

**Senate Select Committee on  
Superannuation and Financial Services**

**Main Inquiry  
Reference (a)**

**Submission No. 78**

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# Investment Initiative

## Fax

**To:** Sue Morten **From:** Peter Van West

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**Fax:** 02 6277 3130 **Pages:** 9

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**Phone:** 02 6277 3433 **Date:** 15 September 2000

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**Re:** Submission to the Senate Select Committee **CC:**

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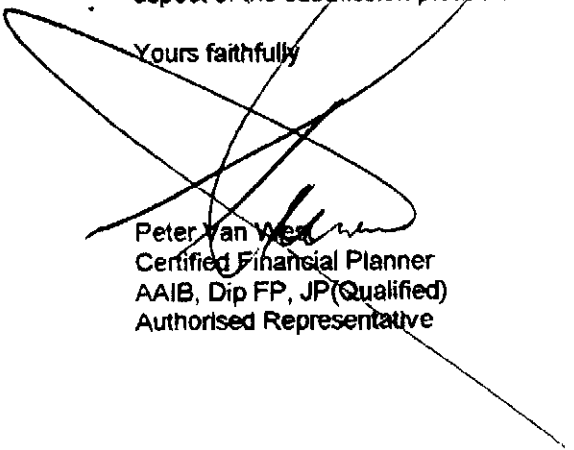
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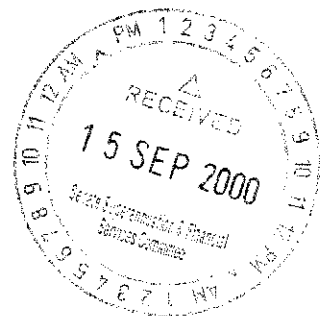
Dear Sue,

As per our discussion last Week, I have compiled the following submission for the Senate Select Committee. If the format needs to be revised or you would like to discuss any aspect of the submission please do not hesitate to call my office on the number listed above.

Yours faithfully



Peter Van West  
Certified Financial Planner  
AAIB, Dip FP, JP(Qualified)  
Authorised Representative



## Submission to The Senate Select Committee For Superannuation & Financial services

### Issue:

The natural integration of various financial planning issues now means that a high inter-dependency exists amongst the various facets.

The final outcome of any financial plan is the estate plan. An estate plan is not just a Will but also a combination of planning initiatives. These include:

- Superannuation Beneficiary Binding Nominations
- Asset ownership Strategies
- Business Succession Plan
- Insurance Strategies

These planning initiatives plus the Will combine to formulate a persons estate plan.

### Concerns:

One of the biggest problems is the question of what **management opportunities** actually do exist in the event that

- (i) A person loses mental capacity to manage his or her own affairs. This is not only as a result of accidents but also numerous diseases including Alzheimer's etc
- (ii) How far available remedies at law actually allow **management efficiencies to be maintained.**
- (iii) The degree of certainty actually imposed by law.

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### Brief Case Studies

"A" is a member of a superannuation fund. As a member he has exercised an insurance option – The insurance company has accepted his risk.

In addition he has given his fund a binding nomination as to his benefits, which includes the proceeds of an insurance policy. Because of the members incapacity he is now compelled to quit his job. The employer fund also requires he roll out his benefit to another fund.

### What Happens?

- (i) If "A" could stay in the same fund, the binding nomination expires in two years. His wife has left him and she is the beneficiary nominated under the binding nomination. The TPD policy pays out to the super fund. "A" is now of "payout age" and being incapacitated satisfies the fund release conditions – the fund pays to his (now) ex-wife – no funds remain for "A"s personal care and becomes a burden on the welfare system. **OR**

- (ii) If forced to roll over "A"'s binding nomination lapses and when payment can be ratified it is paid by the Trustee to the estate where it is attacked under a testate family maintenance action.

**Where "A" is compelled to leave the employer fund**

- (i) The moment that "A"'s benefit is rolled over the binding nomination given to his existing fund lapses – Binding Nominations are not portable with the roll over of the superannuation benefit.
- (ii) The Donee (under an enduring power of attorney) can give instruction to which fund the benefit is to be rolled over **however cannot execute a binding nomination with the new fund.**
- (iii) "A"'s super had "Term cover". On rollover of the fund the insurance company holding the risk offers a "continuation option" – although subject to fresh underwriting. This practice in itself makes a farce of the insurance cover. The insurer for the new fund will not grant cover because of "A"'s condition. This could occur for any change in personal health, not just incapacity related
- The first company has benefited from years of insurance premiums escape liability
  - The insured cannot get new cover
  - The insurance was a key planning strategy to ensure that the family would be taken care of and not become dependant on public welfare – this strategy is now defunct.

For most people there is no intention that super becomes part of their estate. They nominate a beneficiary or the fund Trustee exercises that for them. It is therefore never considered part of the Will; therefore like all other property it should be able to be subject to the authority of a Donee under an Enduring Power of Attorney.

As it is, the Binding Nomination rules already limit who can be a beneficiary under a Binding Nomination – the same as that normally considered able to be a beneficiary under Trustees discretion. Therefore a Donee can't step outside that class of beneficiary in any case.

**Options**

1. Binding Nomination remains binding once incapacitated
  - good --keeps intentions in tact
  - bad – family needs may alter
2. Binding Nomination lapses on incapacity.

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3. Binding Nomination can be amended under Enduring Power of Attorney
4. Binding Nomination can be renewed under Enduring Power of Attorney but not amended – which is virtually ineffective
5. Remove Trustee discretion – the member **must** make a Binding Nomination which remains enforceable but cannot be amended under an Enduring Power of Attorney.

### **Insurance-**

If policy is on foot-

Insurer is required to continue cover for individual on the same terms as was engaged in the fund.

Group cover is a farce in that usually insurance continuation options are not true options but simply a marketing ploy with conditions of renewed underwriting and therefore the insurer has the ability to decline cover.

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### **Definitions**

SIS Regulations section 6.01

Definition of permanent incapacity, in relation to a member who has ceased to be gainfully employed, means ill health (whether physical or mental), where the trustee is reasonably satisfied that the member is unlikely, because of ill health, even again to engage in gainful employment for which the member is reasonably qualified, education, training or experience.

This is a "Nil" encashment/release condition under schedule 1 of the SIS regulations.

#### **Problems with this definition**

- (i) The ability to have the presence of mind to enable successful employment does not equate to an ability to understand or comprehend more complex issues like what to do with superannuation interests let alone how that would integrate into an estate plan (see below).
- (ii) It also ignores the fact that "temporary incapacity" – a state of incapacity considered to exist before a permanent state of incapacity is considered to exist. That such a period can be very protracted during which the person may very well become unemployed. That becoming unemployed may force a rollover out of an employer fund or a voluntary rollover of the superannuation assets to a more appropriate fund may become desirable. Often employees will leave an employer/job because their health is already suffering and they find it difficult to cope. This may often be the first onset of what may later be called permanent incapacity.

### **Problems that arise**

Concerns arise on two fronts

- (1) Binding Nomination
- (2) Insurance cover within the fund

In fact both of these issues bring with them very serious issues in regard to protecting the member and/or their beneficiaries – **not just as a result of incapacity** but also in regard to normal mobility between funds.

Proposed choice of funds legislation will ease the problem insofar as fewer employees will need to alter funds less frequently (on change of employment) however the problem prevails with **any** change of fund where a desire or necessity to retain insurance exists. Conversely, being forced to remain in a poor performing fund or a fund with inappropriate strategies, just to protect insurance cover is hardly a suitable answer.

### **Insurance**

An employee takes up an insurance option within his/her superannuation fund.

Between the time this policy is taken up and leaving the fund they have a change in "health status" which now prevents them from obtaining cover in another fund or direct.

The insurer in this fund offers a continuation option; however experience dictates that this is often a marketing ploy and not a genuine continued acceptance of **existing** risk. The continuation option is offered only in a lot of cases on renewed underwriting and therefore the insurer uses this as an opportunity to shed risk. This defies the concept of "guaranteed renewable" cover. What certainty does an individual have to ensure that insurance he has directly or indirectly paid many years premiums for, continues in existence as long as he perceives a need to retain cover?

As the purchase of insurance is to clear debt and fund lifestyle of the beneficiaries and therefore keep them out of the welfare support system it poses some serious issues,

- (i) Where the person is "temporarily incapacitated" or "forced out" because of non-performance (ill over some time but not incapacitated by definition) then exit from employer will invariably mean loss of essential insurance cover.
- (ii) Where cover is a key component of the estate plan eg: Insurance cover inside super which via binding nomination

funds certain dependants, then it can upset the entire estate plan and cause tremendous disharmony and anxiety amongst family members.

Please remember that an estate plan is more than just a Will, it is a **combination of arrangements by which a person transfers wealth from himself or herself to another on death.** Where this does not occur or cannot occur then further complications arise including protracted legal challenges to any remaining estate covered by the Will.

- (iii) As we have already alluded – this equally involves Binding Nominations. Because Binding Nominations lapse after three years, this becomes even more complex in that if a person is still hopeful of recovery, a state of “permanent incapacity” may never be declared. Then superannuation benefits need continued management, as does the estate plan. What makes matters worse is if the “existing status” of any beneficiary under a binding nomination was to alter, for example: are beneficiary’s bound to receive 10% of the fund was to die, then the **entire binding nomination lapses.** Where the binding nomination is a key part of the estate plan then this creates serious problems.

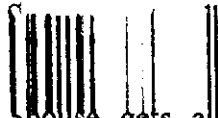
Several large fund managers have obtained legal opinions as to Binding Nominations and have advised the writer that in the event of a Binding Nomination lapsing/failing then the Trustee will merely elect to pass the benefit to the estate.

“A” has various joint assets with spouse  
 “A” has some investments in his own name  
 “A” has superannuation with life and TPD cover with a Binding Nomination - 40% spouse  
 15 % to each of the 4 Children

The children are from a previous relationship.  
 “A” and one child are killed in a car accident.  
 Insurance pays to fund. The fund is compelled to lapse the Binding Nomination as status has changed with one beneficiary.

The Will provides everything to the spouse and if she is predeceased to the kids equally. Because the Binding Nomination has lapsed, all superannuation (with insurance proceeds) is paid to the estate.

Result. Spouse gets “joint assets”  
 Spouse gets investments in his name



Spouse gets all superannuation and insurance proceeds

The 3 remaining children lose provision established for them.

### Outcomes Sought

- (i) Assurance for members that Insures must continue cover for the same terms and conditions as was made available within the fund on application by the life insured or their personal representative.
- (ii) Binding Nominations do not totally lapse on the change of status of one of the beneficiaries; rather that beneficiary's portion is paid to the estate and dealt with in the Will.

That Donees under an Enduring Power of Attorney can amend a Binding Nomination.

(Note - Whilst a Donee cannot amend a Will, their actions even with the best interest of the testator in mind can substantially alter the outcome of the Will.

"B" has a house pledged in a Will to a handicapped child. The balance of his estate is to go equally to all other children, but not the child getting the house.)

"B" is forced to move and vacate to a nursing home prompting the sale of the house by the Donee under an Enduring Power of Attorney.

Result - The child who was to get the house now gets nothing.

- The remaining children get more as funds are released by nursing home add to the balance of the estate.

A Donee therefore does have considerable power to alter the outcome of an estate plan.

A Donee can instruct the rollover of a superannuation benefit as required. This however prompts an immediate lapsing of the Binding Nomination giving rise to problems raised above.

Donees therefore do have a direct responsibility to ensure that the testator's wishes are met.



**We recommend that**

- (A) Insurers be compelled to maintain cover on the same terms and conditions in the life insured's name as was in the superannuation fund. If not we would argue that the insurer;
- (i) Must either make it known what the consequences of moving from that fund may entail
  - (ii) Where the fund rules compel a member to leave under any circumstances before retirement age (65) then the insurer must provide a continuation option on the same terms and conditions and on application of the life insured or their personal representative, establish a new replacement policy. The offering of cover within the fund is a farce aimed at receiving premiums with little reality that the cover will ever do its full job. A person buying a policy outside a superannuation fund at least has the comfort of knowing and they can maintain that cover as long as they want to.

Often an employee will change employer/job/career for medical/health reasons long before incapacity may be permanent.

This can be achieved by

- (i) The issue of a right to maintain cover in employers name or such name nominated on his life, (quantum and type) which must be executed within 3 months of leaving employer/fund.
- (ii) **OR**, that all superannuation Trustees must accept the transfer of all policies from all insurers on the rollover of benefits.

Company X covers "A" for term and TPD cover in the super A fund.

"A" elects to rollover to super B fund. The insurer must maintain cover and transfer ownership to super B fund Trustee at the same time.

Super B fund trustee must accept the policy on behalf of member or persuade his own insurer to provide cover for A on the same terms and conditions.

**(B)**

- (i) Binding Nominations never lapse. That if a portion to any nominated beneficiary fails then that portion settles to the estate and is dealt with under the will.
- (ii) That binding Nomination move with the benefit, (as should the insurance) - This poses marketing

opportunities for the fund trustees (currently all funds do not offer binding nominations or insurance). The better-

~~managed funds will offer to accept the benefit with the~~

view that the member will not be worse off.

- (iii) As a last alternative, Donees under a Power of Attorney can amend or renew or give a Binding Nomination. They have been empowered by the employee to look after their interests in all matters of property and wealth, we have demonstrated and argued that superannuation is not apart from such issues and the current rules limit who can be nominated, we therefore argue that the potential for error is limited.

Submitted by:

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