



## SUPERANNUATION

### **Binding death benefit nominations**

Superannuation death benefits are the benefits payable upon the death of the member of a superannuation fund.

Such death benefits do not automatically form part of a person's estate.

The trustee of a superannuation fund is responsible for the distribution of death benefits.

Regulation 6.22 of the *Superannuation Industry (Supervision) Regulations 1994* ('the SIS Regulations') provides that a trustee of a superannuation fund must pay a death benefit to either or both of:

- the member's legal personal representative; or
- one or more of the member's dependents;

(only).

The *Superannuation Industry (Supervision) Act 1993* ('the SIS Act') contains a detailed definition of 'a member's dependent'.

Briefly, direct payments can only be made to:

- a spouse, a child, a person in an interdependency relationship (e.g. 2 persons living together and providing financial and domestic and personal support to each other); or
- the deceased's legal personal representative;

as defined in Regulation 6.22 of the SIS Regulations - e.g. usually the spouse (usually including a 'de facto' domestic partner), a minor child, an adult child where studying or dependent, and other financial dependents.

Taxation advantages are available where payment is made to a dependent as defined in the relevant tax legislation (spouse, minor child or other financial dependent). No tax advantages are available where payment is made to another (non-dependent) family member.

Until relatively recently any nomination made by a member of a fund with more than 5 members as to who the member wished benefits to be paid was not binding on the trustee of the superannuation fund, (and in fact the trustee could disregard the member's expressed wishes if it considered that it was appropriate to do so).

In 1999 the SIS Act was amended to allow members of funds with more than 5 members to enter into binding arrangements for the payment of benefits payable on their death. These nominations are commonly referred to as binding death benefit nominations ('BDBNs') or 'binding nominations'.

(Provided the trust deed contained appropriate provisions, members of self managed superannuation funds ('SMSF's') could always make BDBN's).

It is not uncommon for adult children from an earlier relationship to complain about a distribution to a widow/er. The Superannuation Complaints Tribunal ('the SCT') does not generally consider that financially independent adult children should be given priority over the needs of the spouse (e.g. see the Death Benefits brochure on the SCT's website).

### **SIS requirements for binding nominations**

Each of the following requirements must be satisfied before a member can make a BDBN:

- 1) appropriate clauses in the Trust Deed.

(The first step is to look to the terms of the superannuation fund trust deed to see if it allows members to make a BDBN. The SIS Act provides that the trust deed must allow a member to make and a trustee to accept BDBNs for a BDBN to be valid);

- 2) satisfying the Trustee's obligations.

Under the SIS Regulations the trustee must give the member the information it reasonably believes the member will need to understand his or her rights in relation to making a BDBN, including notifying the member that he or she can make a BDBN, and the need for regular review of the BDBN.

BDBN's provide certainty, but lose the flexibility of taking account of changed circumstances.

Unless the nomination is binding the fund trustee has a discretion (despite any non binding nomination made) with respect to:

- (a) who should be paid the benefit; and
- (b) the proportion (if any) to be paid to each beneficiary.

That discretion of the superannuation trustee (other than of a self managed fund) is open to challenge.

### **Formal requirements for a valid BDBN**

To be valid a BDBN must satisfy all of the following:

- it must be in writing;

- the person or persons nominated must be SIS dependents or a legal personal representative of the member, at the time of the member's death;
- it must state the proportion of the benefit payable to each nominated beneficiary or be for a defined portion of the fund. A statement as to how the benefit can be paid (i.e. as a lump sum or as a pension) is not binding, even if it appears in the BDBN;
- it must be signed and dated by the member in the presence of 2 witnesses over the age of 18 years, neither of whom is nominated to receive a benefit;
- the witnesses must sign and date the declaration stating the member signed the notice in their presence;
- it must have been signed, confirmed or updated within the previous 3 years (or such shorter period as is specified in the trust deed). [For SMSF's it is possible for a BDBN to operate for longer than 3 years provided the trust deed does not specifically adopt the 3 year expiry period.]

BDBN's are becoming increasingly popular.

Whether a member should make one or not depends on his or her particular circumstances, and whether they have a financial and estate plan of which superannuation forms a significant part.

BDBNs may be of particular significance if a person wishes to put in place some protection against a challenge to his or her will (e.g. by children of different marriages).

If super death benefits are paid direct to the party in whose favour a BDBN has been made, in Queensland they will not form part of the deceased's estate, and will not be subject to a family provision claim challenging the will.

Similarly if one or more of the children of the deceased is a member of an SMSF with the deceased, leaving a BDBN would prevent the trustee of the super fund allocating the super death benefit for the benefit of other members on the death of the deceased (e.g. as occurred in the recent case of *Katz v Grossman* when a daughter effectively [and ultimately successfully] appropriated all of the superannuation death benefits of the deceased, to the disadvantage of the other surviving child of the deceased who the deceased intended to benefit equally).

### **Tax ramifications**

The most tax effective disposition of superannuation benefits is often to leave your superannuation entitlement to a surviving spouse, as either a pension (often better) or a lump sum. If both spouses have died, the taxable portion of the superannuation benefits (e.g. excluding undeducted contributions) is generally assessable income to adult non-dependant beneficiaries, generally taxable at 16.5%.

The desire for certainty must be balanced against the desire for flexibility, and members sometimes prefer to leave non-binding instructions to distribute superannuation benefits to a surviving spouse, to be paid as a pension (or lump sum if the spouse requests).

If the spouse requests to be ignored then with appropriate documentation superannuation benefits may be paid either into the deceased's estate or (probably better) to the persons specified in the will of the deceased (this may incur tax of up to 16.5%, but may be a better option at the time).

If there is no surviving spouse, then the trustee of the superannuation fund may exercise its discretion to pay to the children of the deceased directly, or via the deceased's estate. (Although if it is intended that benefits be distributed to children of the deceased via the estate it may be desirable that there be appropriate provisions in the deceased's will e.g. so that benefits to other beneficiaries can be varied).

Binding nominations are an important tool in the context of overall estate planning, and care should be taken to understand their advantages and limitations.

We would be happy to discuss your particular circumstances with you, and to liaise with your accountant and/or financial advisor regarding your specific needs and financial and taxation situation.

Please do not hesitate to contact Ken Waddington or Tracy Reeves of our office.

**GARLAND WADDINGTON**