and detection of financial abuse.

Education and support services to older Australians about their rights and what constitutes abuse.

Attachment A

The below are extracts from publicly available decisions made by statutory or judicial bodies.

Forfeiture Rule

AFCA case number 857879

19 January 2024

The deceased was survived by two adult children (the joined parties). Her estate was administered by the complainant, who was the deceased's legal personal representative (LPR). The deceased passed away due to the actions of her child (joined party 2).

Joined party 2 was convicted of murder by a state Supreme Court. Their appeal rights were exhausted. The trustee decided not to include joined party 2 in the distribution of the death benefit because of their actions. Instead, it decided to pay 100 per cent of the death benefit to the deceased's other child (joined party 1).

The complaint was brought by the LPR, who said the trustee should have distributed the death benefit to the estate in accordance with the deceased's intentions set out in the lapsed binding nomination and the will. Joined party 2 also expressed dissatisfaction with the decision and sought part of the death benefit to be paid to them, or to their children, if prevented from receiving any part of the death benefit due to their actions.

Therefore, the trustee's decision to distribute 100 per cent of the death benefit to joined party 1 is the decision under review in this determination.

Key finding: AFCA's determination affirmed the trustee's decision to pay 100 per cent of the death benefit to joined party 1.

Did joined party 2's actions prevent them from receiving part, or all, of the death benefit?

Yes – the panel was satisfied joined party 2's murder conviction prevented them from receiving the distribution of the death benefit because of the application of the forfeiture rule. Alternatively, if the forfeiture rule did not apply, the panel was satisfied it would neither be fair nor reasonable for joined party 2 to receive part, or all, of the death benefit in the circumstances.

Was the trustee's decision fair and reasonable?

Yes – the panel was satisfied the trustee's decision to distribute 100% of the death benefit to joined party 1 was, in its operation in relation to the complainant and the joined parties, fair and reasonable in all the circumstances. This is because the panel was satisfied the decision was within the range of fair and reasonable decisions open to the trustee based on the information before AFCA.

In the Estate of the Late Fiona Ellen Fitter and The Forfeiture Act 1995; Public Trustee of New South Wales v Fitter and (3) Ors [2005] NSWSC 1188 (24 November 2005)

On 16 October 2001, Fiona Ellen Fitter was killed when she was attacked with a knife by her husband, George Sidney Fitter and by her son, Grant Fitter, who was then aged about 18 years. The deceased's daughter, Kylie Hope Fitter, who was then about 15 years old, took part in the attack but did not inflict any wounds upon her mother.

George Fitter, Grant Fitter and Kylie Fitter were each charged with murder. On 22 August 2002, Barr J, in a trial by judge alone, found each of them not guilty of murder by reason of mental illness. The question for determination in that case was whether the rule of public policy known as the forfeiture rule applied, or whether the plaintiff, as administrator of the intestate estate of the deceased was

entitled to administer the estate without regard to the operation of that rule. Proceeds of the deceased's superannuation policy formed part of the estate.

George Fitter indicated that, at the time of the deceased's death, he was unaware that she had a superannuation policy and only discovered that fact from his Legal Aid solicitor.

The court ordered that, although the deceased's spouse and children were acquitted of the charge of murder due to mental illness, in the interest of justice, the forfeiture rule applied, and the superannuation benefit would be payable to the deceased's sister.

Superannuation Complaints Tribunal

Determination Number: D02-03\256

File Number: 02-0449

D02-03\256 [2003] SCTA 100 (23 April 2003)

On 24 October 2001 the Trustee decided to allocate the death benefit to the Daughter. On review, the Trustee affirmed its original decision. On 22 March 2002 the Complainant lodged a complaint with the Tribunal that the decision of the Trustee to pay the whole of the benefit to the Daughter was unfair or unreasonable for the reasons summarised in this determination. The Deceased Member was married to the Complainant at the time of her death and he was subsequently charged with her murder. He later pleaded to and was convicted of her manslaughter.

On 26 March 2000, the Deceased Member completed a nomination of beneficiary form (which was not binding on the Trustee). She stated that she wished any death benefit to be divided equally between the Complainant and her Daughter. The Deceased Member left a will dated 7 December 1998, providing that her estate was also to be divided equally between the Complainant and the Daughter.

On 20 July 2001 the Complainant was sentenced to 7.5 years imprisonment for killing his wife. Although he was originally charged with his wife's murder, the Crown reduced the charge to manslaughter, to which the Complainant pleaded guilty. The Complainant's sentence considered his substantial impairment, i.e. the Complainant suffers from a delusional disorder. Medical evidence was provided to the Court that the Complainant's capacity to control himself was substantially impaired and was exacerbated by his consumption of alcohol.

The Complainant's solicitors argued that he should be paid half the death benefit because medical evidence supported the fact that the Complainant suffered from a substantial impairment in the form of 'delusional disorder (jealousy)', depression and alcohol abuse disorder.

They submitted that the forfeiture rule would not apply if the charge of murder had proceeded against the Complainant and if the defence of mental illness was available to the Complainant.

The Complainant's solicitors contended that the law regarding the forfeiture rule is unsettled, and the Complainant should be entitled to half the death benefit.

It is not the role of the Tribunal to determine whether the forfeiture rule should apply to the Complainant. The Tribunal's function is to determine whether the Trustee's decision not to pay any of the death benefit to the Complainant was fair and reasonable in its operation in relation to the Complainant in the circumstances. Further, the Tribunal notes that, even if the forfeiture rule did not apply to the Complainant, he was not automatically entitled to half his wife's death benefit. Payment of death benefits from the Fund are made according to an exercise of the Trustee's discretion.

Given:

- the complex and unclear state of the law regarding the forfeiture rule;
- the difficulty of assessing moral culpability for a killing where a person is suffering from mental impairment; and

- the fact that, in the Complainant's case, even the medical experts drew different conclusions regarding whether the Complainant knew that what he was doing was morally wrong,

The Tribunal was satisfied that the decision of the Trustee to pay the whole of the death benefit to the Daughter was fair and reasonable in its operation in relation to the Complainant and the Daughter in the circumstances.

Suspicious Matters

AFCA Case number 845663

The deceased was a fund member when he passed away on 18 July 2020. The death benefit was approximately $618,389 at 7 December 2021, including an insurance component of $197,490.

The trustee received a document purporting to be a binding nomination signed by the deceased and dated on 16 March 2020. The document nominated that 100% of the superannuation benefit was to be paid to the joined party. The joined party was the separated, but not divorced, spouse of the deceased.

After the deceased passed away, the trustee sought the assistance of a consulting firm (D) to verify whether the binding nomination form had been completed by the deceased. D presented its findings and evidence (the D Report"), including an attached report from a handwriting expert (Ms MH) to the trustee. After reviewing the D Report, the trustee decided not to rely on the binding nomination form and instead decided to distribute the death benefit 50% of the benefit to the complainant (as the de facto spouse of the deceased) and 50% of the benefit to the joined party. The trustee's distribution decision is the decision under review in this determination.

Key finding: The evidence indicates the nomination was not signed by the deceased.

The trustee decided it was not bound by the nomination as it says the evidence indicated the nomination was not signed by the deceased. This is a requirement under regulation 6.17A(6)(b), and therefore the implication of such a finding is the nomination would not bind the trustee. In making such a finding, the trustee relied on the D Report, which was an investigative report commissioned by the trustee into the challenged binding nomination form.

The joined party took issue with the trustee's finding. In particular the reliance on the handwriting report of Ms MH, as well as some of the circumstantial matters relied upon. The panel has considered the D Report and attachments, and the submissions and evidence provided by the parties. The panel found the evidence of Ms MH was well reasoned, and readily acknowledged its limitations, in reaching its conclusions including the conclusion that there was moderately strong support for the hypothesis that someone other than the deceased signed the binding nomination form.

The panel considered this conclusion was supported by the surrounding factors including:

- the witnesses to the binding nomination form could not be located after reasonable enquiries were made and none of the parties (including any of the family members) have identified the witnesses.
- the address listed for the deceased on the binding nomination form was not the deceased's residential address at the time.
- the deceased and the joined party had signed consent property splitting orders on 3 March 2020 (less than two weeks prior to the signing of the binding nomination form), which had the effect of the deceased retaining his interest in the fund (in contrast to other superannuation account balances with other superannuation funds, which were split in favour of the joined party), and
- at least one other person clearly had access to the deceased's online superannuation account, noting his online account was accessed four times after his death.

The trustee was not bound by the nomination

The panel found the evidence supported someone other than the deceased signed the binding nomination form. Because of this, the panel was satisfied the form did not bind the trustee, as it could not be reasonably satisfied the form complied with regulation 6.17(6)(b), as it was not signed by the deceased.