

SUBMISSION

Submission to the
Productivity Commission
— Future Foundations
for Giving: Draft report

23 February 2024

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23 February 2024

Dear Sir/Madam,

Future Foundations for Giving: Draft Report

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to your inquiry into *Future Foundations for Giving: Draft Report* (Draft Report).

ABOUT ASFA

ASFA has been operating since 1962 and is the peak policy, research and advocacy body for Australia's superannuation industry. ASFA represents the APRA regulated superannuation industry with over 100 organisations as members from corporate, industry, retail and public sector funds, and service providers.

We develop policy positions through collaboration with our diverse membership base and use our deep technical expertise and research capabilities to assist in advancing outcomes for Australians.

GENERAL COMMENTS

ASFA supports the objective of ensuring the operational effectiveness of superannuation funds, to deliver, at a reasonable cost, services of a type and standard that meet the needs and expectations of fund members and help them develop confidence in the system.

BACKGROUND/CONTEXT

The Draft Report includes an Information Request 8.4 - Making bequests through superannuation easier.

The Commission is seeking information, including from donors, charities and superannuation funds, on options to allow people to nominate their superannuation death benefit to a charity. The Commission welcomes further information on the:

- *potential design of a mechanism to enable people to direct a portion of their superannuation death benefit to nominated charities, including the roles and responsibilities of parties such as trustees and estate executors*
- *benefits, costs, risks, necessary safeguards, and potential unintended consequences of policy options enabling a person to direct their superannuation death benefit to nominated charities*
- *factors, such as family or financial circumstances, that would contribute to a person deciding whether to take up the option to direct their superannuation death benefit to nominated charities.*

SPECIFIC COMMENTS

The proposal to allow people to nominate their superannuation death benefit be paid to a charity would represent a significant change in how superannuation death benefit payments are administered.

As acknowledged in the Draft Report, the policy intent of superannuation is that it be used to support members during their retirement and, in the event of their death, their dependants.

The Draft Report notes the Explanatory Memorandum to the *Superannuation (Objective) Bill 2023 (Cth)* provides that:

1.53 The statement of compatibility with the objective of superannuation must include an assessment by the member of Parliament or rule-maker as to whether the bill or regulation is compatible with the objective. This is similar to the statement of compatibility with human rights that is currently included in explanatory materials.

Importantly, the majority of superannuation funds are governed by the terms of their trust deed, with some public sector funds established under, and subject to, legislation. Given the policy intent of superannuation to support members in retirement, it is quite likely that the majority of trust deeds, and establishing/governing legislation, will not permit the payment of a death benefit to a charity.

Accordingly, even if the *Superannuation Industry (Supervision) Act 1993* and regulations (SIS legislation) were to be amended to permit the making of binding, or non-lapsing, death benefit nomination to charity, under the terms of the trust/legislation governing their operations trustee are likely not to be able to pay a death benefit to a charity.

Implementing as change such as this is not straightforward.

Paying death benefits to a charity would serve to increase the role and responsibilities of trustees of superannuation funds and result in additional administrative complexity, the costs of which would be borne by members.

This would, include ensuring the charity is correctly identified and that it still has charitable status at the time of the payment of the death benefit. Should this not be the case the trustee would need to make a determination as to the distribution of that portion of the death benefit.

Further, there are Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) obligations that apply whenever a payment is made from the fund and so the trustee would need to perform verification checks which are out of the norm, increasing administrative complexity.

Importantly, a change to enable binding death nominations to charity could result in superannuation trustees becoming involved a legal challenge from claimants, generally dependants or actual/potential beneficiaries of the estate, as to the validity of the binding nomination. In particular, as with other family disputes, the issue could arise with respect as to the capacity of a member to make the nomination/direction, especially where one or more dependants/beneficiaries have been excluded from the nomination and/or the will, which would serve to prolong the time take to pay the benefit.

As identified in the Draft Report, given their role with respect to the resolution of disputes about death benefits, the potential for legal challenges also could have a flow-on effect to the Australian Financial Complaints Authority (AFCA).

Overall, this proposal would mean that trustees will need to develop additional operational policies, processes and procedures, train staff, and review and revise fund communication materials. This would come at a considerable cost, which would have to be borne by the members of the fund.

We submit it is not appropriate for the trustee of a superannuation fund to be exposed to additional legal risk and the consequential increase in costs associated with dealing with them, such as obtaining legal advice and managing any matters that may arise.

Given this, we submit that the proposals to amend the binding death benefit nomination process should be subject to considerable scrutiny, analysis and assessment, in particular with respect to the potential effect on superannuation trustees. Ideally, any such change should be considered as part of a broader review of the superannuation death benefit payment process that seeks to simplify and improve the process for both members and trustees.

As members already are able to make a binding death benefit nomination in favour of their estate, and make a charitable bequest in their will, we submit that at this time the potential increased risks and costs to superannuation fund trustees represented by binding nominations to charities are not sufficiently offset by the incremental benefit to members. Further, where a member directs their superannuation death benefit to their estate and makes provision for a charity in their will, the estate will benefit from a tax deduction for the charitable donation in its final tax return.

Finally, we submit that the issues that arise with respect to bequests to charity are better dealt with by the executor/administrator of the estate, alongside other such matters, as opposed to superannuation funds trustees.

If you have any queries or comments in relation to the content of our submission, please contact Fiona Galbraith, Director Policy.

Yours sincerely

Mary Delahunty
Chief Executive Officer