



MOB STRONG
DEBT HELP



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AFCA Approach Consultation Superannuation Death Benefits

Thank you for the opportunity to comment on AFCA's Approach to superannuation death benefit complaints. We support AFCA updating its Approach.

This submission responds to the request in AFCA's consultation paper for feedback on whether there are aspects of the Approach that could be further improved or clarified, with a particular emphasis on family and domestic violence considerations, and issues particularly impacting First Nations communities.

3.1.4 Fair and reasonable – general comments

When dealing with superannuation complaints, AFCA has to decide if a trustee's decision was 'fair and reasonable in all of the circumstances' in its operation in relation to the complainant and any joined parties in all the circumstances of the complaint. The additional three proposed paragraphs under 3.1.4 concerning how AFCA approaches what is 'fair and reasonable' in a superannuation context remains vague and unclear.¹ Providing further clarity on how AFCA decides what is fair and reasonable, or directing readers to other existing AFCA documentation regarding the concept would be of assistance. Committing to explaining how the concept has been applied in its decisions in individual determinations would be beneficial to give complainants confidence that their death benefit complaint has been handled fairly.

¹ Cf. *Braz v Host-Plus Pty Ltd* [2023] FCA 1454 at [103].

New 3.3.5 - Other Relevant Considerations - FDV

We commend AFCA for updating its Approach to reflect how it handles super death benefit complaints where violence or abuse is reported. We acknowledge there are clear legislative parameters AFCA must operate within when handling super death benefit complaints where financial abuse or DFV may be present. However, this section is overly broad and needs some clarification.

The first paragraph provides background regarding how paying a death benefit to a surviving spouse who perpetrates family and domestic violence (**FDV**) may not be fair and reasonable. The second paragraph suggests that AFCA would generally not pay a death benefit when there is “persuasive evidence” that the perpetrator was involved in the death of the super member (and showed moral culpability).

It is not clear what the outcome would likely be in circumstances that do not reach this extreme situation; that is, where there is persuasive evidence of FDV but not persuasive evidence that the perpetrator was involved in the member’s death. For example, if ongoing FDV can be shown before the super member’s death but the super member died of an unrelated event, AFCA has provided no guidance on whether and if so when it would still be fair and reasonable for the perpetrator to receive a benefit.

We recommend AFCA consider the following questions and reflect its response to these in the updated Approach:

- What level of persuasive evidence will be needed to demonstrate the proposed beneficiary perpetrated FDV and was ‘morally culpable? For example, would the perpetrator need to be charged/convicted? It is well understood that only a portion of DFV victim-survivors report their abuse to police, let alone have their perpetrator charged and convicted.² In our view, requiring a DFV arrest or conviction is far too high an evidentiary burden.
- How does a loved one of the deceased show FDV occurred, especially in circumstances where the abuse was not reported to the police or documented prior to the member’s death. For example, where financial abuse occurred, and the super member had no access to any of their finances, what evidence would be persuasive to show FDV had indeed occurred?
- Likewise, where a victim-survivor is claiming the death benefit of a deceased perpetrator, what happens if they do not have access to evidence of their financial dependency of

² NSW BOCSAR 2022, *Has the rate of domestic and family violence changed in NSW?: Victim survey results from July 2008 to June 2020*, <https://apo.org.au/sites/default/files/resource-files/2022-04/apo-nid317430.pdf>

their relationship due to that abuse? For example, the abuser may have restricted access to a shared tenancy agreement or bank accounts, which provide evidence of a de facto spousal relationship.

- What if a deceased super member was too scared to report the abuse to the police because of the threats made by the perpetrator, but disclosed their abuse to other potential beneficiaries? Similarly, when the super member is no longer alive to give their version of events, what evidence will AFCA consider? Would a statutory declaration from people aware of the abuse suffice as evidence?
- Further, if moral culpability is reduced due to the perpetrator's own circumstances, in what circumstances would AFCA consider it is fair and reasonable to pay the death benefit to the perpetrator?
- What evidence would AFCA consider is sufficient to show reduced moral culpability? For example, we are aware the concept of moral culpability is relevant to sentencing decisions in criminal matters or in judicial decisions under Forfeiture Acts in some jurisdictions; would the same factors be relevant to AFCA's determination as to whether moral culpability has been reduced?
- If the perpetrator committed FDV against the super member, but was financially dependent on the super member, and there are no other people that were financially dependent on the super member (e.g. only other dependants in the super member's life were adult children who were financially independent), would AFCA determine it is fair and reasonable to pay a death benefit to the perpetrator? Or would this be one of the circumstances where AFCA would pay an adult child, even where there is no financial dependence (as outlined in 3.4)?

Ultimately, the draft Approach indicates an extremely high evidentiary threshold for demonstrating the presence of financial abuse or family violence where relevant to a super death benefit complaint – for example, where there is proven moral culpability in a deceased member's death. This evidentiary threshold does not reflect the experiences or meet the needs of victim-survivors of financial abuse and DFV. The crimes committed against victim-survivors are rarely convicted due to a justice system that is stacked against them.

If AFCA can't go further to stop financial abuse and DFV perpetrators accessing victims' super death benefits, and if the process for victim-survivors to access the death benefits of deceased perpetrators' super can't accommodate the limitations of evidence they are able to provide, we consider this an issue in need of law reform. In this case, we would urge AFCA to continue to escalate these limitations to decision-makers.

Finally, the process to make a death benefit complaint will involve disclosing to AFCA (and the trustee) extensive evidence about the nature of the relationship and the financial dependence between the potential beneficiary and the deceased. As described above a

victim of financial abuse may not be able to produce this kind of evidence (e.g. where the abuser had control of bank accounts and shared tenancy agreement). It is important that AFCA recognises this and ensures that its complaints process is accessible for victims of domestic and/or family violence/financial abuse more broadly and be as flexible as possible with financial dependence evidence requirements where FDV is disclosed. On each of the above points, we strongly urge AFCA to consult with family violence specialists and those with lived experience to design a death benefit complaints process that works for victim-survivors of financial abuse and DFV.

We note the comments in the Consultation Paper that AFCA has committed to consult on its two existing Approaches addressing financial abuse during the next 12 months. We submit that the above matters, if not addressed in this Death Benefits Approach document, should be addressed in those Approaches (and appropriately cross-referenced in this Approach, both in new section 3.5.5 and section 6, Useful links).

First Nations' perspectives on dependency etc.

We note AFCA's substantive draft amendments clarifying who AFCA considers to be a dependant, including other relevant considerations, like FDV, that may influence AFCA to consider that the trustee's decision to allocate a death benefit was not fair and reasonable. Superannuation benefits, and particularly the payment of death benefits, is a big issue for First Nations communities. Despite this, we note that AFCA's draft Approach Paper does not address this perspective or include any examples reflective of a First Nations experience. We are of the view that AFCA could improve the Approach document by addressing common issues faced by First Nations people navigating the death benefit distribution system.

We have attached as an appendix to this submission a detailed First Nations perspective on superannuation death benefits, prepared for AFCA by Mob Strong Debt Help. This provides a general overview and summary of the major issues we currently see in relation to superannuation and death benefits in First Nations' communities and informs the following more specific comments.

3.1.4 Fair and reasonable – First Nations cultural awareness

In its superannuation death benefit jurisdiction, AFCA must consider if a trustee's decision is fair and reasonable in its operation in relation to the complainant and any joined parties in all the circumstances of the complaint. That is, fairness and reasonableness is to be assessed with reference to the *particular* complainant and joined parties before the trustee/AFCA. For that reason, we consider that the Approach should make explicit that AFCA will consider whether a decision affecting a First Nations party is fair and reasonable by reference to, inter

alia, the particular barriers and issues that First Nations people may experience in interacting with the superannuation and death benefit system. In particular, for the reasons set out in detail in the Appendix, it is clear that assumptions about a deceased member's wishes or intentions cannot be so readily drawn from a "failure" to make or update a nomination or a Will in relation to First Nations communities. Similarly, we submit that the Approach should make it clear that where the trustee has excluded from or reduced the allocation of a death benefit distribution to a First Nations person because of an apparent failure to comply with specific forms or processes (including in relation to identification), AFCA may consider that not to have been fair or reasonable in its operation in relation to the complainant.

3.2.1 Who is a dependent

Kinship structures

In accordance with the Royal Commission's recommendation,³ in May 2019, the Commonwealth Treasury Department undertook [a consultation process](#) on superannuation binding death benefit nominations and kinship structures.

In circumstances where AFCA has proposed to include its approach to the impact of family and domestic violence to the distribution of superannuation death benefits, we believe it would be remiss of AFCA not to include in its current Approach the impact of kinship considerations when distributing superannuation death benefits.

"Informal" adoption

"Informal" (i.e. not state-ratified) adoption based on kinship structures are not uncommon in some First Nations communities. The AFCA Approach should deal specifically with how AFCA will consider claims by adopted children in a First Nations context where these adoptions have not been legally formalised. This could be done either or both in the Approach documents discussion of who counts as a "Child" or the "Factors to be considered in determining whether an interdependency relationship exists". For example, if AFCA could or did not see fit to treat an informally adopted First Nations child as a "child", informal adoption in First Nations communities could still be noted as an exception to the blanket statement in the Approach that "It is not expected that children will generally be in an interdependency relationship with their parents".

Further, we consider the Approach would benefit from the inclusion in the case study section discussion of how AFCA would approach the example presented in the Treasury consultation

³ The Financial Services Royal Commission final report included specific statements about binding death benefit nominations, see Appendix for excerpts and references.

paper, i.e. "A First Nations aunt takes in a niece without formally adopting her but treats her as one of her children."

Other kinship relationships

Similarly, either this Approach or the proposed Interdependency Factsheet, should address how AFCA intends to deal with interdependency claims in the context of First Nations kinship structures. This could be dealt with both in specific relevant sections of the Approach (where the claimant lived with the deceased member, in the "Factors to be considered in determining whether an independency relationship exists"; and where they didn't, section 3.3.3 "Who had an expectation of ongoing financial support?"). Alternatively, it could be addressed in a section such as the new 3.3.5 "Other relevant considerations".

Further, the case study section could address how AFCA would approach the second example in the Treasury consultation paper i.e. "A young First Nations 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."

Mob Strong would welcome the opportunity to start with a yarn with the AFCA superannuation team about these issues, and what AFCA could do to better support First Nations people in this context. Such a discussion would be of value, not just in relation to this Approach, but to the yet-to-be-published Interdependency Factsheet referred to in the draft Approach.

Kind Regards,



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Appendix: A First Nations perspective

Superannuation benefits, and particularly the payment of death benefits, is a big issue for First Nations communities. Despite this, we note that AFCA's draft Approach Paper does not address these issues.

The issues disproportionately affecting First Nations people accessing superannuation entitlements has been a subject of much consultation, including by the 2018 Financial Services Royal Commission:

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.⁴

AFCA having a clearer public position on how, if at all, it approaches these common barriers would benefit First Nations communities, advocates and the broader community.

Financial Rights and the Mob Strong Debt Help service have observed the following barriers and issues affecting First Nations communities highlighted during Mob Strong's work on outreach in remote and very regional communities:

- Consumers have a lack of awareness and understanding about superannuation entitlements, including death benefits let alone how to access them.
- Poor communication strategies from most super funds or resources on how to claim death benefits on their web pages.⁵
- Significant barriers to accessing superannuation entitlements including digital exclusion (limited or no access to phones or the internet), identification requirements and language issues (English as a second or third language);

⁴ Financial Services Royal Commission, Final Report (2019), vol. 1, 254

⁵ See ASIC, [Improving superannuation member services — Dealing with death benefit claims](#), 1 May 2024

- The lack of First Nations staff or culturally trained and specialised staff teams in superannuation funds with the majority lacking awareness and understanding of cultural protocols and norms, such as kinship structures or gratuitous concurrence.
- Superannuation funds not making provision for allocating benefits to nominees for kinship groups through membership application forms or updates;
- The requirement for legal representatives to have letters of administration or a grant of probate to access a loved one's death benefit through the ATO.

A lack of awareness and understanding about superannuation and death benefits

Some First Nations communities may not have a strong understanding or awareness of superannuation entitlements, including death benefits. This can lead to a complete lack of understanding about when and how to access superannuation entitlements, how to claim a death benefit in the event of a loved one's passing. This issue gets worse when the deceased has their documents for their super but that super fund is consolidated into another super fund. It could take years for even the spouse of the deceased to know how to make a claim and would still require assistance with this.

Further, many First Nations communities may not understand the importance of making binding or even non-binding nominations to ensure their superannuation is paid to their chosen loved ones. The fact that this decision for binding nominations needs to be remade every three years poses difficulties too where digital and physical access barriers prevent this from easily occurring.

Mob Strong Debt Help financial counsellors and solicitors have attended outreach to East Arnhem on multiple occasions. Many people attending these outreach events requested basic information regarding their superannuation benefits and entitlements, including how they can find out their superannuation balance and insurance. Many people expressed their understanding of superannuation as a hidden fund they can access right now when they need it, like a bank account.

Case study – Irma's story - S314891 - Financial Rights

Irma's son passed away. Irma wanted to know if she could make a claim for benefits. Irma didn't know who the insurer was, or which superannuation fund her son was with. Due to Irma's remote location and vulnerabilities, finding out this information was going to be a significant challenge and created a significant barrier to accessing this benefit

Information requirements as barriers

Some First Nations communities may face significant barriers in relation to accessing superannuation entitlements, including death benefits, because of the information requirements imposed by superannuation funds.

For example, security verification processes conducted online or over the phone can be challenging for some First Nations people who may not have specific information regarding their identification papers and superannuation fund accounts readily available. The cost, distance and time barriers they experience to source such documents adds to this burden.

These barriers can be compounded by other intersecting issues such as living in a remote or regional area, having limited access to computers, smart phones and internet and language barriers where the person's first language is not English. For example, the use of digital platforms such as MyGov can also be a barrier for some First Nations communities who may not have access to a computer, smartphone or reliable internet to create and access an email account for MyGov purposes. Due to the cost and availability of phones they are often lost, stolen or shared – even the sim cards are swapped - which also creates a high risk of financial abuse and privacy risks.

Even the deceased's personal details may be incorrect when matched up with the death certificate and the super fund may not engage with the deceased's loved ones. Mob Strong has assisted a number of clients who have super funds with incorrect name spelling or inaccurate dates of birth. Most super funds cannot make this correction over the phone but must be supplied with official identification document copies that have been certified, which is extremely difficult and potentially an insurmountable challenge for vulnerable consumers.

Case study - Joy's story - S314925 - Financial Rights

Joy's husband, James, died in 2023 (not their real names). Joy had a death certificate but was unable to provide a copy to James' superannuation Trustee via email or through an online file sharing platform because she only has limited access to internet in the remote town she lives in. She did not realise that her husband's super fund had been consolidated into another super fund and did not know where to go without assistance from a solicitor.

Case study – Olive’s story - S314753 – Financial Rights

Olive lives remotely and has superannuation with two superannuation funds. Olive doesn't have access to a computer and has limited internet access. When Olive spoke to her superannuation funds to verify her identity, she was asked for various forms of ID. Whilst Olive has a Medicare card, a Working with Children Card, a Proof of Age Card and an expired Drivers' License, one fund told her they would accept this but another said they would not and needed a current Drivers Licence, Medicare Card and/or current passport. She was not permitted access to her second superannuation fund to check her death benefit entitlement and nominations, even though it not only had a higher balance but much greater death and TPD benefits. Olive is unable to renew her Drivers' License as it is suspended and would face significant challenges applying for a passport.

We are aware of other cases where a trustee has imposed inflexible and unnecessary documentation and identification requirements.

Case study – Lucy’s story - Super Consumers Australia

Lucy is a woman living with a psychosocial disability who faced significant challenges accessing her deceased mother's superannuation death benefits from her Super Trustee. Lucy's mother had a valid binding nomination in place, naming Lucy as the sole beneficiary. Lucy contacted the Super Trustee to claim the death benefit and provided a range of documents to identify herself and the validity of her claim, which met the guidelines the Super Trustee had provided. However, the Super Trustee then requested Lucy provide a copy of her deceased mother's drivers' licence, which Lucy did not have access to. The Super Trustee told Lucy they could not 'waive the standard fund requirement for certified proof of identity documents' to verify her late mother's identity. The Super Trustee told her that other documents she provided, including her late mother's water bill and a rates notice, would not suffice but did not explain why. At this stage, Lucy was in significant financial distress and facing homelessness, but the Super Trustee would not be flexible. Lucy made a complaint to AFCA which is ongoing.

We recommend AFCA adopts a position that encourages flexibility in relation to identity and other administrative processes for First Nations people and others attempting to access superannuation entitlements. For example, by encouraging superannuation funds to adopt the AUSTRAC Guidance on Assisting customers who don't have standard forms of identification and to also conduct research into those remote communities where they have members and adopt their identification practices (such as community issued ID cards). This

approach would help AFCA meet Priority Reform Three of the Closing the Gap national agreement which states that:

“To be effective, mainstream organisations need to spend time understanding what is happening in our communities and need to recognise and understand the skills that Aboriginal and Torres Strait Islander people hold.”⁶

It would also be beneficial for AFCA to state that cannot be considered fair and reasonable in all the circumstances for a trustee to impose inflexible and unnecessary identification practices.

Letters of administration or grant of probates requirements as barriers

For various reasons, including kinship ties and other factors, some First Nations communities may not be able to claim a benefit as a dependent. As such, the superannuation fund rules may require the trustee to pay the death benefit to the person’s 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’.⁷

Many First Nations people may face significant, and often insurmountable, barriers applying for a grant of probate or letters of administration. Particularly if the person is located remotely and legal services in the area are inadequate or require significant. In some case, it is a completely alien concept to remote First Nations consumers and explaining it and its process is very difficult. Further, where the potential benefit is minimal, it may not be commercially viable for a beneficiary to apply for letters of administration or probate because of the cost of making an application.

Whilst we acknowledge that this issue is more commonly observed where First Nations persons attempt to access a death benefit paid to the Australian Taxation Office (ATO) where a dependent or legal representative has not been identified by the superannuation fund, this issue may arise from time to time in AFCA’s work and the difficulties identified need to be taken into account.

Case study – Harley’s story -

⁶ [Closing the Gap, Priority Reform Three – Transforming Government Organisations](#)

⁷ *Superannuation Industry (Supervision) Act 1993* section 10(1)

Harley lives in a remote part of the NT. Her partner, David, passed away. David's superannuation was transferred to the ATO. When Harley approached the ATO to access David's superannuation at an outreach event, she was told she needed a grant of probate or letters of administration and was sent away. Harley is receiving a Centrelink benefit and doesn't know how much superannuation her deceased partner has and whether it is worth the cost of engaging a solicitor to assist with an application for grant of probate or letters of administration.

Lack of awareness and understanding of cultural protocols and norms

The current laws, regulations and standards such as APRA prudential standards, have no provision requiring Trustees specifically consider or meet the needs of their members who are experiencing vulnerability, just members as a whole. Consequently, Trustees apply a one-size-fits-all approach in their member services – an approach that is strictly applied in its practices, particularly with outsourced services staff. AFCA has an opportunity, in exercising its jurisdiction to ensure fairness and reasonableness of trustee's decisions in relation to particular complainants, to guide trustees towards a more nuanced, culturally aware, approach.

The current rigid approach fails to understand and accommodate the intricacies of people with specific additional needs, including First Nations consumers, and the communities they live in. For example, a services staff would ask a member for their address and email address but this could be unknown to the member. The services staff might not know that to fulfill an administrative request, the member would need to wait for the wet season to end and take a five hour 4WD trip at their cost to the nearest office to meet this request. The member might also not understand what the services staff is saying for different reasons, including English level, accent, and speaking pace.

A financial counsellor might try to assist the member over the phone but the services staff might reject the financial counsellor and insist on the member to answer these questions. If the member is not able to comply with this protocol then the services staff will not proceed without trying to troubleshoot the problem and the phone call will likely end either by the member or the services staff.

There is no freestanding legal requirement to consider the needs of the individual member if they are vulnerable or disadvantaged. Each fund may have their own practice to consider the cultural needs of the member but even these practices might vary from creating a First Nations service to giving outsourced staff 30 minutes of video training.

Where a trustee has made a decision adverse to a First Nations person, AFCA should, in considering if the decision was fair and reasonable, consider whether the trustee has implemented a number of minimum standards for cultural accommodation including:

- Dedicated First Nations support lines and services co-designed with First Nations stakeholders under paid consultation – these service teams must include First Nations staff and other staff with cultural experience and given greater discretion to resolve issues for vulnerable clients.
- Increased First Nations in service design and managerial roles
- Cultural awareness training and certification for all staff, including outsourced staff who may engage with First Nations members.
- Socioeconomic empirical data analysis to determine areas where vulnerable members are most likely to call from.
- Uniform standards on adopting of AUSTRAC guidance on First Nations identification to include reference letters and community ID cards.