Senate Select Committee on Superannuation and Financial Services

Main Inquiry
Reference (a)

Submission No. 37

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8 May, 2000

Ms Sue Morton FAX: (02) 6277 3130 PH: (02) 6277 3433
Secretariat, Senate Select Committee on Superannuation & Financial Services
Parliament House
Canberra ACT 2600

Re: Submission relating to Binding Superannuation Death Benefit Regulations.

Dear Sue

Following our phone discussion last Friday, please accept the following submission. I write to indicate a serious concern about the form of the regulations relating to binding superannuation death benefit nominations. It is my understanding that under the legislation, a nomination of beneficiary will only be binding on the trustee of the superannuation fund for 3 years, before it needs to be refreshed. In this context, I ask you to consider the following common circumstance:-

1) Seventy year old member of a superannuation fund makes a binding nomination.

2) The following year, this super fund member becomes mentally incompetent - a frequent problem for the elderly.

- In a further 2 years time, the binding nomination lapses.
- Later the super fund member dies - and the member's wishes might not be carried out as he intended - for a range of possible reasons.

The government seems to have made this 3-year refreshment requirement to ensure that we keep our death benefit nomination current (a little paternalistic perhaps) ... but in doing so, the government seems to have taken away some of the super fund member's control in ensuring that his/her superannuation death benefits are distributed in the manner in which they had intended. And it seems that in trying to overcome the "problem" created by this 3-year rule, super fund member is forced into much greater complexity than he should be. I would hope that the parliament would be prepared to acknowledge & "fix this problem."

I attach a more detailed discussion of the issues as I see them.

Yours Sincerely

Bruce Baker

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Binding Superannuation Death Benefit Nominations - Issues.

Unfortunately, the people who are most needing the use of Binding Superannuation Death Benefit Nominations, are faced with what I believe is a serious deficiency in the Law - that nominations only last for 3 years before the nomination has to be "refreshed".

Unfortunately as many of us get older, a significant number of us will experience dementure (eg Alzheimer's disease). As a result of this we are likely to be regarded as "not having legal capacity" and as such we will not be able to update our Wills or "refresh" our Binding Superannuation Death Benefit Nominations.

As a result of this **deficiency** in the law, if there is a risk of our wishes not being followed by our survivors, we need to be very careful of the implications of the new law (allowing binding superannuation death benefit nominations) if we are to achieve the desired result.

The best solution would be for the government to amend the law, so that we do not have to refresh our binding superannuation death benefit nomination every three years. The government seems to have made this 3-year refreshment requirement to ensure that we keep our nomination current (a little paternalistic perhaps) ... but in doing so, the government seems to have taken away some of our control in ensuring that our superannuation death benefits are distributed in the manner in which we had intended.

Issue 1. What happens, under the current binding death benefit rules, if your nomination lapses?

It seems that under the new rules, if your nomination lapses, some trust deeds revert to "trustees discretion" while others require the trustee to pay the death benefit to the estate. Clearly the superannuation member would be implementing a binding death benefit nomination if the member wished to avoid "trustees discretion" for some reason (eg lack of certainty that the trustee pay as the member may desire. This clearly is often the case with a self managed super fund where there is family disharmony. Likewise, the current way many public offer funds implement "trustees discretion" creates a situation where a potential but unintended beneficiary can cause difficulty for the primary intended beneficiary.)

However, under the current rules, if a binding nomination lapses after 3 years and the trust deed then requires the benefit to be paid to the estate (with no trustees discretion) we might have the following issues:-

- A person who sees a binding superannuation death benefit nomination as being desirable, is also a person whose Will is likely to be challenged. Therefore the payment of funds into the estate still may not achieve the wishes of the deceased. A member in these circumstances may have to use a self-managed super fund to hold his/her superannuation assets (if he/she wants certainty). Certainty would then be achieved through either:-
  - designing appropriate succession of control of the trusteeship of the super fund knowing that the trustees discretion cannot be challenged **(Note: This is becoming potentially a little trickier on some cases after SLAB 3 because unexpected circumstances may cause an unexpected executor to be standing in the shoes as joint trustee or as director of the trustee company.)**, OR
  - amending the super fund trust deed, to (in effect) insert some Will-like provisions binding the trustees to distribute the death benefit in a manner that the member had intended.

- Another problem with having a trust deed that requires the trustee to distribute the death benefit to your estate, is that you may be denying your beneficiary (eg your spouse) the right to receive the death benefit as a superannuation income stream (eg allocated pension) - and you would be denying your beneficiary the tax benefits that go with that.

So you can see that causing the binding nomination to lapse after 3 years, seems to cause:-

- ➔ potential loss of control of the outcome AND
- ➔ potential loss of flexibility (that may have been available under the binding nomination) on how the benefit is paid.

Issue 2. **Binding death benefit nominations and your Enduring Power of Attorney. Can your attorney change your death benefit nomination?**

I put the following question to a Queensland superannuation & succession lawyer. **"Since your Enduring Attorney does not have the right to re-write your Will, why would it be that your Enduring Attorney could change your superannuation death benefit nomination?"**

The lawyers response indicated that there were the following issues. First there is the issue of **whether the courts would treat the Binding Death Benefit Nomination as a testamentary instrument** (as a Will is). With a testamentary instrument, the individual for whom the Will is being made is the only person who could sign such a document. That is, someone holding an Enduring Attorney could not sign such a nomination on behalf of the donor of those Powers. I believe that this is the way that it should be. I.e. that an Attorney should not be able to change your binding death benefit nomination.

However, a more considered & detailed answer from this lawyer was as follows:-

- ➔ Under the Superannuation Industry Supervision Act (the SIS Act), in the definitions section (for use in this act). The term "Legal Personal Representative" was defined as "executor of the Will or administrator of the estate of a deceased person, the trustee of the estate of a person with a legal disability or a person who holds an enduring power of attorney granted by a person." The lawyer had the view that this definition implies that the legal draftsman intended that the term "Legal Personal Representative" would be used if the it had been intended that someone holding an Enduring Power of Attorney should be able to act for the member.

- ➔ The lawyer also reviewed regulation 6.17A which came into effect in the first half of 1999. The lawyer's interpretation therefore is that since the term "member" is used, therefore:-
  - ➔ only the member (and not his Attorney) could make a new binding death benefit nomination.
  - ➔ only the member (and not his Attorney) could revoke a binding death benefit nomination.
  - ➔ it is arguable that maybe the Attorney might be able to re-fresh the binding nomination. By refresh, I mean to confirm to the trustee that the existing nomination without amendment should still stand.

Issue 3. **Complexity.**

My exploration of this issue has also highlighted to me the issue of complexity. It seems that even nearly 2 years after this law (binding superannuation death benefits) has come into being many lawyers who "deal in this part the law", still are not on top of the issues ... or have even explored the questions. Clearly fund managers are still struggling with this issue. And awareness levels among financial planners is not high.

Why is this? At least part of the answer to this question ... is that the estate planning issues for superannuation benefits are starting to become quite complex. "Solving this estate planning problem" involves a wide range of specialist knowledge including superannuation law, succession law, trust law - and each of these areas are undergoing change. (On that note I would encourage the Senate to consider the excellent documents that the Queensland's Department of Justice have published on Enduring Powers of Attorney, as an example of how legislators can make the law more accessible to professionals and ordinary taxpayers.)

If the professionals are having some difficulty, what chance has the man on the street got?