

It is a trite but often forgotten fact that superannuation interests **cannot** automatically be transferred by a Will. Rather, the Trustee of the Superfund is responsible for disposing of and/or applying a deceased's superannuation interests.

Nevertheless, every member of a Superfund can and should give the Trustee a direction as to how his/her entitlements should pass.

A death benefit is a payment from a super fund and can be in the form of both a ***lump sum payment*** and an ***income stream***.

## *Death Benefit Nominations*

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All members of Super Funds should make a Binding Death Benefit Nomination and give it to the Trustee of the Super Fund. While bound by the nomination, the Trustee is only bound as to **whom** benefits should be paid. The member cannot impose restrictions on the trustee about the **mode** of payment.

The opportunity to make a Binding Death Benefit Nomination (BDBN), within a Self Managed Super Fund (SMSF) is the reason why many individuals concerned about estate planning choose to invest in a SMSF, rather than a large public Fund.

To be effective, the Deed establishing the Superannuation Fund must permit a member to lodge a Death Benefit Nomination with the Fund Trustee.

Most large Funds will also allow a BDBN and forms can normally be accessed on their website. There are however some funds which will **not** allow such a Nomination.

If flexibility is important, then the member might provide the Trustee with a **Non**-Binding Death Benefit Nomination.

A Non-Binding Death Benefit Nomination is nothing more than a statement of wishes. Such a Nomination is used when a member wants to provide a Trustee with some guidance but doesn't wish to bind the Trustee. The member might believe it important that the Trustee be able to exercise some discretion over who should be paid a deceased member's death benefits.

**Every** Nomination ceases to have effect at the end of three (3) years after the day when it was first signed (or first confirmed) by the member.

Some advisors suggest that this (3 year) restriction can be overcome by a member lodging a "Non-Lapsing Binding Death Benefit Nomination". The legal effect of such a Nomination however has not been tested as yet, and there is a risk that a Court, if asked, would not accept such a Nomination.

(For more abundant caution it may be worthwhile giving both a Non-Lapsing Binding Death Nomination and a normal Binding Death Nomination, in case the three (3) year Nomination should lapse.)

### *Pensions*

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Pursuant to a BDBN, a fund member can instruct the Trustee to pay a pension to the death benefit dependants. Such pension is **not** considered a 'reversionary' pension.

There can be tax benefits in allowing pensions paid to a member to revert to someone else on his/her death. However, usually, a pension can only revert to a spouse or to a dependant of the deceased member. Otherwise, the pension must be converted to cash and paid out of the fund, within some reasonable period after the member's death.

A pension commenced on the death of a fund member and payable to a spouse is known as a superannuation "income stream" death benefit.

Unless your super fund offers retirement income streams (pensions) and you are able to take a pension from your super fund when you retire, it will **not** be possible for your super benefits to be paid as a reversionary pension upon your death.

Since a reversionary pension works like a BDBN, creating a separate BDBN is only necessary when a reversionary pension direction is **not** in place, and a fund member still seeks to control what happens to his or her super benefits, after his/her death.

### *Amending a Superfund Deed*

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A contributor to a Superfund could ensure certainty about the application of their interests in a Superfund by seeking to amend the Superannuation Fund Deed, to specifically make it a fixed trust, and thereby remove the discretion of the trustee. This however would only be done in very extreme circumstances.

The amended “rule” is then binding on the Trustee of the Fund, and then can only be removed or amended with the consent of the relevant members.

### *Taxation of death benefits*

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The general rule is that lump-sum death benefits, if paid to “death benefit dependants”, will be tax free.

A person is a “death benefit dependant” if that person is:

- the deceased person’s spouse or former spouse;
- a child of the deceased person who is aged less than 18;
- is a person with whom the deceased had an “interdependency relationship”; or
- is a person who was a dependant of the deceased immediately before the deceased died.

Broadly, people have an “interdependency relationship” if they live together and either one of them provides the other with some financial support.

Adult children who have established their own careers and families will **not** be death benefit beneficiaries.

If a member does receive a pension from a complying super fund, the income from the fund might be (either) totally (or partially) tax free.

An unpleasant fact faced by funds is that unless a pension reverts to a death benefit beneficiary, that tax exemption may well be lost. A fund's assets might also be tied up in investments and it might be required to sell those investments in order to cash out a pension. This might and probably will, subject to the fund, meaning that fund will be liable to capital gains tax.

So, a benefit of a tax exemption might be lost, when a member dies.

Similarly, distributing fund assets "in specie" is a deemed "sale" for CGT purposes, with the same tax outcome.

In addition, income earned by the fund on the deceased member's entitlement between the date of the members death and paying the benefit, will also be subject to income tax.

If the benefit is paid to someone who is **not** a death benefit beneficiary, tax will be levied on that payment (currently at the 16.5% rate).

So, **there is (or definitely can be)** a de facto "death duty" in the way super death benefits might be paid.

As a planning mechanism, as unpleasant as it might seem, a strategic plan **could** be to suggest to any aged or infirm person that he/she should recognise that they might be in the final years of their lives, and, at that time, they should or could dismantle their super schemes **before they die**, or at the very least convert them all to cash investments **before death!**

If you have any questions or if you wish to discuss any of the matters set out in this brochure, then please do not hesitate to telephone or contact  
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